

**IIPA 2023 SPECIAL 301 REPORT  
ON  
COPYRIGHT PROTECTION  
AND  
ENFORCEMENT**



**SUBMITTED JANUARY 30, 2023  
TO THE  
UNITED STATES TRADE REPRESENTATIVE  
BY THE  
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®**



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January 30, 2023

**Submitted via regulations.gov Docket No. USTR 2022-0016**

Mr. Daniel Lee  
Assistant United States Trade Representative for  
Innovation and Intellectual Property  
Office of the United States Trade Representative  
600 17<sup>th</sup> 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 2023 Special 301 Review*, 87 Fed. Reg. 76660 (Dec. 15, 2022)

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) inadequate copyright and related laws, particularly where rights holders are unable to fully exercise their rights; (ii) inadequate and ineffective enforcement of existing copyright and related laws; and (iii) market access barriers that inhibit the licensing and dissemination of copyrighted works and sound recordings.

The annual 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>1</sup> IIPA members appreciate USTR's efforts to maintain Special 301's focus on improving and strengthening copyright protection and enforcement in the reported countries and on opening up these markets for U.S. creators, producers, and workers who rely on copyright protection—as the statute requires and as Congress intended. As USTR has noted in past Special 301 Reports, Congress expressed concern that intellectual property (IP) protection and market access deficiencies "seriously impede the ability of the United States persons that rely on protection of intellectual property rights to export and operate overseas, thereby harming the economic interests of the United States."<sup>2</sup> The ultimate goal of the Special 301 review, therefore, is not to catalog trade barriers or admonish foreign governments for deficient laws or enforcement regimes as such, but rather to open markets for American copyrighted materials in digital and hard copy formats.<sup>3</sup>

American creators, producers, workers, and consumers all benefit when U.S. trading partners enact strong IP laws, effectively enforce those laws, and eliminate barriers to their markets. These benefits include the enrichment of American culture and consumers through enjoyment of creative content, including literary works, video games, movies and television programming, and music.<sup>4</sup> Strong IP protection and enforcement also help U.S. trading partners develop,

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

<sup>2</sup> See, e.g., 2022 Special 301 Report at 4, citing Omnibus Trade and Competitiveness Act of 1988, § 1303(a)(1)(B), and referencing S. Rep. 100-71 at 75 (1987) in footnote 2 ("Improved protection and market access for U.S. intellectual property goes to the very essence of economic competitiveness for the United States. The problems of piracy, counterfeiting, and market access for U.S. intellectual property affect the U.S. economy as a whole. Effective action against these problems is important to sectors ranging from high technology to basic industries, and from manufacturers of goods to U.S. service businesses.")

<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 2022 National Trade Estimate Report on Foreign Trade Barriers (March 31, 2022). That report is available at <https://ustr.gov/sites/default/files/2022%20National%20Trade%20Estimate%20Report%20on%20Foreign%20Trade%20Barriers.pdf>.

<sup>4</sup> See, e.g., 2022 Essential Facts About the Video Game Industry, available at <https://www.theesa.com/wp-content/uploads/2022/06/2022-Essential-Facts-About-the-Video-Game-Industry.pdf> (highlighting the benefits of playing video games including "fostering connection in person and online, building new skills and ways of thinking, [and] promoting health and driving economic growth.").

nurture, and enjoy the economic and cultural benefits from their own cultural and creative sectors, 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 benefits to American creators, producers, and workers are demonstrated in IIPA's December 2022 update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2022 Report*, prepared by Secretariat Economics, Inc. (2022 Report). According to the 2022 Report, in 2021, the "core" copyright industries in the United States: (i) generated more than \$1.8 trillion of economic output; (ii) accounted for 7.76% of the entire economy; and (iii) employed approximately 9.6 million workers, which is nearly 4.9% of the entire U.S. workforce and over 5.5% of total private employment in the United States.<sup>5</sup> The jobs created by these industries are well-paying jobs; for example, copyright industry workers earn on average 51% higher wages than other U.S. workers. Further, according to the 2022 Report, the core copyright industries outpaced the U.S. economy, growing at an aggregate annual rate of 6.15% between 2018 and 2021, while the U.S. economy grew by 1.76%. When factoring in other industries that contribute to the copyright economy (which together comprise what the 2022 Report calls the "total" copyright industries), the numbers are even more compelling. The 2022 Report and statistics amply demonstrate the economic importance of the copyright industries to the U.S. economy and to the livelihoods of millions of American workers.

The global health crisis unleashed by the COVID-19 pandemic has taken a toll on individuals, governments, and industries around the world. The copyright sector is no different. 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. Some of these stresses are evident in the 2022 Report, yet the report 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. For example, while U.S. GDP decreased by 2.77% from 2019 to 2020, reflecting the strain of the pandemic, the core copyright industries' value added grew by 0.89% during that time period, and that growth accelerated to nearly 13% in 2021. Thus, especially in the wake of the pandemic, the need for strong copyright protection remains critical to incentivize the investment in the creation and dissemination of entertaining, informative, and educational content.

On behalf of its member associations, IIPA has filed comments every year since the 1988 Trade Act established the Special 301 review proceeding. A particular focus of this IIPA submission is on the improvements necessary to the legal frameworks of trading partners to further enhance digital trade in copyrighted works and sound recordings. For more than 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. For example, the 2022

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<sup>5</sup> See Secretariat Economists, *Copyright Industries in the U.S. Economy: The 2022 Report* (December 16, 2022) available at [https://www.iipa.org/files/uploads/2022/12/IIPA-Report-2022\\_Interactive\\_12-12-2022-1.pdf](https://www.iipa.org/files/uploads/2022/12/IIPA-Report-2022_Interactive_12-12-2022-1.pdf). 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 51 country studies employing virtually the same agreed-upon methodology as the methodology used by Secretariat Economists. 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 21st Century: The 2020 Economic Impact Report, available at <https://www.theesa.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 2020 Jobs & Benefits Report: <https://www.riaa.com/wp-content/uploads/2021/02/The-U.S.-Music-Industries-Jobs-Benefits-2020-Report.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 2020 U.S. economic contribution infographic, available at [https://www.motionpictures.org/wp-content/uploads/2022/01/MPA\\_US\\_Economic\\_Contribution\\_2020\\_Final.pdf](https://www.motionpictures.org/wp-content/uploads/2022/01/MPA_US_Economic_Contribution_2020_Final.pdf). See also individual (country) MPA economic contribution reports for Australia (<https://www.mpa-apac.org/wp-content/uploads/2022/09/Report-The-Economic-Impact-of-VOD-Services-in-Australia-2022.pdf>), India ([https://www.mpa-apac.org/wp-content/uploads/2021/12/Logos\\_India-Frontier-The-Economic-Impact-of-OCC-in-India.pdf](https://www.mpa-apac.org/wp-content/uploads/2021/12/Logos_India-Frontier-The-Economic-Impact-of-OCC-in-India.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).

Report demonstrates that in 2021 the copyright industries contributed significantly to the digital economy, as defined by the U.S. Bureau of Economic Analysis (BEA), with the core copyright industries accounting for over 52% of the digital economy value added and over 48% of digital economy employment and the total copyright industries accounting for nearly 65% of the digital economy value added and nearly 59% of digital economy employment. The report points out that these numbers likely understate the total contribution of the copyright industries to the digital economy, because the BEA's digital economy classification does not encompass the full range of the copyright industries' digital activities.

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>6</sup> Though the copyright sector is increasingly employing electronic means to 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 remain at the forefront of technological developments to expand markets and creative activity and to launch new business models.

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 continues to yield results, including positive legal reforms, enforcement actions, and the removal of market access barriers. In addition to recommending improvements, IIPA's comments also highlight some of the recent successes and positive outcomes in several 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 Country Reports contained in the filing include a summary of developments from 2022 along with key issues to focus on in 2023. 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 on only a few key issues or one or two industries.

IIPA's 2023 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>7</sup> These 20 Country Reports cover: **Argentina; Brazil; Canada; Chile; China; Colombia; Ecuador; India; Indonesia; Mexico; Nigeria; Peru; Poland; Russian Federation; South Africa; Switzerland; Taiwan; Thailand; United Arab Emirates; and Vietnam.**

For these countries, the IIPA recommends:

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<sup>6</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 1.3 billion in 2021, a 14% increase from 2020. See, <https://www.motionpictures.org/wp-content/uploads/2022/03/MPA-2021-THEME-Report-FINAL.pdf>. For more information generally on the proliferation of services, see, <https://www.motionpictures.org/watch-it-legally/> (movies and television content); and <http://www.whymusicmatters.com>, <http://www.pro-music.org/>, and the IFPI Global Music Report 2022 at <https://globalmusicreport.ifpi.org/> (music).

<sup>7</sup> The Country Reports were prepared by IIPA Staff, including Linda Quigley, Madeline Dunn, and the undersigned. We particularly thank Madeline Dunn for her contributions to the preparation, production, and distribution of this submission. The Country Reports are based on information furnished by IIPA's member associations. The information contained in this submission should not be construed as providing legal advice.

IIPA 2023 Special 301 Recommendations	
Priority Watch List	Watch List
Argentina	Brazil
Chile	Canada
China	Colombia
India	Ecuador
Indonesia	Nigeria
Mexico	Peru
Russian Federation	Poland
South Africa	Switzerland
Vietnam	Taiwan
	Thailand
	United Arab Emirates
9	11

**Appendix B** provides a Historical Chart of countries’ placement on Special 301 lists by USTR since 1989 and IIPA’s 2023 Special 301 recommendations.<sup>8</sup>

**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.theesa.com](http://www.theesa.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.

**III. INITIATIVES TO STRENGTHEN IP PROTECTION AND ENFORCEMENT IN FOREIGN MARKETS**

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

**Brazil:** The Brazilian Audio-Visual Agency (ANCINE) created an anti-piracy chamber, and the Ministry of Justice’s National Council to Combat Piracy and Intellectual Property Crimes (CNCP) has pursued several helpful voluntary initiatives to fight illegal activity. The Ministry of Justice has consistently deployed raids against online piracy, such as the recurrent waves of Operation 404,<sup>9</sup> with the most recent wave focused on large numbers of infringing

<sup>8</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 consider “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).

<sup>9</sup> Operation 404 aims to tackle infringing services online, coordinated by the Brazilian Ministry of Justice and Public Security, together with cybercrime police units from 11 states in Brazil, Homeland Security Investigations (US), and the Police IP Crime Unit, City of London Police (UK).

mobile apps, and regulatory agencies have recently improved their focus on combatting illicit streaming devices (ISDs), although current efforts on ISDs remain insufficient given the scale of the problem. In addition, positive progress has been made regarding disabling access to infringing websites. On August 10, 2021, the Tribunal of Justice of the State of São Paulo issued a permanent blocking order against 14 stream-ripping sites in the criminal case initiated by the recorded music industry's anti-piracy body, APDIF DO BRASIL (APDIF). The decision was part of the campaign developed by APDIF and the Unit against Cyber Crimes of the State of São Paulo's Prosecutors Office (Cyber-GAECO), and the first of its kind in Brazil against music piracy services, confirming the legal powers of Brazilian courts to order permanent injunctions in cases against foreign sites with a significant audience in Brazil. More recently, on September 23, 2022, the Tribunal of Justice of the State of Sao Paulo, following a request from Cyber-GAECO, granted a dynamic injunction for blocking against 40 major stream-ripping services for an initial period of 180 days. While these developments are encouraging, as discussed in the Brazil country report, the government should make additional improvements to Brazil's copyright enforcement framework.

**Canada:** In June 2022, Parliament passed Bill C-19 to amend the Copyright Act to extend the general term of copyright protection. As discussed in the Canada Country Report, IIPA encourages the government of Canada to meet its U.S.-Mexico-Canada Agreement (USMCA) commitment by swiftly enacting this bill.

**India:** India established a site-blocking remedy in 2019 and, in 2022, rightsholders achieved two new milestones. First, rights holders obtained orders to block "pirate brand" domains based on their apparent association with an already-blocked site. This will create further efficiencies and help disrupt persistent infringers who mimic the name or brand of popular pirate sites to attract traffic and ad revenues to their copycat sites. Rights holders also obtained the first blocking orders against a cyberlocker, allowing blocking of server domains associated with cyberlockers shown to be servicing referral sites with massive infringements. In addition, in February 2022, the Delhi High Court Intellectual Property Rights Division Rules entered into force. The Rules establish an IP Division of the Delhi High Court and are intended to ensure that the judges hearing IP cases are well versed in IP laws and practice. These rules have had a positive impact on the adjudication of IP cases to date and could provide a model for other states. Finally, in May 2022, the Supreme Court of India held that offenses under Section 63 of the Copyright Act are cognizable and non-bailable offenses. This decision improves the police's ability to effectively respond to copyright infringements committed within their jurisdictions. The Ministry of Commerce and Industry should analyze, and, as necessary, seek to amend any penal provisions or ancillary provisions related to Section 63 that may be inconsistent with this Supreme Court judgment.

**Kenya:** In early 2022, a bill proposed by a Member of Parliament to repeal online enforcement provisions (including notice and takedown obligations) was withdrawn, following strong opposition by Kenya's Copyright Office, as well as local and international rights holders. It is important for Kenya to effectively and consistently implement notice and takedown and other measures demonstrated effective in preventing or restraining infringement to help address online piracy. As discussed below, IIPA encourages the U.S. and Kenyan governments to work together to ensure that legislative reforms are consistent with international obligations and standards and provide protection for foreign and domestic rights holders alike.

**Malaysia:** In March 2022, new anti-ISD amendments to the Copyright Act entered into force. Pursuant to these new amendments, the Alliance for Creativity and Entertainment (ACE), Premier League, and Malaysia's Ministry of Domestic Trade and Consumer Affairs (MDTCA) in October 2022 undertook a joint enforcement action against an electronics retailer for allegedly selling ISDs.

**Mexico:** In 2022, the ESA entered into a Memorandum of Understanding (MOU) with the Mexican Institute of Intellectual Property (IMPI) to work together on issues impacting video game IP protection and enforcement. The MOU focuses on collaboration on IP enforcement activities, promotion of the importance of IP, public awareness campaigns about the value and importance of IP to the video game industry, and collaboration with Mexican government agencies

that work on IP matters. Work under the MOU has already begun, including an ESA-led training for over 60 members of the IMPI enforcement team.

**The Netherlands:** The site-blocking mechanism in the Netherlands continued to improve in 2022. After the Association for the Protection of the Rights of the Entertainment Industry of the Netherlands (BREIN) secured a final blocking order of The Pirate Bay in 2020 following 11 years of proceedings, Dutch Internet service providers (ISPs) agreed in 2021 to a covenant whereby a court order for blocking an infringing website against one ISP will be executed voluntarily by the other ISPs. This agreement has been tested with the blocking of an additional six infringing sites (as well as hundreds of proxies) in 2022. Blocking is dynamic, enabling updates by BREIN without further court orders.

**Peru:** Although Peru still has high levels of piracy, it has taken significant, positive steps to address this, notably thanks to the decisive role that continues to be played by the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (“INDECOPI”) in issuing injunctions for ISPs to disable access to copyright infringing websites. For example, on June 2, 2022, INDECOPI issued the largest *ex officio* administrative blocking order against a total of 147 websites, including over 40 globally popular stream-ripping sites that were blocked by all ISPs. This unprecedented action was possible because of the close cooperation between INDECOPI and private sector organizations representing national and international rights holders in Peru.<sup>10</sup>

**Singapore:** In October 2022, the Criminal Investigation Department of the Singapore Police conducted simultaneous enforcement actions at several retail shops, seizing 2,500 suspected illegal set-top-boxes. The Copyright Act in Singapore was amended recently to provide that those found to have infringed the Act by making, dealing, importing, distributing, or offering of devices or services to access works without the authority of copyright owners can be fined up to \$100,000, imprisoned for up to five years, or both.<sup>11</sup>

**Thailand:** Although further improvements are still needed in Thailand’s copyright framework as discussed in the Thailand Country Report, amendments to the Copyright Act that entered into force in August 2022 included some helpful improvements, including on secondary liability, the protection of technological protection measures (TPMs), and the reinstatement of a procedure for notice and takedown. There also have been some positive voluntary public/private sector initiatives in the form of Memorandums of Understandings in connection with “Online Advertising and Intellectual Property Rights” and “Protection of IPR on the Internet” devised by the Department of Intellectual Property, together with the Department of Business Development and Department of International Trade Promotion, respectively.

**Vietnam:** In June 2022, the Cinema Law passed, allowing self-classification for films disseminated on the Internet, which includes most video-on-demand (VOD) content, and a grace period for implementation. Vietnam should maintain these positive changes in the related draft implementing decrees, while removing negative policies like the screen quota and discriminatory film fund. In June 2022, Vietnam also passed amendments to the IP Law, which will enter into force on January 1, 2023, following Vietnam’s welcome accession to the WIPO Performances and Phonograms Treaty (WPPT) in April 2022. The latest amendments contain improvements for rights holders, with an improved definition of the making available right, the illegal uploading and streaming of a cinematographic work categorized as a violation of communication rights, and the copying of part of a work considered as a reproduction, all of which create additional opportunities for rights holders to seek civil or criminal relief against online infringers. IIPA understands that implementing regulations are currently being drafted by the Copyright Office of Vietnam under the Ministry of Culture, Sports, and Tourism. This process offers an opportunity to further clarify and refine some important,

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<sup>10</sup> Illustrating the effectiveness of these website blocking actions, in November 2020, the most popular stream-ripping site in the country was *Y2Mate*, which received an average of 138,000 visits from Peru each day. The site was blocked by ISPs in the country in December 2020, and by March 2021, daily visits from Peru were down to just 22,000, a reduction of 84.1%. The blocking action of this single site continued to be effective and visits to the site did not exceed 15,000 per day during the first six months of 2022. Ten further stream-ripping sites were blocked in May 2021, and an even more positive effect was observed. By July 2021, traffic to the ten blocked sites was down by 88.4%. In June 2022, visits were 97.5% lower compared to the month before the blocking took place. These actions also had an impact on overall levels of stream ripping. Total visits to all stream-ripping sites were 22.9% lower in Q2 2022 than in Q4 2020 when *Y2Mate* became the first blocked stream-ripping site.

<sup>11</sup> See Ang Qing, Sim Lim Square Shops Raided for Illegal Streaming Devices, 2,500 Sets Seized and 17 People Arrested, October 7, 2022, <https://stomp.straitstimes.com/singapore-seen/sim-lim-square-shops-raided-for-illegal-streaming-devices-2500-sets-seized-and-17>.

outstanding elements of the law, and IIPA encourages the government to continue to incorporate feedback from rights holders to ensure a smooth implementation of the improved IP Law.

IIPA welcomes these 2022 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 enforcement issues remain in several of these countries. The details of these and other issues in certain of these countries can be found below and in the respective Country Reports in [Appendix A](#).

#### IV. **ADDITIONAL CONCERNS IN OTHER KEY FOREIGN MARKETS**

As detailed in the Country Reports, there are several countries, notably **South Africa, Canada, Ecuador, Indonesia, Nigeria, Peru, and Switzerland**, where the press for reforms and modernization of national copyright laws have failed to keep pace with market and technological trends. In some cases, reform efforts have become a vehicle for proposals that threaten well-established global norms enshrined in long-standing international instruments, including by introducing broad exceptions and limitations. In addition to the problematic legal reform efforts identified in the Country Reports, the governments of several other countries, including **Belgium, Germany, Kenya, Malaysia, Paraguay, Philippines, South Korea, and Turkey**, have introduced legislation, recently enacted legislation, or taken other actions that threaten to significantly weaken, not strengthen, copyright protections or enforcement in those countries. Further details of the serious concerns in these markets are provided below. IIPA urges the U.S. government to monitor developments in these countries and proactively engage with these governments to ensure their legal reform efforts result in adequate and effective copyright protection and enforcement.

##### A. **Belgium**

In June 2022, Belgium enacted a law implementing the European Union (EU) Directive 2019/790 on copyright and related rights in the Digital Single Market (DSM Copyright Directive) that introduced an additional remuneration right (ARR) for uses covered by Article 17, and more broadly in the context of the implementation of Article 18, of the DSM Copyright Directive. The law was published on August 1, 2022, and entered into force on the same day. The introduction of ARR in Section 62 of the implementing law was proposed by the government without conducting consultations or any proper impact assessment of this issue. The new provision raises significant questions regarding its compliance with fundamental EU principles, including its impact on freedom of contract and freedom to conduct business, as well as regarding the practical application of the ARR and how the new legal regime should work (e.g., what is the impact on local and foreign rights holders and performers, how to ensure the correct distribution, to what time period should it apply, etc.).

##### B. **Germany**

The 2021 transposition of the DSM Copyright Directive into German legislation and the changes to Germany's Copyright Act introduced broad new exceptions for copyright protected works on online content-sharing service providers (OCSSPs). The new exceptions include an overbroad limitation on the exercise of exclusive rights for "presumably permitted uses" and content that is "pre-flagged" by users as non-infringing. Those presumably permitted uses apply to user-generated content that (1) contains less than half of a work by a third party or several works by third parties, (2) combines the work parts according to (1) with other content, and (3) makes only minor use of third-party works. Uses of up to 15 seconds each of a cinematographic work or motion picture, 15 seconds per soundtrack, 160 characters per text, and 125 kilobytes per photographic work are considered "minor uses" of a copyrighted work. These new *de facto* exceptions exceed the "three-step test" and will lead to an untenable situation in which certain uses would be permitted in Germany but not elsewhere in Europe or worldwide.<sup>12</sup>

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<sup>12</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)

In addition, the implementation of Article 17 introduces direct remuneration claims for authors and owners of certain related rights, subject to mandatory collective rights management. This means that creators who have licensed or transferred their rights to producers and already obtained remuneration under these contracts, would still be able to ask for a remuneration from an OCSSP. The direct remuneration claim would be unwaivable and administered only by collective management organizations (CMOs). These provisions raise significant questions regarding both their practical application, as well as their legitimacy, not least because they are unreasonable restrictions of the freedom of contract.

### C. Kenya

While the Government of Kenya has indicated its intention to ratify the WIPO Copyright Treaty (WCT) and the WPPT (collectively, the WIPO Internet Treaties), it has yet to do so or to set a timeframe for accession. Kenya should ratify and implement the WIPO Internet Treaties as part of its ongoing Copyright Act amendment process. Kenya's 2019 amendment to the Copyright Act was intended to address some of the challenges of the digital age, but Kenya's copyright framework remains deficient in several 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. To ensure its legal framework provides adequate and effective protection and enforcement of IP rights, Kenya's government should revise the IP Bill 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 and the WTO TRIPS Agreement, and with the requirements of 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 TPMs and rights management information (RMI), in line with international standards;
- providing a term of protection consistent with international norms (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;
- improving Kenya's online liability regime to ensure that it supports sustainable growth of the digital content markets and does not shield copyright infringing services, including by: (i) ensuring there is a clear legal basis under which ISPs may be held liable for IP infringements carried out by third parties using their services or networks; (ii) clarifying that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities; (iii) clarifying the responsibilities of ISPs eligible for safe harbors, including an obligation to remove infringing content expeditiously upon obtaining knowledge or awareness of the infringing activity and to take measures demonstrated effective in preventing or restraining infringement; (iv) requiring ISPs to implement effective repeat infringer policies; and (v)

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(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).

- encouraging all ISPs, not only those that may avail themselves of safe harbors, to implement “know-your-business-customer” (KYBC) procedures.
- 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, including applying increased penalties for second and subsequent offenses and fines and imprisonment terms for criminal offenses to all offenses, including circumvention of TPMs, distribution of devices designed to circumvent TPMs, and removal/alteration of RMI; and
  - clarifying the role of the proposed IP Tribunal.

#### **D. Malaysia**

Following a short consultation period in December 2021, Malaysia’s new Copyright (Amendment) Act 2022 was adopted on February 10, 2022. The Act introduces new offenses for the unauthorized sharing of links to copyrighted works and for addressing streaming technologies that commit or facilitate copyright infringement in any work. However, the Act also provides for broad intervention in collective management from the “Controller of Copyright” (the Director General of the Intellectual Property Corporation of Malaysia (MyIPO)) to issue guidelines on any matter relating to the declaration and operation of a CMO. New subsidiary regulations relating to collective management have since been introduced but these have not been substantive. Proposals have been made to introduce mandatory one-stop shop CMO licensing in Malaysia, interfering with rights holders’ right to determine how and by whom their rights are managed. Unfortunately, the amendment did not change Malaysia’s outdated term of protection for sound recordings and works, which should be extended to 70 years.

#### **E. Paraguay**

In August 2022, a problematic bill was introduced in the National Chamber of Deputies in Paraguay proposing a new remuneration right for musical and audiovisual performers to be paid by all digital platforms. The one-article bill establishes a 10% (default) statutory rate to be collected by banks and other financial institutions out of the subscribers’ payments to premium accounts. The new right is subject to mandatory collective management, and the financial institutions must remit the proceeds to national CMOs. In certain respects, the proposal resembles a broad compulsory license that may apply even to unauthorized performances (i.e., piracy) and, as such, would be inconsistent with Paraguay’s obligations under the WTO TRIPS Agreement. The proposal has no sound foundation (legal, economic, or otherwise), is unprecedented, and would significantly hinder the market for audiovisual works and recorded music in Paraguay. If enacted, the proposal would undermine the free exercise of exclusive rights and contractual freedom and would create chaos in the market because the scheme for administration is cumbersome and unnecessarily confusing involving multiple transactions, which will prove difficult, if not impossible, to follow.

#### **F. Philippines**

Online piracy is a major threat to the creative industries in the Philippines, and a more robust IPR enforcement regime is needed, including more timely investigations and prosecutions of online copyright theft. The Philippines have long been a primary source of camcord piracy of major motion pictures, and the government should remain vigilant on this issue. With the new Marcos government, an iteration of draft IP Code amendments has been introduced in Congress which would, for the first time in the Philippines, provide for an administrative no-fault injunctive remedy to disable access to infringing websites. IIPA encourages the government to enact this remedy to help rights holders protect their copyrights and combat online piracy. The remedy should not include a fiscal bond requirement, which is

inapplicable to the online environment, and reasonable qualitative criteria should be applied (such as whether the site has the primary purpose or effect of infringing or facilitating infringement of copyright). Unfortunately, the draft legislation also retained several problematic provisions, which should be removed or revised as indicated below:

- Remove the extended collective licensing (ECL) mechanism in Section 204: ECL is a system that was developed for certain specific cases in markets with well-developed collective rights management systems, and with CMOs already representing a substantial number of rights holders in their respective fields. This is not the case in the Philippines. Furthermore, an ECL is a limitation on the exercise of rights and, as such, must comply with the three-step test. Accordingly, an ECL may be introduced only where there is a proven market failure and where individual licensing is unfeasible, not into a developed and well-functioning market. There is no evidence justifying the introduction of ECL in the Philippines, and the proposed ECL does not comply with the three-step test. At a minimum, if evidence justifying ECL for certain uses emerges, sufficient safeguards must be added to ensure compliance with the three-step test.
- Remove the provision for additional remuneration for performers for subsequent communications or broadcasts, which, like the ECL mechanism, interfere with freedom of contract and established contractual and licensing arrangements.
- Remove the open-ended fair use provision in Section 207 or at least change it to a closed-list fair dealing provision. Open-ended exceptions create unnecessary uncertainty, litigation, and conflicting decisions, causing confusion. Such exceptions can be harmful not only to rights holders but also to users who need certainty regarding which uses are permitted. Closed list systems have been adopted in most countries because they provide a high degree of certainty as to the permitted uses. Fair use is determined on a fact-intensive, case-by-case basis. In the United States, a well-developed body of case law helps to mitigate the inherent uncertainty of the scope of the fair use exception. Without this foundation of a well-developed body of case law, a fair use exception in the Philippines raises questions regarding the first requirement of the three-step test, that exceptions must be limited to “certain special cases.”
- Extend the term of protection for sound recordings and works: The term of protection should be extended to at least 70 years in keeping with the international standard, as discussed below.
- Clarify the requirements for mandatory accreditation of CMOs with Intellectual Property Office of the Philippines (IPOP) in Section 203.2: It should be made clear that individual rights holders, engaged in licensing of rights they own or control, shall not be under any obligation to seek an accreditation.

Finally, the Philippines government should avoid any consideration of a screen quota in proposed legislative amendments and remove or dial back foreign ownership and investment restrictions, which limit the U.S. industries contribution to the growth of local creative economies.

## **G. South Korea**

Several legislators in the National Assembly have proposed amendments to the South Korea’s Copyright Act that contain problematic proposals, including to introduce a statutory remuneration right for directors and scriptwriters who have already assigned their rights, which would allow them to claim additional compensation from any profits generated. These proposals would undermine the freedom and sanctity of contracts and have a dramatic chilling effect on investment in the audiovisual industry. If enacted, producers of content will be faced with uncertainties regarding increased risks of unlimited liability for payouts of additional remuneration over an extended period of time. As a result, producers may reserve profits from popular, best-selling works to pay this additional remuneration to directors and scriptwriters, instead of re-investing the profits into the production of other, more niche content. This will ultimately harm the diversity and variety of content produced.

## H. Turkey

For over a decade, the Government of Turkey has promised to modernize its Copyright Law (1951, last amended in 2016) to fully implement the obligations of the WIPO Internet Treaties. Turkey acceded to the treaties in 2008, but has yet to fully implement them, including by providing proper remedies against the circumvention of TPMs and protecting RMI. In 2018, the Government of Turkey circulated a comprehensive Copyright Law reform bill (2018 Bill), but that draft was withdrawn in 2019, in large part because of disagreements about the provisions on CMOs. The Ministry of Culture and Tourism worked on a smaller package instead of the withdrawn 2018 Bill, but only Article 72 of the Copyright Law was amended to expand protections against circumventing TPMs. While secondary legislation was studied and changes were made in the CMO regulations and banderol regulations, these small changes will not bring the required solutions to many of the existing copyright problems as discussed below and, unfortunately, the needed changes are not expected to be made soon.

Turkey's legal framework should be amended to address Turkey's digital piracy problem—including stream ripping, cyberlockers, BitTorrent and other peer-to-peer (P2P) linking sites, download sites, and "topsites" (i.e., high speed servers used covertly to share content)—which is widespread and has stifled the legitimate market. While the current Copyright Law provides for a notice and takedown process, an ISP's failure to comply with takedown notices or requests to block access to infringing websites are merely subject to administrative fines. A rights holder must obtain a criminal court injunction to require the ISP to remove the infringing content. In addition, current law does not provide for criminal penalties for copyright violations.

The Internet Law sets out broad liability exceptions that 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, and should be clarified to define who is, and is not, eligible for the limitation on liability, and the liability limitation should apply only to passive and neutral intermediaries that do not contribute to infringing activities. Also, unlike most countries, including the United States, the liability exemption denies the ability of a rights holder to obtain injunctive relief. This also should be corrected.

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 April 2022 Special 301 Report recommended, and rights holders agree, that Turkey should require "fair, transparent and non-discriminatory procedures" for CMO governance of all rights holders' rights.

One loophole in the 2018 Bill would allow 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 violate international treaties and norms, and should not be adopted in any CMO law (or Copyright Law) revision.

There were other concerns with the 2018 Bill that should be corrected in any future draft legislation, including: (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.

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

Notwithstanding the positive developments noted above, the U.S. copyright industries face complex challenges in overseas markets that fall into three distinct, but overlapping, categories: (i) inadequate copyright and related laws; (ii) inadequate and ineffective enforcement of existing copyright and related laws; and (iii) market access barriers that inhibit the licensing and dissemination of copyrighted works and sound recordings. Below is a summary of the major challenges across the global markets in each of these categories:

### A. **Inadequate Copyright and Related Laws**

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, the current legal regimes of many U.S. trading partners fail to meet their obligations to the United States, evolving global norms, or the minimum standards of the WIPO Internet Treaties. Second, in several countries, CMOs are not operating fairly or properly, resulting in the denial of monies to rights holders. Related to these concerns, as outlined above, several countries undertaking major overhauls of their copyright and related laws are considering adopting or have adopted proposals that would weaken rather than strengthen copyright protections or enforcement mechanisms, thereby undermining markets for the digital creation or dissemination of rights holders' materials.

#### 1. ***Failure to Meet Legal Reform Obligations, Evolving Global Norms, and Global Minimum Standards***

As detailed in the Country Reports, U.S. trading partners have many unmet legal reform obligations from the numerous bilateral, regional, and multilateral trade agreements with the United States. 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);<sup>13</sup> and (b) free trade agreements (FTAs) or trade promotion agreements (TPAs) with over 20 countries, including the 2020 agreement with **Mexico** and **Canada** (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.<sup>14</sup> 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, such as mandated local-content quotas, purchase requirements, or restrictions on audiovisual over-the-top (OTT) businesses.

Some signatories to existing FTAs have not met their agreement obligations, yet these countries continue to enjoy advantageous access to the valuable U.S. markets for goods and services. These concerns are detailed in the Country Reports, notably in **Chile** and **Colombia**, where the legal frameworks for online enforcement remain deficient. As detailed in the **Mexico** Country Report, Mexico has enacted key copyright reforms to implement certain obligations under the USMCA (and longstanding commitments under the WIPO Internet Treaties), but IIPA is concerned about the

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<sup>13</sup> IIPA commends USTR and the interagency for helping to ensure the WTO's TRIPS waiver decision on COVID-19 vaccines did not undermine the WTO TRIPS Agreement's important standards on copyright protection and enforcement.

<sup>14</sup> In addition, some countries such as the United Kingdom (UK) and Japan are actively seeking additional trade agreements with their trading partners, some of which are paying dividends in stronger intellectual property (IP) protection and enforcement obligations that, through the most favored nation (MFN) principle, should afford benefits to U.S. rights holders as well. For example, the UK-New Zealand Free Trade Agreement (FTA), signed on February 28, 2022, includes several important obligations, such as providing injunctive relief against intermediaries for copyright infringement (Article 17.70), incorporating a "commercial scale" definition, mirroring that of U.S. FTAs, that requires criminalization of "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" (Article 17.75), and providing for "blocking orders" (Article 17.82), among others. In addition, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) contains similar disciplines, for example regarding "commercial scale" criminal liability, which now bind countries like Vietnam, which has notoriously weak criminal enforcement to date.

pending constitutional challenge to these reforms, which if successful would seriously undermine Mexico's compliance with its USMCA obligations.

The U.S. government has entered into 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>15</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, an online enforcement obligation agreement with **Russia** that has never been fully implemented. As detailed in the **China** Country Report, the Economic and Trade Agreement with China (Phase One Agreement) includes copyright enforcement obligations and also purchasing obligations for licensing of audiovisual services.<sup>16</sup> IIPA urges China to follow through on its Phase One Agreement commitments.

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 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.

Our trading partners should be urged to bring their laws into line with evolving global norms regarding duration of copyright protection. 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 the *de facto* global norm. More than 80 countries, including most of the United States' 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 have not yet adopted longer terms for works or sound recordings, or both. It is hoped that countries that have not yet adopted this longer term, particularly in Asia and Africa, will follow recent examples (many in Latin America) and extend copyright term accordingly.

The U.S. government should also make it a priority in 2022 to encourage all U.S. trading partners to accede to and fully implement the WIPO Internet Treaties. At the time they came into force, the WIPO Internet Treaties 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 also 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 at 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 regarding legislation in any country purporting to implement the WIPO Internet Treaties and copyright reforms undertaken in countries that are parties to an agreement with the United States. In particular, anti-circumvention prohibitions (i.e., 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

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<sup>15</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).

<sup>16</sup> See Economic and Trade Agreement Between the United States and China, available at: [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic\\_And\\_Trade\\_Agreement\\_Between\\_The\\_United\\_States\\_And\\_China\\_1\\_ext.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_1_ext.pdf).

in this way can TPMs legislation establish effective, practical, and enforceable anti-circumvention prohibitions that protect and support digital content services.

Although recent trade initiatives—including the trade pillar of the Indo-Pacific Economic Framework (IPEF), the U.S.-Kenya Strategic Trade and Investment Partnership, and the U.S.-Taiwan Initiative on 21<sup>st</sup>-Century Trade—do not address IP rights issues, these initiatives do include a focus on digital economy-related matters. Given the importance of the copyright industries to the digital economy as discussed above, the U.S. government should ensure that the outcomes of these initiatives do not in any way reduce or undermine high standards of copyright protection, including obligations in the WIPO Internet Treaties and the WTO TRIPS Agreement. IIPA also hopes that negotiators can make progress on ensuring trading partners accede to and fully implement the obligations of the WIPO Internet Treaties, which as noted above include critical provisions, such as protections for TPMs, that are fundamental to digital trade of copyrighted works and sound recordings. Moreover, the digital trade negotiations are an important opportunity to address policies and measures that discriminate against U.S. creative content and services, including through the imposition of performance requirements. Furthermore, these trade initiatives provide important opportunities to work with trading partners to enhance cooperation and capacity building activities to improve copyright protection and enforcement, which is a longstanding United States trade negotiating objective.<sup>17</sup> To achieve these important goals, negotiators should work with the U.S. government's IP experts, including those at the U.S. Copyright Office and the U.S. Patent and Trademark Office. Moreover, in addition to these recent trade initiatives, the U.S. government should continue to use other bilateral trade dialogues, such as the U.S.-India Trade Policy Forum's Working Group on Intellectual Property, the Transatlantic IPR Working Group, Trade and Investment Framework Agreements (TIFAs), and Trade and Investment Council Agreements (TICs), to improve copyright protection and enforcement regimes of U.S. trading partners, including by addressing the concerns identified in this filing.

The Country Reports in Appendix A, as well as in the section above regarding additional concerns in other key foreign markets, identify certain key markets that have not acceded to or implemented the WIPO Internet Treaties or have other unmet legal reform obligations. In addition to these countries, **Saudi Arabia** is an important market that still needs to accede to and implement the WIPO Internet Treaties and ensure that the legal framework, including the Copyright Law and Implementing Regulations of Copyright Law, is compatible with the WIPO Internet Treaties and international standards and best practices. In particular, key definitions and rights should be clarified to ensure they are consistent with the treaties, including the definition of “sound recordings” and the rights of communication to the public, broadcasting, and making available, which should be separately enumerated and defined. In addition, Saudi Arabia should ensure its exceptions and limitations are confined to the three-step test. The Government of Saudi Arabia should also extend the current 50-year term of protection for copyrighted works and sound recordings to at least 70 years in keeping with the international standard.

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

Direct licensing of copyrighted works and sound recordings by individual rights holders of their exclusive rights should always remain the baseline. However, in certain circumstances where it makes economic sense, 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 frequently licensed collectively, because often a large number of users (potential licensees) are involved, for example, from cafés and restaurants to hundreds of radio stations, and the value of individual transactions may be relatively small compared to the transactional costs.

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<sup>17</sup> See, e.g., 19 U.S.C. 4201(b)(5)(A) (The principal trade negotiating objectives required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 include “to further promote adequate and effective protection of intellectual property rights. . .”); see also 19 U.S.C. 4201(c)(1)(A) and (B) (“In order to address and maintain United States competitiveness in the global economy, the President shall . . . direct the heads of relevant Federal agencies . . . to work to strengthen the capacity of United States trading partners to carry out obligations under trade agreements by consulting with any country seeking a trade agreement with the United States concerning that country’s laws relating to . . . intellectual property rights . . . and to provide technical assistance to that country if needed. . .”).

Royalties for the retransmission of audiovisual works and public performances of musical works and recordings are significant revenue sources for all music rights holders and represent an important source of monies for financing 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, particularly for music industry rights holders, to set up and govern their own CMOs on a voluntary basis. 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).

Serious concerns regarding rights holders' ability to fully exercise their rights, especially the public performance right, through collective management in key markets are detailed in the Country Reports in [Appendix A](#) and in the section above regarding additional concerns in other key foreign markets. IIPA also has significant concerns in several other important markets. The Ministry of Justice (MOJ) in **Israel**, encouraged by a coalition of small businesses and large hospitality and accommodation service providers—generally using “COVID recovery” as a pretext—is proposing to limit the communication to the public right<sup>18</sup> and create a “sole corporation” with the mandate to set tariffs for the use of music rights in public performance, to collect the fees, and to distribute money to the different CMOs or rights holders. **Japan** does not provide a public performance right for producers of sound recordings, depriving U.S. rights holders of significant revenues.<sup>19</sup> In **Kenya**, in recent years there has been a notable increase in government interference in the collective management sector, including the Copyright Office's failure to renew the operating licenses of the three music CMOs, despite reasonable efforts by the CMOs to meet the Office's demands. This has negatively affected the performance of the CMOs in terms of licensing commercial uses of copyright and related rights. **Singapore's** recently introduced public performance right includes a carve out for certain “indirect uses” of works or sound recordings, allowing users to evade paying equitable remuneration to rights holders if the content is received through a television or broadcast (including by radio) or a cable program. The exception is out of step with Article 15 of the WPPT and has already proven to be a significant contributing factor to lower than expected public performance collections in Singapore, which is expected to continue to the detriment of rights holders if the exception is not removed. Like **Indonesia**, **South Korea** does not fully recognize producers' public performance right, limiting it to only a select list of venues recognized on a “positive list” and maintaining an unacceptably broad exemption from the public performance right. This problem is exacerbated by the government's interference in the setting of public performance tariffs, resulting in rates set below international standards. **Saudi Arabia**, which presently has no CMOs, should introduce voluntary, 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. This should include the critical principle that any CMO established in Saudi Arabia should be owned or controlled by their member rights holders (whether local or foreign).

## **B. Inadequate and Ineffective Enforcement of Existing Copyright and Related Laws**

As a minimum standard, the WTO 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>20</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 multiple countries. Moreover, enforcement authorities need adequate resources and the capability to do their jobs effectively. As digital technologies have expanded consumer access to copyrighted materials, rogue services

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<sup>18</sup> The proposal would exclude the following entities from the scope of the communication to the public right: (i) small businesses (including waiting rooms) with no more than 6 clients at the time; and (ii) “joint permanent places of residence.”

<sup>19</sup> The music industry estimates that the value of public performance rights in Japan is \$120 million per year, with a significant portion of that value attributable to U.S. rights holders.

<sup>20</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.

have exploited those technologies 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, various stream-ripping sites and apps 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 online infringement of music. Thus, enforcement systems (and trade commitments to address enforcement) must be adaptable, agile, efficient, and effective to deter the myriad forms of infringing activities. To deter all copyright piracy on a commercial scale, countries should look to the standard in U.S. trade agreements, other bilateral trade agreements (such as the recent United Kingdom (UK)-New Zealand FTA), and regional trade agreements (such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)), which define "commercial scale" piracy as not only "acts carried out for commercial advantage or financial gain" but also "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." Countries should incorporate these best practice standards in amending their criminal laws to ensure they can best address the latest forms of piracy

This Section highlights some of the enforcement challenges confronting IIPA members. The Country Reports in [Appendix A](#) provide detailed discussions of these challenges where they are present in those key markets.

### **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 access for U.S. creators and rights holders in markets worldwide. For example, piracy via cyberlockers, which are often based in countries such as **Russia** where enforcement is difficult, and BitTorrent and other P2P services continues to pose constant and serious problems for the creative industries. To address these concerns, IIPA continues to recommend the following four steps:

**(1) Identification:** Identify and close down services and actors engaged in infringement activities, especially criminal syndicates, through the use of criminal enforcement remedies and other tools. USTR makes an indispensable contribution to this step by regularly conducting its "Special 301 Out-of-Cycle Review of Notorious Markets."<sup>21</sup> As detailed in the Country Reports, there have been many successes with 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 either to 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.

**(2) Create an Adequate and Effective Legal Framework:** The goal is a legal framework that: (i) prevents the operation of services that promote or otherwise induce infringement; (ii) criminalizes online infringement (particularly all "commercial scale" piracy, in line with the best practice definition described above); and (iii) provides strong incentives for neutral intermediaries to work with rights holders to curb the use of their proprietary networks and services for infringing purposes. Such a legal framework should: (i) provide 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 adopt global best practices for copyright protection in the digital environment; (ii) ensure that any ISP liability limitations, if present, do not reduce the scope of substantive copyright protections and require appropriate conditions to be met for eligibility, including obligations for ISPs to remove infringing content expeditiously upon obtaining knowledge or awareness of infringing activity and to take measures demonstrated effective in preventing or restraining infringement; (iii) recognize online piracy as a form of cybercrime (consistent with

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<sup>21</sup> The most recent report is USTR's Out-of-Cycle "2021 Review of Notorious Markets for Counterfeiting and Piracy" (February 2022), available at: <https://ustr.gov/sites/default/files/IssueAreas/IP/2021%20Notorious%20Markets%20List.pdf> (NM 2021 Report).

the Budapest Convention and global best practices); and (iv) foster 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, often a mistaken perception exists that they are 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. Indeed, the U.S. Copyright Office has said in a report about the U.S. notice and takedown system that such laws must properly “balance the rights and responsibilities of [online service providers] and rightsholders in the creative industries.”<sup>22</sup> 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 apply to only 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. Mitigating and preventing online piracy should be a shared responsibility with balanced obligations between online intermediaries and rights holders, particularly because 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, such intermediaries have little interest in fully cooperating with rights holders.

**(3) Provide Injunctive Relief:** A country’s failure to take effective action against its own (“homegrown” or otherwise) notorious online marketplaces that target consumers in other markets causes harm to the markets of its 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 42 countries—including **Australia, Belgium, Brazil, Denmark, France, India, Ireland, Italy, Peru, Portugal, Singapore, South Korea, Spain, Sweden,** and the **UK**—employ injunctive relief or administrative orders to compel ISPs to disable access to copyright infringing websites.

However, several important markets do not yet provide a legal basis for doing so, including **Taiwan**, as discussed in the Taiwan Country Report. **Japan** is another example of a major market that needs to do more to address effectively “offshore” infringements. An amendment was adopted in 2020, confirming liability against linking sites, but additional measures are necessary to take effective action against offshore piracy. Japan’s Intellectual Property Strategy Headquarters’ (IPSH) first ten anti-piracy measures, which were issued in their 2019 strategy document, have had minimal effect. Piracy remains serious, which underscores the need for Japan to introduce additional effective measures to prevent access to copyright infringing services, including infringing websites operated both within and outside of Japan.<sup>23</sup> While **Singapore’s** Copyright Act provides injunctive relief for online infringement in Section 325, improvements should be introduced to further strengthen the provision, including introducing an expedited procedure, especially for infringed content that is newly released or has not yet been released. In Europe, Article 8(3) of the EU Copyright Directive (2001/29/EC) requires Member States to ensure injunctive relief is available “against intermediaries whose services are used by a third party to infringe a copyright or related right.” Unfortunately, **Poland** has not fully implemented this provision (as detailed in the Poland Country Report) nor has **Bulgaria**, which does not provide a legal

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<sup>22</sup> US Copyright Office, Section 512 of Title 17, at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

<sup>23</sup> See, e.g., Eriko Watanabe, Study Update: Benchmarking and Tracking Online Film & TV Piracy in Japan (July 2018 to July 2021) [https://www.bunka.go.jp/english/policy/copyright/pdf/93696901\\_01.pdf](https://www.bunka.go.jp/english/policy/copyright/pdf/93696901_01.pdf).

basis for permanent injunctions.<sup>24</sup> The recently concluded UK-New Zealand FTA includes a provision that is similar to Article 8(3), which hopefully will develop into a needed regional and international best practice and norm.<sup>25</sup>

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 against service operators who cannot be identified or who avoid service of legal process.

**(4) Develop Inter-Industry Cooperation:** Because 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; search engines; and marketplaces and app stores. 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. For example, governments should encourage all relevant intermediaries to implement “know your business customers” (KYBC) policies to ensure they keep up to date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers. Additionally, governments should ensure that private sector 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.

In a positive development, on December 20, 2022, approximately 20 organizations representing companies from the audiovisual and telecommunications sector as well as government representatives and regulators from Uruguay, Venezuela, Colombia, and Argentina signed an agreement to form a global anti-piracy coalition. The “Global Anti-Piracy Pact” aims to improve and better coordinate the efforts of these companies and governments to combat IPTV and audiovisual piracy.<sup>26</sup> This promising initiative should be encouraged by the U.S. government.

## **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

<sup>24</sup> The Bulgaria Copyright and Neighboring Rights Act (CNRA) provides for a legal basis for injunctive relief against third-party infringers, but the provision appears to provide for only precautionary and provisional measures, not for a permanent injunction. See Article 96a(8) of the CNRA.

<sup>25</sup> Article 17.82 (“Blocking Orders”) of the UK-New Zealand FTA provides, “Each Party shall ensure that injunctions as provided for in Article 17.67 (Provisional and Precautionary Measures) and Article 17.70 (Injunctions): (a) are available against an OSP, where its online services are used by a third party to infringe an intellectual property right; and (b) include injunctions requiring that OSPs disable access to infringing content.”

<sup>26</sup> See “Global Anti-Piracy Pact,” available at: [https://certalatam.org/wp-content/uploads/2022/12/CERTAL\\_Documento-Pacto-Global.pdf](https://certalatam.org/wp-content/uploads/2022/12/CERTAL_Documento-Pacto-Global.pdf) (in Spanish). The “Global Anti-Piracy Pact” includes the following requirements: (i) all governments are required to put administrative blocking procedures in place, with countries that do not already have an administrative blocking procedure in place required to incorporate the issue into their 2023 legislative agenda; (ii) governments must guarantee an expedited process to block retransmissions of illegal content over the Internet, whether on demand or live; (iii) governments must establish “effective mechanisms” to demonetize online pirate services; (iv) audiovisual rights holders and distributors who own over-the-top (OTT), Multichannel Video Programming Distributor (MVPD) and Virtual Multichannel Video Programming Distributor (V-MVPD) platforms must commit to actively demand and implement content protection technologies (e.g., “watermarking”) that identify and block user accounts containing illegal content; (v) given the increase in recent years of pirated devices passing through customs in various countries in the region, signatories must cooperate jointly to “reinforce customs controls for the effective seizure and destruction of illegal devices, and, likewise, identify the marketing channels for devices to achieve the removal of offers and identify and punish those who generate them;” and (vi) signatories must develop initiatives, create awareness campaigns, and establish procedures to educate the public and raise awareness of the importance of consuming legal services, and the dangers of consuming illegal services, that offer audiovisual content.

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, or manufacturing and distributing technologies, software, devices, components, or tools, to circumvent TPMs 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 Review of Notorious Markets for Counterfeiting and Piracy (Notorious Markets List) and in subsequent Notorious Markets Lists, for example in 2021, including services such as *Fivto.biz* and *Mp3juices.cc*.<sup>27</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. 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 adequate protections against circumvention activities and services.

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

Unauthorized photocopying of academic textbooks, and scientific, technical, and medical books, in many markets remains a persistent problem for publishers. Combatting book 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 domestic sale in certain markets, but they may also be exported to some developed markets. Government agencies and educational institutions (especially those that are state funded or state operated) should do more to promote and adopt appropriate use and copyright policies, and in particular, the use of legitimate textbooks and journal publications, as well as to discourage the use of unauthorized copies of all literary, educational, and professional works in educational settings. Piracy of journal articles is likewise a significant concern for the publishing industry. Piracy sites such as *Sci-Hub* and the Library Genesis Project (*Libgen*) and its many mirror sites collaborate to acquire massive amounts of infringing copies of books and journal articles and enable the seamless flow of the illegally obtained content between the two entities, and the multiple *Libgen* mirror sites.<sup>28</sup>

### **4. Piracy of Motion Picture and Television Programs by Piracy Devices and Piracy-as-a-Service**

A damaging piracy ecosystem has emerged around piracy devices and apps, i.e., 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 illicit 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

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<sup>27</sup> See NM 2021 Report.

<sup>28</sup> Both *Sci-Hub* and the Library Genesis Project (*Libgen*) were listed as notorious markets in USTR's 2021 report. See NM 2021 Report. For additional information on *Sci-Hub* and *Libgen* see the Russia Country Report in Appendix A.

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>29</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, or stalls, kiosks, or "repair" shops that offer 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.

In addition, "Piracy-as-a-Service" (PaaS), which is a subset of the larger threat of Cybercrime-as-a-Service, was identified by Europol as a growing threat enabling a variety of cybercrimes. PaaS encompasses a suite of often off-the-shelf services that make it easy for would-be pirates without any technical knowledge to create, operate, and monetize a fully functioning pirate operation, such as website templates, databases of infringing content, and hosting providers specialized in servicing infringers. PaaS services are evidence of the scale, sophistication, and profitability of modern online commercial copyright infringement. The emergence and development of PaaS services have become a key concern of the motion picture industry and a top priority for its antipiracy efforts.

## **5. *Illegal Camcording of Theatrical Motion Pictures***

In addition to the problems of piracy devices and apps and emerging PaaS, another priority for the motion picture industry involves stopping camcording or the illegal recordings of movies in theaters. 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 2021, because many theaters closed due to the COVID-19 pandemic. With the re-opening of theaters in many markets around the world, illicit camcording has resumed, with illicit audio and video recordings in 2022 up 71% from 2020.

A multifaceted approach is needed to tackle camcording that 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.

## **6. *IPTV Piracy***

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. Cable and satellite piracy still persists in some markets (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).<sup>30</sup> However, Internet Protocol TV (IPTV) services have become the dominant threat in major markets. Pirate IPTV services provide access to stolen telecommunication signals

<sup>29</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." See USTR, 2017 Out-of-Cycle Review of Notorious Markets at 8-9, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

<sup>30</sup> 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 to foster the licensing of broadcasters and cablecasters and to weed out unlicensed television distributors.

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. Thousands of illegal IPTV services operate worldwide, offering thousands of channels sourced from multiple providers, along with VOD content of unauthorized movies and television programs.<sup>31</sup> Many of these illegal services are subscription-based, for-profit services, with monthly or yearly user packages, and often coincide or are found or used with more typical online piracy sites (e.g., streaming, BitTorrent, P2P). The technical infrastructure of these services is often vast and complex, making the identification of content sources and service operators extremely challenging. The marketing and sale of these IPTV services are 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. IPTV services have been the driving force in the emergence of related illegal businesses, including those engaged in the re-sale of IPTV services or the theft, distribution, and sale of channel feeds. In addition, IPTV 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). As a result, criminal enforcement against these large-scale operations is the most effective deterrent.

### **C. Market Access Barriers that Inhibit the Licensing and Dissemination of Copyrighted Works and Sound Recordings**

In addition to the key challenges pertaining to copyright protection and enforcement, which constitute *de facto* market access barriers, the U.S. copyright industries are also adversely affected by a variety of formal market access barriers, investment restrictions, and discriminatory measures that make it difficult for U.S. producers and distributors to participate fully in crucial foreign markets. These barriers also include interference with rights holders' contractual freedoms or with their licensing practices. The issues of copyright protection of authorized materials and enforcement against infringing goods are moot if rights holders cannot disseminate legitimate American works and recordings 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 and 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);

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<sup>31</sup> In the United States, 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). 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>.

- 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 worrisome trend is 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 streaming services. For example, in November 2020, the government of **Australia** released a consultation paper that proposed an obligation on VOD services to invest five percent of local revenue in Australian content. A revised content investment obligation was announced by the previous government in February 2022. The new Albanese Government has outlined a commitment to introducing a content investment obligation and is currently consulting on a National Cultural Policy, which is expected to contain such an obligation. Such an investment obligation would raise concerns with Australia's compliance with its obligations under the U.S.-Australia FTA. To ensure the continued production of Australian content, Australia should maintain competitive programs for attracting international film and TV productions. Doing so would boost the quantity and quality of local Australian content, rendering unnecessary any consideration of quotas or a content investment obligation for digital delivery. In May 2020, the **South Korea** National Assembly passed the Telecommunications Business Act Amendments (Articles 22-7), which require content providers to take responsibility for "network stability" and consumer demand. The Enforcement Decree does not mandate content providers to pay a network usage fee to ISPs. However, there are several amendment bills in the National Assembly that would force content providers to pay for network usage fees, including a provision mandating negotiations for network fees in network service contracts. If implemented, these proposed amendments would restrict trade and freedom of contract, raising concerns under the U.S.-Korea FTA (KORUS). South Korea should avoid unnecessary intervention into the commercial relationship between content providers and ISPs, apply light-touch regulation to OTT services, and ensure consistency with its KORUS obligations.

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 of market access barriers, effectively rely on the flexibilities built into FTAs, including permissible support programs, to promote their cultural interests.

## VI. CONCLUSION

As detailed in the Copyright Industries in the U.S. Economy: The 2022 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, benefit workers, 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 continuing to work together with USTR and all the U.S. agencies engaged in copyright legal reforms, enforcement, and market access to meet the goals identified in this submission.

Respectfully submitted,

/Kevin M. Rosenbaum/

Kevin M. Rosenbaum, Executive Director  
International Intellectual Property Alliance

# **APPENDIX A**

## **COUNTRY SURVEYS**

# **PRIORITY WATCH LIST**

# ARGENTINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Argentina be maintained on the Priority Watch List in 2023.<sup>1</sup>

**Executive Summary:** Argentina lacks the resources and political will needed to match high rates of piracy, which accelerated and diversified in the past several years. Argentina must recognize at the highest levels the need to foster a digital market that is free from illicit content within its highly connected population. There is a dire need for an agenda and strategic policy for enforcement and interagency cooperation, especially between prosecutors and law enforcement cybercrime experts. The spike in demand for pirated content that Argentina experienced in the initial pandemic lockdown has enabled pirate sites to take hold and expand to other Spanish-speaking countries. Satellite and signal piracy also persists in Argentina. Hard goods piracy remains rampant through both importation and production and is linked to organized crime groups. Market access obstacles persist, including film and television quotas and high taxes on copyrighted content. Unauthorized digital goods (UDGs) for video game platforms are rampant, with purveyors having taken advantage of the e-commerce boom generated by the pandemic to consolidate the market among local game consumers. While sales of music recordings on physical media have declined in recent years, the offer of unauthorized copies of new releases is still a significant problem for the Argentinean recording industry.

IIPA urges the Government of Argentina to make use of the recently established 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 to combat rampant online piracy in conjunction with its anti-cybercrime efforts. The government should also revisit efforts to strengthen the Penal Code to improve the enforcement landscape for copyrighted works.

### **PRIORITY ACTIONS REQUESTED IN 2023**

#### **Enforcement**

- Increase resources and political backing for a coordinated, long-term anti-piracy agenda at the federal level to address online piracy.
- Partner with rights holders to maximize industry expertise in the fight against cybercrime.
- Engage cybercrime authorities and the National Communications Entity (ENACOM), Argentina's telecommunications regulator, to monitor and perform online operations against high-profile sites and commercial activities occurring in online marketplaces and e-shops.
- Continue to apply the Civil and Commercial Code to Internet service provider (ISP) liability cases, including for storing infringing content.
- Host private sector discussions on potential cross-industry cooperation to tackle online piracy more effectively and to support the development of the local digital economy.
- Create a specialized Intellectual Property (IP) Prosecution Office and establish federal jurisdiction over copyright crimes.
- Undertake routine, *ex officio* actions, such as inspections and raids of physical markets to stop commercial piracy.
- Actively involve the Argentinean Customs Office (DGA-AFIP) in copyright enforcement actions.

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<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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

- 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 (*Dirección Nacional del Derecho de Autor*).
- Introduce legislation for the adequate protection and legal remedies against the removal of technological protection measures (TPMs) and rights management information (RMI).
- Ensure that any amendments introduced to the Argentina Digital Law, do not conflict with the activity of (and enforcement actions by) right holders.

## Market Access

- Remove quotas for motion pictures and television content, and electronic devices, and refrain from extending quotas to over-the-top (OTT) services.
- Reject customs duties on audiovisual works based on the potential royalty value of the work rather than on the value of the carrier medium, as well as other customs duties and taxes that burden foreign rights holders.
- Amend legislation to change collections on behalf of music performers and phonogram producers to be 50-50 between performers and producers instead of the currently inequitable split of 67% to performers and 33% to producers.
- Reject other legislation or regulations that burden the creative industries or unfairly target foreign rights holders.
- Reject Executive Order No. 600/19 that imposes an obligation to unify performance rights tariffs for hotels and establishes a governmental control system over tariff rates.

## THE NATURE OF PIRACY IN ARGENTINA

The levels of online piracy of copyright works in Argentina worsened in the past year, showing no signs of recovery from the spike in piracy that the country suffered during the spring of 2020, coinciding with the lockdown implemented to contain the initial spread of the COVID-19 pandemic. The country's Internet penetration rate of over 87% is the highest in the region, with 38.02 million users,<sup>2</sup> but a robust legitimate online content market cannot take hold until the government makes concerted efforts to address the country's rampant and increasing digital piracy via torrent sites, and downloading, streaming, stream-ripping, and linking sites.

**Audiovisual Piracy:** Argentina, like the region as a whole, continues to see an increase in the usage of Piracy Devices (PDs). In particular, Android boxes, such as the HTV box and Kodi boxes, 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.

According to the study *Dimensión e impacto de la Piratería online de contenidos audiovisuales en América Latina* (by CET.LA and Ether City), during the twelve months ending in February 2020, illegal platforms received 53% more visits than websites with authorized audiovisual content, and 17% of searches (45 million searches) for illegal online content in Latin America came from Argentina.<sup>3</sup> Pirated content applications were downloaded 473,000 times, while applications for streaming authorized content were downloaded 1.8 million times. Illegal sports broadcasting websites received 22 million visits in the course of the year.<sup>4</sup>

**Video Game Piracy:** The illegal distribution of physical and online video games and entertainment software in Argentina has continued in recent years. During the pandemic, video game piracy spread over an even greater

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<sup>2</sup> Tiago Bianchi, Statista, *Internet usage in Argentina - Statistics & Facts*, October 18, 2022, available at [https://www.statista.com/topics/6709/internet-usage-in-argentina/#topicHeader\\_wrapper](https://www.statista.com/topics/6709/internet-usage-in-argentina/#topicHeader_wrapper).

<sup>3</sup> CET.LA and Ether City, *Dimensión e impacto de la Piratería online de contenidos audiovisuales en América Latina*, December 10, 2020, available at <https://cet.la/estudios/cet-la/dimension-e-impacto-de-la-pirateria-online-de-contenidos-audiovisuales-en-america-latina/>.

<sup>4</sup> Id.

diversity of formats, including: BitTorrent game content available on Spanish-language illegal linking and download sites, increased availability of online UDGs,<sup>5</sup> and an increase of illegal consoles and devices available from small, local businesses. According to Entertainment Software Association (ESA) data, Argentina ranks 16th in the world for peer-to-peer (P2P) piracy of console-based video games, and 14th overall (accounting for over 44 million unique infringements in 2022 of all types of video games) for the entertainment software industry. Instead, the volume of UDGs available on the country's major platforms increased further, by an estimated 40% in 2021. Infringing linking sites in Spanish—monetized by advertisements—are the most popular piracy channels for video games in Argentina. 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 to contain the spread of COVID-19 in Argentina, the availability of listings on *Mercado Libre* for illegal game titles, UDGs, or physical video game products, including counterfeit controllers and modified game consoles, increased overall by 40% on the popular marketplace; however, removals also increased. Social media platforms enable online pirates of all varieties to attract wider audiences.

**Music Piracy:** The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2022 (MCS) found that Argentina had one of the highest music piracy rates in the world. The study found that 48.1% of Internet users (and 54.7% of 16- to 24-year-olds) had pirated music at least once in the previous month.

The most prominent forms of piracy in Argentina are stream ripping and the use of cyberlockers. IFPI's MCS found that 42.9% of all Internet users aged 16 to 64 used stream-ripping sites and services to illegally download music from sites like YouTube in the previous month. In total, 12.7% of Internet users reported using the stream-ripping site *Y2Mate* and a further 6.9% had used *mp3y.download*. Data from SimilarWeb reinforced the popularity of stream ripping: *y2mate.com* received more than 20.4 million visits from Argentina during the third quarter of 2022 and *ssyoutube.com* more than 7.6 million. *Y2Mate* was one of the top 100 most popular websites of any kind in Argentina. Mobile apps that allow users to illegally download from YouTube are also popular: in IFPI's MCS, 17.9% of Internet users said they regularly used *SnapTube* to download music from YouTube. A further 6.6% used a similar app called *TubeMate*.

Cyberlocker sites also remain a threat in Argentina, particularly the site *Mega.nz*. IFPI's MCS found that 12.6% of all Internet users had downloaded music from *Mega* in the previous month, and SimilarWeb reported 14.7 million visits in the third quarter of 2022. *Zippyshare.com* was also used by 3.3% of users in Argentina to download music. SimilarWeb reported millions of visits to many other cyberlockers: for instance, there were 1.4 million visits to *1fichier.com* in the third quarter of 2022 and 2.0 million to *Uptobox.com*.

**Physical Piracy:** 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 2020 with strict protocols that were blatantly violated when throngs descended on the market for Christmas shopping in December. The market's owner was arrested on non-piracy charges and remains under house arrest.

**Illicit Theatrical Camcording:** The COVID-19 pandemic, which caused the widespread closure of cinemas in Argentina, temporarily halted theatrical camcording activity. However, as cinemas have reopened 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 that source camcorded material from all over the region and resell it online.

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<sup>5</sup> Unauthorized digital goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the entertainment software 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.

## **COPYRIGHT ENFORCEMENT IN ARGENTINA**

In 2022, in the absence of significant enforcement improvements to promote a legal online environment during the pandemic, Argentina experienced rapid expansion of already high levels of piracy. Law enforcement authorities suffer from a severe shortage of the resources and coordination needed to efficiently monitor and control digital piracy and the use of illicit streaming devices (ISDs). Reforms in enforcement efforts are needed to stop the import of ISDs into the country, conduct full-scale raids against piracy websites and applications, and take actions against unlicensed retransmission and theft of Pay-TV signals.

In 2022, by Resolution 75/2022, the Ministry of Security updated the Federal Plan for the Prevention of Technological Crimes and Cybercrimes 2021-2024 to redouble efforts to prosecute cybercrime that occurred, especially in the finance sector and in the public sector. In February 2022, the Argentinian Ministry of Security issued Resolution # 86/2022, which creates the ForCIC – Program for Strengthening Cybersecurity and Cybercrime Investigation. The Program aims to coordinate, assist, and provide advice on digital infrastructure security techniques and investigation techniques for cybercrime and crimes involving technology or the use of technology. Although the scope of the program is not restricted to piracy, it is an important step in combating copyright infringement in the digital environment.

Finally, Resolution No. 139/2022 of March 15 created, within the framework of ForCIC, the CICAT (High Technology Cybercrime Investigation Center). The objective of the Center focuses on training, preventing, analyzing, and investigating cybercrimes, covering specific areas of approach such as digital forensics and federal regional units, among others. Within the framework of this plan, the Ministry of National Security called for a Federal Public Awareness Campaign on Cybersecurity and Cybercrime Prevention, through Resolution 731/2022, with which it invites the Provinces and the City of Buenos Aires to join the campaign.

It should be noted that the Specialized Cybercrime Unit (UFECI) also reported an increase in cybercrime from 2020 to 2021. Throughout 2020 they received 11,396 reports – around 31 per day – which is 381% more than in 2019, which had 2,369 cases – 6.5 daily. While only in the first quarter of 2021 they registered 3,976, which is 403% more than the same stage of the previous year.

Rights holders have reported very few significant cases of copyright enforcement actions by Argentina's law enforcement in 2022. General inaction and lack of coordination in online infringement investigations and cases between federal and state jurisdictions remain major concerns. 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. The federal police view copyright infringement as a federal crime, and the state prosecutor views it as a crime involving a local Argentinean citizen. The Government of Argentina should establish greater cooperation among federal enforcement agencies to address online piracy as a united front by creating a specialized IP Prosecution Office and establishing federal jurisdiction over copyright crimes. 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 of Argentina should assign adequate legal powers and financial resources to the Ministry of Justice's Copyright Office (*Dirección Nacional del Derecho de Autor*). Moreover, the Government of Argentina should undertake routine, *ex officio* actions, such as inspections and raids of physical markets to stop commercial piracy. The Government of Argentina should actively involve the Argentinean Customs Office (DGA-AFIP) in copyright enforcement actions and 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.

Other procedural challenges in Argentina include defaults in the evidence chain of custody for cybercrime cases and the characterization of profit and economic benefits from online advertisements. The Government of Argentina should continue to apply the Civil and Commercial Code to ISP liability cases, including for the storing of infringing content. Furthermore, Argentina lacks legislation establishing protections relating to TPMs and RMI, which are critical for enabling legitimate online business models and products. The lack of these legal tools is a further obstacle to enforcement against circumventions and hacks of copyright works.

Enforcement actions against piracy linking and direct download sites require complex investigations involving data requests to multiple service providers, who, in turn, require the support of judicial authorities for the requested actions. Unfortunately, because law enforcement authorities generally fail to prioritize online copyright infringement cases, rights holders must instead rely on self-help measures. While there are some positive examples of private sector cooperation, there are no clear incentives from the government to generate cooperation between the private and public sectors, causing a shortage of voluntary and beneficial initiatives.

In 2022, in the absence of government action, rights holders continued to rely more on cooperation with other actors in the online ecosystem. 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. ESA reports that from 2021 to 2022, *Mercado Libre* successfully completed approximately 1,800 takedown requests. The Government of Argentina should host private sector discussions on potential cross-industry cooperation to tackle online piracy more effectively and to support the development of the local digital economy.

The music industry requests the removal of pirate sites through notices sent to registrars and hosting services. In some cases, these notices result in successful site removal. The music industry also sends daily notifications to Google services and YouTube to request the removal of pirate sites from search results and infringing user uploaded content.

In August 2022, the Alliance for Creativity and Entertainment (ACE) managed to take down seven piracy domains based in Argentina. The Pelismart/Pelispop ring comprised several websites that combined monthly traffic of over 27 million visits. Due to ACE's actions, the operator agreed to take down the content, transfer the domains to ACE, and enter into a settlement agreement. However, it is important to note that this enforcement action was undertaken by a private entity (ACE), and not by the Argentinian government.

In October 2022, the Supreme Court ordered a Buenos Aires lower court to investigate a complaint for illegal broadcasting of audiovisual content of the Premier League of England. The complaint is from the Football Association Premier League and maintains that "unknown persons" are illegally broadcasting audiovisual content of football in England. The case, initiated several years ago, will now be processed by the National Criminal and Correctional Court 18. The Premier League's claim maintains that the images are "limited access" and that the retransmission to the detriment of the firm is done through the method of continuous download or "streaming."

In May 2021, Argentina approved the Second Additional Protocol of the Budapest Convention. This bolsters the Government of Argentina's welcome creation of the C4 within the Cybercrime Investigations Directorate in the Ministry of Security. The commission's goal is to monitor the implementation of the NPAC and to coordinate actions against cybercrime through collaboration among the 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. C4 concentrates on crimes such as large-scale money laundering, fraud, and crimes against sexual integrity, trafficking, and pedophilia. The creation of C4 could be part of a long-awaited solution for enhanced coordination to tackle online IP crimes.

IIPA urges Argentina's authorities to partner with rights holders to use industry expertise to combat cybercrime. Additionally, Argentina should create forums of cooperation with the private sector and to accelerate law enforcement actions against the increasing problem of online crime in Argentina. Indeed, at the beginning of this year, by Resolution 1/2023, the Argentinean government called for a public consultation regarding the document on the Second National Cybersecurity Strategy.

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

In November 2022, the National Court of Original Jurisdiction in Civil Matters issued a decision ordering ISPs to effectively block access to the stream-ripping site *Y2mate.com*. This was the first time ISPs in Argentina had been ordered to block a stream-ripping website. Prior to this, ISPs were ordered to block *The Pirate Bay* by the National Court of First Instance in Civil Matters No. 64 (Case 67,921/13). This decision remains in full force and effect. After the initial order was issued in 2014, it was found that some ISPs were not complying with the order. As a result, new legal actions were filed and, at the end of 2018, all ISPs were sent new notices instructing them to continue blocking the site.

Despite the success of the blocking action against *The Pirate Bay*, it should be stressed that, due to the time required to prepare the evidence and information gathering for the action to move forward, as well as the jurisdictional disputes that arise in ordinary civil and federal procedures, this is not the most effective way for scaled actions that would have a real impact on the digital piracy ecosystem.

On September 23, 2019, the music industry filed a judicial review action challenging the constitutionality of the Executive Order No. 600/19 that 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 freely negotiated agreements with users' associations. In 2022, the case was still pending for resolution before an administrative court of first instance in Buenos Aires.

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

No new laws regarding copyright, IP or piracy have been adopted by the legislature in 2022.

## **MARKET ACCESS IN ARGENTINA**

A number of economic conditions in 2022, combined with a heavy tax burden on content, have driven audiences in Argentina to seek pirated materials online as a less expensive alternative.

**Local Content Quotas:** 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<sup>6</sup> and to modify Media Law 26.522 to extend quotas to streaming services. Another proposal by local interest groups would modify the 1994 Law 17.741 for the Promotion and Regulation of Film production (also known as the Film Law) to implement screen quotas on digital platforms and subscription-based media for which more than 50% of broadcast content is fiction, documentary, or animation programs: 35% must consist of nationally produced audiovisual content by companies or studios not associated with or part of the exhibitor, 75% of which should be at most two years old. All audiovisual broadcasting services including free-to-air television signals and mobile telephony with video platforms would also be required to produce at least 20 hours of national audiovisual productions per year. There appears to be an increase in proposals to regulate streaming services by introducing content quotas and imposing taxes (recently tabled bills include 3951-D, 5735-D, and 6716-D). IIPA cautions against proposals for additional quotas or imposing quotas on streaming services because they negatively impact non-Argentinean content industries and impact the competitiveness of audiovisual ecosystems where cross-border services are subject to local content quota requirements.

**Customs Duties:** 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 entertainment software industry as consumers 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 such as online game platforms that operate in the country and use foreign currency. These laws contradict international norms and should be amended or repealed.

Election commitments made at Alberto Fernández’ 2019 inauguration hint that the government could send a Digital Tax Bill in 2023. The government is waiting for further international discussions on the topic, including technical guidelines on how to calculate the income for companies before submitting a Bill to Congress.

**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 67% to performers and 33% to producers. This unfair distribution rule, imposed by law, goes against international practice and basic fairness. IIPA urges Argentina to consider legislation that establishes a more balanced distribution of 50% to performers and 50% to producers.

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<sup>6</sup> Resolution 4773 E/2017, mandating certification of compliance with the screen quota provisions set forth in Section 67 of the 2009 Media Law and its 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 Argentinean film and TV movies. Moreover, 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 Argentinean consumers are unable to get sought after U.S. content.

**Bill to Modify the Audiovisual Communication on Digital Platforms Law:** In the last quarter of 2022, representatives from Argentina’s Ruling Party (FdT, the Front for All) presented two separate bills to modify the Audiovisual Communication on Digital Platforms Law and to amend the 2009 Media Law, *inter alia*, extending its reach to regulate digital streaming platforms. A third proposal was sponsored by a broader range of the political spectrum. All three bills establish OTT taxes and screen quotas that would negatively impact several audiovisual markets, including but not limited to, streaming platforms, music streaming, video game production, and podcasts. Furthermore, in one case, a differential percentage was proposed for taxation between foreign and national platforms (six and three percent respectively) of billing. The proposals are in different stages of review; only one has been assigned to and is awaiting treatment in the Lower House’s Communications and ICT’s Committee and Budget and Treasury Committee.

**Decree 690/2020 Establishing Pay-TV, Internet, and Mobile Telephony “Competitive Public Services”:** In 2020, President Fernandez issued Decree 690/2020 establishing Internet, cable television with spectrum and satellite use, and mobile telephony as “essential services” with rates increases determined by ENACOM and subject to government approval. The Decree has been successfully challenged in court, with all the larger cable service operators granted successive six-month injunctions suspending the principal articles (Arts. 1-6) of the Decree. The Government has appealed to the Supreme Court.

## **TRAINING AND OUTREACH**

A conference on cybersecurity and cybercrime investigation occurred from October 17- 21, 2022. Organized jointly by the Ministry of Security of the Catamarca Province and the Federal Ministry of Security, the goal was to provide support in capacity building in relation to cybercrime problems, investigation techniques, and protection and analysis of digital evidence through forensic software.

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Priority Watch List in 2023.<sup>1</sup>

**Executive Summary:** The digital market for creative content in Chile is teeming with illegal materials, a problem exacerbated by a weak legal framework and inadequate dedication or coordination of government resources for online enforcement.

Chile's copyright law, which more than ten years ago established what at the time was an experimental notice-and-notice online piracy response system, has utterly failed to deter infringement online. The law was adopted six years after the 2004 entry into force of the U.S.-Chile Free Trade Agreement (FTA), and yet it left important FTA obligations unmet, such as protections against circumvention of technological protection measures (TPMs) and deterrent remedies against infringement. Other major gaps in Chile's legal framework include: the absence of clear and comprehensive secondary copyright liability standards to encourage voluntary cooperation from intermediaries; a counterproductive court order requirement for online content removal; and broad exceptions to copyright protection. The country lacks many of the standard copyright enforcement measures and procedures available in other similar markets. We urge Chile to improve and significantly update its legal framework for Internet service provider (ISP) liability and online copyright enforcement to foster the development of a healthy digital marketplace.

A number of recent legal developments in Chile threaten to hinder, rather than advance, enforcement efforts. The pending amendment to Article 24-H of the Telecommunications Law would create an unlimited net-neutrality principle, with no distinction between legal and illegal content, and would prevent ISPs and copyright holders in Chile from addressing mass online infringement. The Digital Platforms Bill is another misguided proposal that could make online enforcement more difficult. 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 FTA commitments. The Chilean government should abandon these proposals in favor of reforms that would promote a vibrant legal environment for creative content.

On a positive note, in 2022, Chile made an effort to meet the requirements of important international treaties, with the enactment of the Beijing Treaty on Audiovisual Performances, and the promotion of alterations to its legislation to conform to the Budapest Convention on Cybercrime. The implementation of the new cybercrime law may assist in prosecuting acts of piracy, but it will be necessary to see the results of the cases brought to court.

In an October 4, 2022, referendum, the proposed draft of the new Constitution was overwhelmingly rejected. Negotiations on the modification of the Constitution continue. IIPA urges USTR to monitor the impact that any constitutional changes may have on Chile's intellectual property rights (IPR) landscape and, in particular, to closely monitor how any reform will permit Chile to adequately implement its existing international, multilateral, and bilateral commitments to provide strong copyright protection, enforcement, and equitable market access.

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<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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## **PRIORITY ACTIONS REQUESTED IN 2023**

- Amend the copyright law (Ley No. 17.336) and repeal Ley No. 20.435 of 2010 to: (i) clearly distinguish 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, establish 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 TPMs legislation with civil and criminal penalties for acts of circumvention and the trafficking in devices or services.
- Create a centralized copyright authority responsible for all copyright-related matters, such as registration and enforcement, to coordinate the promotion, administrative enforcement, and public policies related to copyrights and neighboring rights.
- Refrain from reducing copyright infringement penalties currently provided in the Intellectual Property (IP) 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.
- Ensure that proposed amendments to the Telecommunications Law (Bill # 10999-15) and the Digital Platforms Bill (Bill #14.561-19) do not interfere with the enforcement of IPR online, including through voluntary initiatives agreed between rights holders and ISPs.

## **THE COPYRIGHT MARKETPLACE IN CHILE**

The overall level of piracy in Chile remained high in 2022, after worsening in 2021. Digital piracy takes a variety of forms, such as: Piracy Devices (PDs) including, for example, illicit streaming devices (ISDs); piracy apps; 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; signal theft; and, increasingly, Internet protocol television (IPTV) services.

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 Livre*. Businesses sometimes offer console modifying services for sale through their *Mercado Livre* listings. Modified console offerings include the Nintendo Switch, Nintendo 3DS, Sony PSP and PS3, and Xbox 360. *Mercado Livre* continued to have a steady audience in 2022, ranking as the 9th most popular site in Chile by SimilarWeb. A significant portion of all game titles offered at *Mercado Livre Chile* are illegal and are predominantly unauthorized digital goods (UDGs),<sup>2</sup> primarily digital unauthorized account resales.

An increasingly popular online marketplace, *www.linio.cl* (owned by the popular commercial entity, *Falabella*), has been relatively unresponsive to requests from the video game industry to take down counterfeit products, despite

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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 UDGs 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.

having a rudimentary online notification system. 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. 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 2021, Chile placed 23rd (an improvement from 22nd in 2021) 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 15th in the world in P2P infringement of console-based video games (also an improvement since last year when it ranked 11th).

The most prominent forms of music piracy in Chile are stream ripping and the use of cyberlockers. The most popular stream-ripping sites in Chile are *y2mate.com*, *mp3.download*, and *ssyoutube.com*. These sites received 6.1 million, 2.2 million, and 1.4 million visits from Chile respectively in the fourth quarter of 2022, according to SimilarWeb data. The most popular cyberlocker in Chile is *Mega.nz*, which received 8.7 million visits from Chile during the fourth quarter of 2022. Other popular cyberlockers, *1fichier.com* and *Zippyshare.com*, received over 2.2 million and 1.7 million visits respectively during this same period. BitTorrent indexing sites are also popular in Chile, most notably *thepiratebay.org*, with over 1.0 million visits in the same quarter.

In 2022, the motion picture industry continued 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 devices opens the door to infringing material. PDs are freely offered in markets in Santiago without a proper response from law enforcement. Similarly, 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 a widespread lack of enforcement efforts by the Government of Chile to tackle online piracy. Chile remains the only country in Latin America without a dedicated, centralized authority responsible for copyright protection and enforcement. Currently, copyright matters are handled by four different entities: (1) *Departamento de Derechos Intelectuales en la Dirección de Bibliotecas, Archivos y Museos* (Ministry of Education); (2) the Minister of Education; (3) *DIRECON – Dirección de Economía, Departamento de la PI* (Ministry of Foreign Affairs); and (4) the IPR prosecutor.

The implementation of a unified department would advance the fight against copyright infringement and help deliver the kinds of significant results that have been made possible in other countries that have set up such organizations. The Chilean government should establish a national authority to oversee all copyright matters and to better coordinate all policies for the promotion, protection, and enforcement of rights. This central copyright office would also assume all currently dispersed duties, such as registration. The fact that no central and dedicated authority exists in the copyright sector speaks volumes about the lack of political will by the Chilean government to prioritize copyright in the national agenda. Additionally, specialized online crime police units from *Carabineros* and *Policía de Investigaciones* are not focused on pursuing IP crimes or engaging in any disruptive strategy for broader IPR enforcement, despite a good level of technical investigative skills.

The video game industry has reported in previous years that Chilean Customs had conducted several border seizures and encourages additional such actions in 2023. 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

**Cybercrime Law #21459:** In June 2022, Chile enacted Law #21459, which alters provisions from several laws to align with the Budapest Convention on Cybercrime. Law #21549 on computer crimes establishes new offenses that should allow an efficient prosecution of certain piracy actions, but the law has not been tested in the courts. Among the relevant criminal offenses in this area are the “attack on the integrity of a computer system,” which is committed by anyone who hinders or prevents the normal operation, in whole or in part, of a computer system, through the introduction, transmission, damage, deterioration, alteration, or suppression of computer data. Additionally, “illicit access” is the crime committed by whoever accesses a computer system without authorization or who exceeds their authorization and overcomes technical barriers or technological security measures. “Use of information obtained from a computer-related crime” is the crime committed by whoever, knowing its origin or being unable to know it, commercializes, transfers, or stores computer data, obtained by means of illicit access, illicit interception, and computer forgery. Finally, “abuse of devices” is a crime that punishes whoever delivers or obtains for its use, imports, disseminates, or otherwise makes available one or more devices, computer programs, passwords, security or access codes or other similar data created or adapted mainly for the perpetration of the crimes of attack related to integrity of a computer system, illicit access, illicit interception, and attack on the integrity of computer data.

**Constitutional Reform:** In an October 4, 2022, referendum, the proposed draft of the new Constitution was overwhelmingly rejected. Negotiations on the modification of the Constitution continue. IIPA urges Chile to ensure all future work on the Constitution preserves, at a minimum, current levels of protection for IPR. Rights holders seek to achieve the right balance among all fundamental rights. IIPA urges the Convention 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 constitutional reform and its implications for copyright protection and enforcement, particularly in view of Chile’s FTA obligations.

**Digital Platforms Bill (Bill #14.561-19):** Chile’s Senate is considering a bill to regulate digital platforms. The initiative aims to address harmful activity mainly on social media networks, but with broad references to “digital services platforms” and “providers for digital platforms,” the bill could have a spillover effect for all Internet applications operating in the region, including curated video-on-demand (VOD) services. Moreover, as currently drafted, the bill contains language that could negatively impact the way IPR are currently enforced online in Chile, as Internet applications might delay or be prevented from applying their own policies and procedures in response to notices from rights holders.

**Amendments to Telecommunications Law (Bill # 10999-15):** In May 2020, amendments to the Telecommunications Law were passed at the Specialized Commission of Transports and Communications in the Senate. After consideration, the Bill was returned to the aforementioned Commission in July 2021 for further study and consideration. The core of this reform is the proposed modification of Article 24-H (sections “a” and “b”). Under the modification, ISPs are prohibited from implementing any policy measure for the purpose of prioritizing traffic, or any measure that would have the effect of causing delay to Internet access. The Bill also removes from Article 24-H the all-important “legal” requirement that would distinguish between access to “legal” content, websites, and apps on the Internet, and “illegal” content, websites, and apps on the Internet. It would also have the effect of hindering the use of tools or devices on the Internet to inhibit access to such materials online. In sum, the Bill imposes an unlimited and unrestricted net neutrality principle in Chilean legislation with no limitation or distinction regarding the legality of the content, device, or website accessed by the Internet users. This proposed “unlimited” net neutrality proposal is in stark contrast with the law in both the United States and the EU, where net neutrality principles apply only to legal Internet traffic and content. The Bill also proposes to further enshrine the position that access to illegal content can be blocked “only by judicial order.”

The implications of this proposal are especially relevant to the consolidation of a digital music market in Chile. An unlimited net neutrality principle would make it even more cumbersome for rights holders in Chile to enforce their IPR online. The idea of resorting to the judiciary for each and every infringement of copyrights or neighboring rights is

a *de facto* diminution of the level of protection in Chile, because most of the infringement cases committed online can be addressed by coordinated and voluntary action between rights holders and ISPs. The reform could imply that Internet users in Chile have a *de facto* right to freely access pirated music content, and that ISPs and rights holders cannot do anything to prevent or deal with such infringements. Due to a lack of prioritization of this Bill, it is difficult to predict any time frame for a vote on the floor.

### **Needed Legal Reforms Related to Chile’s Free Trade Agreement (FTA) Obligations**

In the U.S.–Chile FTA, Chile made bilateral commitments to the United States to significantly improve its levels of copyright protection and enforcement.<sup>3</sup> Yet, Chile’s copyright law regime remains inadequate and lags far behind both 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 Internet Service Provider (ISP) Safe Harbor:** Article 85Ñ of Chile’s copyright law 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 be established only by a court order (issued as per procedure under Article 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. Article 85O, which sets out the conditions for liability limitation, also poses problems due to its conflicting criteria. The provision at first appears to narrow the safe harbor by setting out an additional eligibility criterion that “service providers” must meet to avoid liability for IP infringements, namely: “that the service has not generated, nor selected the material or the recipient” (Article 85O (c)). However, the last sentence of Article 85O then sets out that providers of “search, linking or reference services” are exempt from these additional conditions.

**Content Removal:** Where ISPs are eligible for the above safe harbor privileges, Article 85Q of the copyright law requires ISPs to remove or disable access to copyright infringing content only following a lengthy, expensive, and complicated court process that can take over a year and is out of step with international norms. 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 fines or 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. Currently, the only method of tackling infringing content online is to follow the burdensome and ineffective notice-and-notice system (Article 85U), which requires ISPs to pass on takedown requests to uploaders. However, rights holders have no way to know whether an infringer has actually been notified to take down material, and there are no provisions to deter repeat infringers or to ensure that the notified content stays down. The cost and ineffectiveness of Chile’s “notice-and-notice” system has prompted the music industry to discontinue using it altogether. The only remaining option available to rights holders is to initiate a civil case directly against the user, a practical impossibility given the very high numbers of infringing users. IIPA urges 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 passive and neutral intermediaries that do not contribute to infringing activities. Finally, to be effective, the system should require measures that have been demonstrated to be effective in preventing or restraining infringement, including removing infringing content on sites that have been identified by the rights holder.

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<sup>3</sup> The U.S.–Chile Free Trade Agreement (FTA) is available at <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

**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 Technological Protection Measures (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. Draft Bill # 14767-0 aims to modify the Chilean IP Law to include TPMs, but it is at a very early stage of the legislative process. Chile should amend its law to provide adequate legal protection for all forms of TPMs and protect against their circumvention.

**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.

### **Other Needed Legal Reforms**

**Website Blocking:** The music, sports, and TV industries have pursued successful test cases regarding infringing websites in Argentina, Peru, Mexico, Uruguay, Brazil, and Ecuador, but these industries report that Chile lacks a legal mechanism for judicial 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 block access to other non-infringing content. This limitation hampers enforcement under the provision, as the posting of a single non-infringing work 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 further report that the Article 85R procedure, in conjunction with the last line of Article 85L, is also seen by some ISPs as preventing them from cooperating with IP rights holders on a voluntary basis.

**Theatrical Camcording:** IIPA continues to urge the Chilean government to enact 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.

## **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. In July 2021, the proposal was approved by the Senate's

Education Commission (*Comisión de Educación*), but the bill has not progressed. U.S. motion picture exporters remain concerned that the screen quota, if signed into law by the president and implemented, would discriminate against non-Chilean works and would contravene Chile's bilateral FTA commitments.

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2023 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** China remains a critical market for the creative industries. With the largest Internet user base in the world, China's online marketplace continues to expand, although 2022 saw some slowing in momentum, in part due to continued disruptions arising from the COVID-19 pandemic. Persistent and evolving piracy, worsening market access concerns, some procedural hurdles in the courts (in part due to the ongoing COVID-19 situation), and remaining legislative shortcomings hamper rights holders' ability to distribute copyright content, protect their content most effectively, and see the Chinese creative marketplace reach its full potential.

In a positive development, China's 2021 amendments to its Copyright Law include the introduction of the rights of broadcasting and public performance for producers of sound recordings, which are essential protections for the music industry. Introduction of these rights is a critical development in China's legal regime. Additional positive developments include: enforcement reforms, including a ten-fold increase in maximum statutory 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. While these amendments are laudable, it is critical that the implementing measures of the new law (and implementing measures of prior Opinions issued in 2019) allow rights holders to fully take advantage of the improved (and promised) measures in practice, meet China's international commitments, and reflect global best practices. Unfortunately, the amendments did not include several reforms that remain necessary to align the standard of copyright protection and enforcement with global norms and best practices to effectively meet the challenges of the digital age, including on term of protection and the adoption of a more effective online liability framework.

Moreover, the Supreme People's Court (SPC) improves the position of rights holders generally by clarifying, strengthening, and streamlining the application of copyright laws with respect to civil, criminal, and administrative enforcement actions brought in Chinese courts. The National Copyright Administration of China (NCAC) continues to pursue administrative actions against certain online services that facilitate piracy, but these actions alone are not sufficient to meaningfully deter widespread online piracy. Other serious enforcement challenges in China include unauthorized camcording, unauthorized distribution of journal articles, and the proliferation of thousands of "mini video-on-demand (VOD)" facilities that screen unauthorized audiovisual content, among other things.

China remains one of the most challenging markets in the world for the distribution of copyright content. Extensive market access barriers, both in law and in practice, severely limit foreign participation in the market. Notably some of these barriers are violative of China's multilateral and bilateral obligations to the United States. Rather than continue to pursue policies that impede access to its market, China should meet its trade commitments, eliminate market access barriers, and take other steps to open its marketplace for the U.S. creative industries.

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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://www.iipa.org/reports/reports-by-country/>. For the history of China's Special 301 placement, see <https://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## **PRIORITY ACTIONS REQUESTED IN 2023**

### **Enforcement:**

- Fully implement the *2019 Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, including lowering criminal thresholds; streamlining evidence processes; establishing a list of repeat infringers; regulating websites to “remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information”; and separately define criminal violations regarding circumvention of TPMs or trafficking in circumvention technologies.
- Improve effectiveness of administrative enforcement by:
  - Imposing enhanced penalties for repeat infringements and repeat infringers, and where penalties have already been issued against an infringer, issuing penalties for subsequent infringements without the need for rights holders to issue a new complaint;
  - Providing rights holders with timely, transparent, and detailed information regarding the process and the results of administrative actions, as well as ensuring more consistent treatment of cases between provinces; and
  - Facilitating prompt and more efficient transfer of copyright cases from administrative to criminal authorities for investigation and prosecution.
- Improve the effectiveness of civil and criminal enforcement, including by:
  - Providing a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and ensuring courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply;
  - Streamlining civil and criminal enforcement, including by reducing documentation requirements to commence action, such as documents needed to establish the identity and standing of the plaintiff, copyright ownership, and infringement, as well as ensuring timely enforcement of monetary damages;
  - Issuing deterrent-level civil and criminal penalties against operators of piracy websites that make available a massive amount of infringing content;
  - Ensuring proper implementation of the E-Commerce Law, including that Article 43 implementation does not result in sellers of infringing products avoiding responsibility by merely objecting to rights holders’ notices of infringement and eliminate liability for erroneous takedown notices submitted in good faith; and
  - Encouraging Internet service providers (ISPs) to institute a “know your business customer” (KYBC) policy.

### **Legislation:**

- Ensure that nationwide courts are moving away from the “server principle” and affording rights holders with a remedy against websites and apps facilitating infringement, including where infringing content is hosted remotely.
- Provide a clear legal basis under which ISPs may be held liable for intellectual property (IP) infringements carried out by third parties using their services or networks.
- Clarify that only passive and neutral intermediaries that do not contribute to infringing activities are eligible for safe harbor protection from monetary liability and that such intermediaries fulfill certain conditions, including adoption and implementation of a repeat infringer policy, and, upon obtaining knowledge of infringement (including through notice) or otherwise becoming aware of circumstances from which infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated to be effective in preventing or restraining infringement.
- Provide at least a 70-year term of protection for copyright-eligible works and sound recordings in line with international norms.

## Market Access:

- Immediately and fully implement all the terms of the 2012 U.S.-China Film Agreement, such as:
  - Enhance compensation, liberalize the distribution market for private third-party Chinese distributors, and finalize a new MOU;
  - 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;
  - 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;
  - Eliminate informal restrictions on the number of imported “flat fee” films so that independent producers have unimpeded access to the Chinese market;
  - Further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have fair and equitable access to the rapidly growing marketplace for films and TV in China;
  - 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;
  - Establish defined and prescribed content review time frames for theatrical and online distribution; increase the 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; and
  - Streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and do not establish any regulation or policy that impedes the collection of license fees by American IP owners.
- Reconsider measures prohibiting foreign involvement in online publishing activities and allow distribution of audiovisual content on online video platforms;
- Increase the number of approvals for foreign video games to match the number of domestic approved video games; revoke all other measures 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 censorship process is transparent, predictable, and expeditious;
- Refrain from extending China's burdensome content review regime to books merely 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.

## **CHINA'S COPYRIGHT MARKETPLACE**

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. China also leads the world in the number of cinemas with over 82,200 movie screens as of mid-2022—most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen. China also remains the largest theatrical market in the world for the second consecutive year, with total box office revenue in 2021 of \$7.3 billion (RMB 47.3 billion), up 131.5% from 2020.<sup>2</sup> Further, China is now the sixth largest music market, the second largest music streaming market in the world by number of subscribers, and China joined the United

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<sup>2</sup> Patrick Brzeski, The Hollywood Reporter, *China Retains Global Box Office Crown With \$7.3B in 2021, Down 26 Percent From 2019*, available at <https://www.hollywoodreporter.com/movies/movie-news/china-tops-global-box-office-2021-1235069251/>.

States, Japan, UK, Germany, and France to become a US\$1 billion plus recorded music market.<sup>3</sup> China is also the largest market for video games with an estimated 742.19 million gamers and revenues estimated to reach US\$50.18 billion in 2022.<sup>4</sup>

However, with China's population size of over 1.4 billion in 2021,<sup>5</sup> the creative industries should be seeing significantly higher revenues from China. For example, while the music market in China has enjoyed double-digit growth over the recent years, it still remains far below the full commercial potential of a country of 1.4 billion people and behind its immediate neighbors in South Korea (51.7 million people)<sup>6</sup> and Japan (125.7 million people).<sup>7</sup> Per-capita recorded music industry sales revenues in China are some of the lowest in the world at US\$0.73 per person, compared to US\$15.75 in South Korea, US\$24.78 in Japan, and US\$8.44 in Hong Kong.<sup>8</sup> Licensed music is widely available in China across a range of different services but too often, listeners still find pirated content easy to locate and use. The COVID-19 pandemic has exacerbated China's online piracy challenges over the past several years, resulting in substantially increased Internet traffic to both legitimate sites and 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 submissions and does not provide an exhaustive review of all concerns.<sup>9</sup>

**Online Piracy Remains Very Serious:** Online piracy in China—including illegal downloading and streaming of copyrighted content through piracy websites, apps, and devices—has evolved extensively in recent years and remains a significant concern. For example, in 2022, China ranked 12th in the world in number of connections by peers participating in the unauthorized file-sharing of ESA member video game titles on public peer-to-peer (P2P) networks, and, according to this same metric, 13th in the world for mobile game titles. The music industry reports that 78% of users in China admitted to using unlicensed or illegal sources to listen to music.<sup>10</sup> 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.

Rights holders in China face problems from piracy apps and devices (including illicit streaming devices (ISDs) like *EVPAD*, *SVI Cloud*, *LokLok*, and *UnblockTech*).<sup>11</sup> Piracy websites are also a significant challenge, whether operating from within or outside China (like *Dytt8.net*, *Dy2018.com*, *Dygod.net*, *Ygdy8.com*, *gaoqing.la*, *mp4ba.cc*, *btbtt20.com*, *piaohua.com*, *vodxc.com*, *panduoduo.com*, *meijutt.tv*, *hao6v.com*, *80s.tw*, *gimyvod.cc*, *100vdo.com*, *olevod.com*, and *fqfilm.com*). Piracy cloud storage services and social media platforms (e.g., *Baidu Tieba*, *WeChat*, and *Weibo*) are also a concern for rights holders. Apps that aggregate infringing content hosted on remote servers are proliferating, and there remains legal uncertainty regarding the “server principle,” where several court cases in China have held that no liability can be found unless the infringing material resided on the defendant's server. Piracy over cloud storage services (or cyberlockers) in China represent a major area of concern for copyright holders, with large quantities of infringing content being stored on *Baidu Pan* (which is the cloud storage service provided by Baidu, Inc., which also provides more than 80% of China's search engine market) and then disseminated through popular Chinese

<sup>3</sup> International Federation of the Phonographic Industry (IFPI), 2022 *Global Music Report*, p. 144.

<sup>4</sup> Newzoo, *Top Ten Countries/Markets by Game Revenues*, available at <https://newzoo.com/insights/rankings/top-10-countries-by-game-revenues>.

<sup>5</sup> Macrotrends, *China Population 1950-2022*, available at <https://www.macrotrends.net/countries/CHN/china/population>.

<sup>6</sup> Data Commons, *Place Explorer: South Korea*, available at [https://datacommons.org/place/country/KOR?utm\\_medium=explore&mprop=count&popt=Person&hl=en](https://datacommons.org/place/country/KOR?utm_medium=explore&mprop=count&popt=Person&hl=en).

<sup>7</sup> Data Commons, *Place Explorer: Japan*, available at [https://datacommons.org/place/country/JPN?utm\\_medium=explore&mprop=count&popt=Person&hl=en](https://datacommons.org/place/country/JPN?utm_medium=explore&mprop=count&popt=Person&hl=en).

<sup>8</sup> IFPI, 2022 *Global Music Report*, p. 144, 154, 161, and 178.

<sup>9</sup> See, e.g., IIPA's 2022 Special 301 submission on China (IIPA 2022), available at <https://www.iipa.org/files/uploads/2022/01/2022-SPEC301-3.pdf>; IIPA's 2021 Special 301 submission on China (IIPA 2021), available at [https://www.iipa.org/files/uploads/2021/01/2021SPEC301REPORT\\_12854504\\_1.pdf](https://www.iipa.org/files/uploads/2021/01/2021SPEC301REPORT_12854504_1.pdf); and IIPA, *China's WTO Compliance – “Request for Comments Concerning China's Compliance With World Trade Organization (WTO) Commitments”* (87 Fed. Reg. 52835, August 29, 2022), September 28, 2022, available at [https://www.iipa.org/files/uploads/2022/09/2022-China-WTO-Compliance-Report\\_International-Intellectual-Property-Alliance-Comment-1.pdf](https://www.iipa.org/files/uploads/2022/09/2022-China-WTO-Compliance-Report_International-Intellectual-Property-Alliance-Comment-1.pdf).

<sup>10</sup> IFPI, *Engaging with Music 2022*, p. 26, available at [https://www.ifpi.org/wp-content/uploads/2022/11/Engaging-with-Music-2022\\_full-report-1.pdf](https://www.ifpi.org/wp-content/uploads/2022/11/Engaging-with-Music-2022_full-report-1.pdf).

<sup>11</sup> Another issue is that illicit streaming devices (ISDs) are manufactured in China and can be modified to support the installation of third-party, pre-loaded, or post-purchase infringing applications, allowing consumers access to pirated content. The devices often target overseas customers, and their proprietary applications are not accessible in China, which leave rights holders without a remedy, or at best, with an uncertain remedy.

social media platforms and piracy linking sites. The Government of China needs to do more about piracy hosted through cloud-based services that facilitate piracy, such as *Baidu Pan*, including by encouraging such services to keep pace with other similarly sized services across the globe that provide prompt and consistent processing of takedown requests and take more effective action to suspend or terminate accounts of repeat infringers.

Short video-sharing platforms, such as *XiaoHongshu*, *Douyin*, Dou Yin's *Huo Shan*, and *Kuaishou*, have become increasingly popular distributors of pirated popular movies, television series, video games, and music. Users break up the content into short videos and distribute them on these platforms. In the past two years, this form of piracy increased significantly, particularly from Multi-Channel Network (MCN) accounts. In response to this growing problem, domestic rights holders and streaming platforms formed an alliance and launched public campaigns against widespread piracy on MCN accounts. Piracy operators also use short video platforms to attract users to piracy websites and applications. Some streamers, in particular via *Douyin*, will play official trailers of video games without authorization to attract traffic for their channels, and further profit directly or indirectly from promoting other videos or mobile games by recommending download links in connection with unauthorized game trailers. In addition, these platforms have begun providing live-stream functions that enable infringers to provide unauthorized video content in real time. Finally, some game operators will place short advertising videos on *Douyin* that use video game images, characters, or music from rights holders' games without authorization. The infringing uses mislead players to believe the linked game content is related to the popular (unauthorized) content. Because these short-video ads are recommended to targeted users by *Douyin*, it is sometimes difficult for rights owners to monitor proactively.

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, or categories of weapons and skills, without copying key character images, soundtracks, and voices. Plagiarism against online video games through *WeChat* and *Douyin* (i.e, the Chinese equivalent of TikTok) is becoming more prominent in 2022. Due to the suspension of approval for online video games by the Chinese State Press and Publication Administration from July 2021 to April 2022, and the continuous strict policy controlling approvals, most foreign online video games cannot be legally published in Mainland China. In the meantime, those developers who were unable to get approved often had to make business decisions to publish the online video games first in an overseas market on platforms like Steam or Google Play. On the other hand, no approval is required if game developers do not receive money directly from game players (in other words, the developers do not require payments or offer in-game purchase). To take advantage of this loophole, copycats quickly plagiarize video games released overseas and launch them on mini-platforms in China at very low cost, then induce game players to watch advertisements when they want to replay or go to the next level. While the infringers do not earn money directly from players, they receive huge profits from advertisers through the display of advertisements.

**Book and Journal Piracy:** Online journal piracy remains a significant and persistent challenge. The unfortunate lack of deterrence in the marketplace allows entities engaged in providing unauthorized copies of journal articles to continue to operate. Several online platforms that facilitate access to unauthorized copies of journal articles and academic textbooks, including *Ureader*, *2447.net*, *80lib.com*, *Beijing Increscence*, 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 several 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. Some of these services even reach out to the customers of legitimate publishers pretending to represent those rights owners. Administrative enforcement measures apparently still have no lasting impact, with administrative authorities unwilling to act against previously sanctioned entities unless the rights holder files a new complaint for the same infringing content. Rights holders need to meet lengthy procedures involving repetitious and complicated evidentiary requirements and must do so repeatedly. In addition, 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 these illegal products to overseas

buyers. In part due to China's inadequate online enforcement framework (often with complex evidentiary requirements), sending notifications of infringement to remove these products remains unduly complicated.

A long-running case against the online site *Keyandi*, which made available infringing copies of more than 1.15 million textbooks and other reading materials, was finally concluded in 2022 with an administrative punishment decision imposing a fine of RMB20,000 (around US\$2,830). The case was initially brought in 2018 by the administrative authorities, who—following their own investigation into and their discovery of the extent of the operator's infringing activity—later referred the matter for criminal prosecution. Unfortunately, the matter sat with the police for 5 months and then the prosecutor's office for over a year. Ultimately a non-prosecution decision was issued. Despite a promising start with the administrative authorities, a review of the prosecutor's files showed that the matter stalled as the police failed to undertake any substantive investigation of the site or its operator, relying instead on the evidence initially collected by the administrative authority, thus failing to provide the prosecutor's office with the evidence necessary to pursue a criminal action. The resources required to push the case forward, the long delays, and the insignificant fines ultimately issued again demonstrate the difficulty with which any deterrence can be achieved in the market.

*Sci-hub* (*Sci-hub.ru*) and *Library Genesis* (*Libgen.li*), the Russian operated and facilitated platforms and repositories of pirated content are frequented by Chinese Internet users and mimicked by Chinese-language piracy platforms. At least 21 mirror sites are facilitated by Chinese domain registrars. Some Chinese copycat sites have also added payment processing services to their cloned repositories of infringing book and research content, while the copied pirate repositories lack such processes.

Publishers have identified at least 18 Chinese sites and platforms that either host infringing books or link to pirated works, including: *Baidu.com*, *Douban.com*, *Sina.com.cn*, *CSDN.net*, *Docin.com*, *Book118.com*, and *doc88.com*. To better combat infringement on these sites, as discussed below, China should provide rights holders with more effective remedies, including improved administrative processes for notice and takedown as well as other measures demonstrated effective in preventing or restraining infringement. P2P file sharing remains popular among Chinese Internet users with one Association of American Publishers (AAP) member publisher identifying 2 million downloads of pirated books since May 2021.

**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 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.

**Illicit Theatrical Camcording and Mini-Video-on-Demand (VOD) Locations:** Illicit theatrical camcording in the region remains a significant challenge in China, though in 2021 there was a notable decrease in illicit camcording in the country and globally because of theater closures. The numbers in 2022 were also low, owing to the small number of foreign films that China approved for distribution. In general, the quality of films camcordered in China has improved over the years, threatening the legitimate theatrical and home entertainment markets. Live streaming of theatrical broadcasts of films online is a growing concern. While China has taken some successful enforcement actions in recent years, a more comprehensive solution requires enactment of a specific criminal law against using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of audio 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.

Moreover, the proliferation of thousands of mini-VOD locations that show unauthorized audiovisual content is also causing significant problems in China. 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 camcordered 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.

**Pirated/Counterfeit Books and Hard Goods of Certain Copyright Products:** Certain copyright industries continue to report piracy of hard goods, which harms both the domestic and foreign markets. Production of pirated/counterfeit textbooks and trade books remains a significant concern. AAP member publishers report that there have been instances where counterfeit textbooks exported from China have been sold, through online marketplaces, into other markets. China remains an export center for pirated music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese music products, including "deluxe edition" collection sets of music content that have almost identical artwork and packaging to the genuine products and that contain genuine-looking International Federation of the Phonographic Industry (IFPI) source identification (SID) codes. These infringing sets are often sold through popular Chinese and international e-commerce platforms. In recent years, another common form of Chinese physical piracy exports involves the sale of USB flash drives that contain thousands of illegal music files and are exported to other Asian territories (e.g., Taiwan), usually following a sale on e-commerce platforms. In addition, some Chinese software developers have started to sell TPM circumvention software to the United States and the European Union, which enables users to circumvent the TPMs used by legitimate digital music services, such as Spotify, and obtain music content without getting legal access to the services. Video game machines, originating from China, containing hundreds or thousands of infringing video games have been seized by customs agencies around the world. These machines are found in kiosks and shopping malls in many countries and are sold through several online marketplaces.

At present, domestic e-commerce platforms have onerous formal requirements for complaints from rights holders or agents, and if they accept the complaint, they will delist only the specific infringing items and generally do not take any further action to suspend or close the online shop. Depending on the scale of infringement, local cultural enforcement authorities will pursue a warning and removal of infringing content, administrative penalties, and closure of the online shop, or refer to the public security authorities for criminal investigation.

## **ENFORCEMENT UPDATES IN CHINA**

Enforcement efforts have been largely the same in the last year. As highlighted in past filings, China has increased its enforcement efforts in recent years, contributing to improved protection and development of the legitimate marketplace for some creative sectors. Some enforcement actions, including the ongoing civil cases against the operators of the app *RenRen/DuoDuo ShiPin*, and the *Yyets* and *Diyidan* criminal convictions, give some hope for deterrent action in the Chinese market. While these actions are helpful, they are not enough to deter widescale piracy, particularly when compounded by China's many informal and formal barriers that restrict the distribution of legitimate foreign content in China. Chinese courts should issue deterrent-level civil and criminal penalties against operators of piracy websites that make available a massive amount of infringing content. Also, the same companies that operate services like *RenRen* in China pivot to run apps like *LokLok*, which massively infringe outside of China but are geo-blocked there, thus evading enforcement. Further, China remains the hub for the manufacture and distribution of piracy devices (PDs, also referred to as ISDs) and its enforcement response is lacking, making it incumbent on the Chinese government to closely examine this issue and crack down on such activities that are fueling much of the world's Internet protocol television (IPTV) piracy landscape. (Indeed, enforcement actions taken in Singapore and Malaysia, after new laws were enacted and went into force in both countries, indicate the need for China, as the source of the problem, to take action to fix it.)

China's large Internet user base creates opportunities for rights holders, but China's enforcement deficiencies have kept the creative marketplace from reaching its potential and hamper the development of legitimate services. In 2022, the impact of the COVID-19 pandemic continued to strain China's enforcement resources and hinder the progress of investigations in the country. IIPA is hopeful that China will fully implement commitments under the Phase One Agreement to improve its enforcement framework, which would make progress in addressing some of the concerns identified below.

Administrative and criminal enforcement against copyright infringement involves challenges for IP rights holders. Moreover, in some industries, notice-and-takedown procedures on major platforms have proven ineffective at addressing large-scale piracy abuses on their services. Short video-sharing platforms are reluctant to take action to prevent the appearance of infringing content. In the face of the rapid distribution of short videos, the "Notice-Deletion" doctrine runs into significant hurdles. Even if platforms delete the links upon the receipt of notices, in some cases this deletion happens hours or days after the infringing content is posted when the damage has already occurred. Further, the same content continues to reappear and many platforms do not take any measures against users that repeatedly upload infringing content. In addition, most infringing websites and apps use overseas servers and domain registration agencies to hide their identity, making it difficult to find the real operators of infringing websites and apps. These rogue services effectively cannot be sued. The NCAC should establish a mechanism with the Ministry of Industry and Information Technology (MIIT) and ISPs to shut down infringing sites operating without a business license, and the government should, consistent with the *Guidelines*,<sup>12</sup> 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." Chinese courts should streamline procedures for civil and criminal enforcement, including by reducing documentation requirements to establish copyright ownership and infringement and to ensure timely enforcement of monetary damages.

China's Customs Database allows rights holders to record IP and authorized licensees for use in preventing infringing items from being exported from or imported into China. However, the database is in Chinese only and does not support any other languages. It would be helpful for the database to support other languages, at least English, to reflect the international nature of infringement activity across China's borders.

**Administrative Actions Helpful but Insufficient:** IP enforcement officials conducted the "Sword Network Action," an annual anti-piracy campaign, from September to November of 2022. During this campaign, online platforms deleted nearly 1.2 million infringing links; 1,066 pirated websites and apps were shut down; 1,031 cases related to Internet piracy were handled, among which 135 criminal cases involved a value of RMB711 million (around US\$100 million). While the campaigns have produced some good results, there is a need for greater transparency, including providing rights holders with timely and detailed information regarding the process and the results of administrative action, and more consistent treatment of actioned cases as results have varied among various provinces. It is also hoped that the IP Key Programme will continue its engagement with the Ministry of Public Security so that more copyright infringement cases eventually could be addressed by the criminal authorities. Administrative enforcement should be improved by expanding the resources and capability of the NCAC, local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs) and improving the mechanism between NCAC, the MIIT, and ISPs for shutting down infringing websites operating without a business license (consistent with the *Guidelines*). Administrative enforcement should also be improved by imposing enhanced penalties for repeat infringers without the need for a new complaint. Finally, improvements should be made for the prompt, more efficient, and transparent transfer of administrative complaints to the criminal authorities for investigation and prosecution.

**Civil Enforcement:** Because the operation of piracy services is often overseas or multinational, cross-border enforcement cooperation is critical and needs to be improved. Many piracy websites have applied for personal

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<sup>12</sup> See, e.g., IIPA 2020 at 23 for additional information on the 2019 *Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, which were issued jointly by the Communist Party of China's Central Committee (CPCCC) and the State Council.

information protection with overseas domain registrars, which makes it impossible for copyright holders to collect information and lodge a complaint with related enforcement agencies in China, which require such personal information. Even when rights holders can identify the infringers, China's system creates a barrier to action by requiring extensive documentation even to commence a civil action. There are also often delays by the courts in formally accepting cases. More broadly, China should provide a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and should ensure that courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply. Injunctions also 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 which remains available. China should also eliminate the "server principle." While courts in Shanghai and Beijing are beginning to shift away from this principle in practice, courts nationwide should follow suit.

Chinese courts have also issued judgments with some notable improvements in damages awards and recognition of copyright in the gaming industry. In November of 2021, Perfect World, a gaming and entertainment company, filed suit against another gaming company for the unauthorized use of character names, biographies, and the relationship between characters in Jin Yong's *Wuxia* novels. The Beijing IP Court upheld the judgment of the first instance and granted damage awards of RMB20 million (US\$2.81 million). In December of 2021, the High People's Court of Guangdong Province affirmed the decision of the Guangzhou IP court, which recognized that the map of a MOBA game operated by Tencent was copyrightable. It should be noted that burdensome procedural requirements for launching civil litigation by foreign plaintiffs can, if not remedied, undermine the effectiveness and availability of enforcement action in China.

**Criminal Enforcement:** In recent years, several criminal enforcement actions have notably resulted in the imposition of deterrent criminal sentences in a modest sea change in China. In November 2021, the Shanghai Intermediate People's Court sentenced the founder of the China-based multi-million user site *Yyets.com* (also operating as "*Rrys*") to 42 months' imprisonment and a major fine following a guilty plea for copyright infringement offenses, in a case jointly referred by the Motion Picture Association (MPA) and a local Chinese rights holder.<sup>13</sup> It will hopefully set a positive example leading to greater deterrence. In July 2020, Chinese police executed a raid against the operators of the *Diyidan* app.<sup>14</sup> Then in May 2021, the operator and 27 defendants were convicted of copyright infringement. It is important for Chinese courts to issue deterrent-level civil and criminal penalties against operators of piracy websites that make available a massive amount of infringing content.

In other positive news, the Xuzhou police and public security bureau (PSB) are aggressively chasing a syndicate of TPM circumvention device manufacturers and sellers. Following their notable raid against the *Team Xecuter* syndicate in December 2020, Xuzhou PSB raided another cluster across Shanghai, Guangzhou, Jilin, and Sichuan provinces in May 2022 and continue investigations into similar targets. As a result of these actions, one hacker programmer, two manufacturers, and seven distributors and retailers were raided.

Regional police took positive actions against video game pirates in other locations as well. In February 2022, the Shanghai PSB raided a factory and seized more than 1,400 counterfeit controllers, taking action against seven defendants. In November, the Shanghai court heard the case and reported it to the media. In June 2022, Guangzhou PSB raided seven distributors of infringing game consoles and seized thousands of infringing game consoles from ten locations (factories and warehouses). From the end of August to the beginning of September 2022, Hangzhou PSB raided factories, distributors, and retailers of counterfeit game controllers, and seized more than 3,000 counterfeit controllers and more than 40,000 related items. Following the investigation into an online seller, they found upper

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<sup>13</sup> One case was brought against the operators of the piracy service *Yyets*. *Yyets* had more than 6.8 million registered users and offered nearly 33,000 pirate TV shows and films, earning almost US\$2 million in profits since 2018. The case resulted in criminal convictions against *Yyets*, which was noted by the Supreme People's Court (SPC) as among "2021's Top 10 IP Cases at Chinese Courts" and was further noted as an exemplary case. See also, IIPA 2022 at 15.

<sup>14</sup> At its height, *Diyidan* was disseminating over 20,000 TV series, including series from the U.S., Japan, and Korea. See also, IIPA 2022 at 24.

suppliers and factories, and related distributors and downstream retailers. Finally, in October 2022, a local Cultural Market Comprehensive Law Enforcement Detachment shut down a pirate website following consumer tips.

In a raid action in July 2019, a Shenzhen company was raided for selling infringing game consoles and around 2,000 infringing game consoles were seized. In March 2020, a judgement was issued in which the court reduced punishment on the basis of a false claim of a settlement agreement by the defendant. After resolving the fraudulent evidence, the rights holder requested the original court, Shenzhen Bao'an District People's court, to reopen the case to consider proper punishment against the defendant, only to receive the court's denial in June 2022. The appeal of the case brought no resolution.

Late in 2022, the China National Intellectual Property Administration (CNIPA) published a three-year Plan (replacing the prior 2020-2021 plan) of implementing the *Guidelines* jointly released by the Office of CCP Central Committee and the Office of the State Council in November 2019. CNIPA's plan specifies 114 measures in six categories (with deadlines). The Plan contains relevant items to the copyright industries, and IIPA will be monitoring these developments closely. Industry has identified at least 24 of the 114 measures as having direct relevance to the protection and enforcement of copyright for IIPA members, including measure 56, "Push IP Courts to hear IP criminal cases, continuously push reform of 'Three in One (criminal, civil, and administrative cases in one court)' IP trial mechanism," and measure 51, "Further enhance management of website platforms, push fulfillment of platform accountability, and based on opinions of related departments, dispose suspected IP infringement information/content online, in accordance with laws." The "Three in One" approach is one which IIPA members would like to see fully implemented, particularly against not only the piracy app ecosystem but also against the massive proliferation of the manufacture and distribution of PDs (so-called ISDs) which are ravaging copyright holders' legal businesses, largely outside China. The fact that the entire APEC member community is considering soft-law approaches to this issue, and Singapore and Malaysia have recently enacted statutes and implemented them to crack down on local sales of the infringing activities of resellers, indicates that the government of China can do more to tackle this problem; hopefully the Three in One approach will be effective.

## **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>15</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 entered into force in June 2021. IIPA encourages China to expedite the process to revise the Regulation on the Implementation of the Copyright Law to ensure proper implementation of the amendments, as discussed below.

IIPA is pleased that the amendments to the Copyright Law 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. It is vital that China swiftly and effectively implement these new performance rights, including securing protection for foreign sound recordings, ensuring the effective exercise and management of these rights in accordance

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<sup>15</sup> See, e.g., IIPA 2022.

with international best practices, and establishing tariffs reflecting the economic value of the use of the rights in trade.<sup>16</sup> Despite the closure of this major gap in protection, Chinese law still falls short of international norms and standards regarding the term of protection for sound recordings and other works. A minimum term of 70 years for the protection of sound recordings and works has become the international standard, yet China's Copyright Act still provides for only 50 years of protection.

The Copyright Law amendments also include some positive reforms that will improve the enforcement environment in China, including increasing the maximum for statutory damages ten-fold and, upon *prima facie* evidence, shifting the burden of proof to the accused infringer to show the use was authorized by the rights holder or is otherwise permissible under the Copyright Law. In addition, the amendments elevate certain elements of the three-step test from the Berne Convention and the WTO TRIPS Agreement 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 they 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, protection should apply to TPMs that control and manage authorized access to copyright works ("access controls") and prohibition against circumvention should apply to both access controls and TPMs that protect rights (including against unauthorized copying) in those works ("copy 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 (certainly broader than those found in U.S. law). Implementation of these exceptions should ensure they do not undercut the exclusive rights of copyright owners. 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 not only for circumvention of TPMs, but also for the manufacture, distribution, and exportation of circumvention devices and software components and the trafficking of circumvention services. If necessary, China should further revise the Copyright Law to address these issues and ensure adequate and effective protections of TPMs.

Other positive aspects of the amendments include: requiring 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 Copyright Law as amended did not address several deficiencies in China's legal framework. To address these, 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; and by clarifying the right of "communication over information networks" to reject the "server principle" and 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. The Copyright Law should be further updated to provide protection against unauthorized retransmissions of copyrighted content over the Internet (including live-streaming), and consistent with the requirements of the *Guidelines*, clarify the

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<sup>16</sup> Unfortunately, China maintains its reservation of Article 15 of World Intellectual Property Organization (WIPO) Performers and Phonograms Treaty (WPPT). This reservation remains an obstacle for the protection of international sound recordings in China. It is urgent that China withdraw this reservation to ensure Article 45 of the new Copyright Law is effectively implemented.

legal basis for no-fault injunctions against online intermediaries whose services are used to infringe copyright, including against access providers, requiring them to disrupt 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. Finally, the Copyright Law should be amended to clarify that only passive and neutral intermediaries are eligible for the safe harbors from monetary liability and that such intermediaries must fulfill certain conditions, (including adoption and implementation of a repeat infringer policy) and that, upon obtaining knowledge of infringement (including through a notice) or otherwise becoming aware of circumstances from which infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated to be effective in preventing or restraining infringement. Service providers should be encouraged to institute a know your business customer policy. Chinese Copyright Law should also 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>17</sup>

**Criminal Law Reform:** China's 11th amendment to its Criminal Law was issued in December 2020 and entered into force in March 2021. Among other things, the reform included some positive changes to the provisions on criminal copyright infringement (Articles 217 and 218 of the Criminal Law), including increased criminal penalties for copyright infringement.<sup>18</sup> In addition, the reforms expanded the scope of criminal liability to include the right of transmission over an information network, performers' rights, and the prohibition on circumvention of TPMs (although there is no express prohibition against trafficking in circumvention devices, technologies, and services). Finally, "disseminating to the public through information network" was explicitly added as a prohibited act of criminal copyright infringement.

The Government of China should also adopt reforms that address shortcomings in China's Criminal Law that IIPA has identified in previous reports. In particular, China should meet its obligations in the 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* and which will now be further explored through the recently issued Three-Year Plan);<sup>19</sup> separately define criminal violations regarding trafficking in devices, technologies, or services to circumvent TPMs used by copyright owners to protect their works in the digital environment; and separately criminalize the manufacture and distribution of PDs when it is clear that these devices are exported for the purpose of infringing or facilitating infringement.

**Fully Implement Phase One Agreement:** IIPA welcomed the conclusion of the Phase One Agreement, signed by the United States and China on January 15, 2020. In the agreement, China made several enforceable commitments that address certain concerns identified in these comments, particularly regarding intellectual property rights (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 IP cases for criminal enforcement are required upon "reasonable suspicion" that the criminal thresholds have been met. The requirement that rights holders show that criminal thresholds have been met 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, although implementation by local law enforcement and public security authorities has so far been uneven. 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. IIPA urges China to follow through on its Phase One commitments and encourages the U.S. government to work with China to ensure full implementation.

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<sup>17</sup> While secondary liability for intellectual property (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>18</sup> Criminal detentions are no longer applied to the crime of copyright infringement (Article 217) and the crime of selling infringing copies (Article 218). The minimum criminal punishments are fixed-term imprisonment, with the maximum sentence raised from seven years to 10 years imprisonment for the crime of copyright infringement and from three years to five years imprisonment for the crime of selling infringing copies.

<sup>19</sup> China should clarify that a single episode of a television program counts as one copy toward the threshold.

China's "e-commerce" 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.<sup>20</sup> 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. As IIPA reported previously, the new Civil Code and SPC's Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement provide for improved takedown procedures that are consistent with Article 1.13 of the Phase One Agreement.<sup>21</sup> It is critical that implementation of the e-commerce law is consistent with the Phase One Agreement, supports rights holders' actions to prevent illegal trafficking of infringing goods on e-commerce platforms, and does not upset existing voluntary arrangements between rights holders and some e-commerce platforms where there is already good cooperation.

**Internet Information Services:** The *Provisions on the Management of Algorithmic Recommendations in Internet Information Services* (the *Provisions*) was implemented on March 1, 2022. According to the *Provisions*, the algorithmic recommendation refers to "the application of any algorithmic technology, including without limitation, generation and synthesis, individualized push, sorting and selection, searching and filtering, and scheduling and decision-making, to provide information to users." Legal liability associated with the violation of the *Provisions* include the suspension of information updates, the imposition of a fine of RMB10,000 to RMB100,000, administrative penalties, and even criminal liabilities. The *Provisions* could provide rights holders the opportunity to prove that a platform improperly used its algorithm to recommend infringing content to its users and hold the platform responsible for direct infringement.

**Judicial Improvements:** New legal interpretations and procedural guidelines from the SPC, which will come into force from 2020-2022, improve the position of rights holders generally by clarifying, strengthening, and streamlining the application of copyright and other IP laws regarding civil and criminal enforcement actions brought in Chinese courts. Most recently in April 2022, the SPC released a judicial interpretation and a subsidiary notice that provided that all copyright-related civil and administrative cases of first instances should be filed with basic-level courts designated by the SPC, but that cases of significance can start at the Intermediate People's Court. IIPA is hopeful that this will help to ease the heavy dockets of the IP courts in China.

## **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 products 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 United States regarding many market access barriers in music, audiovisual products,

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<sup>20</sup> As previously reported, the e-commerce law entered into force in January 2019 and applies only to online transactions of infringing goods, while copyright liability limitations for digital content platforms continue to be governed exclusively by the framework of the existing copyright law and related regulations. The interpretation and implementation of the e-commerce law should be monitored closely, including with respect to its stated scope of coverage as well as any expansion of such explicit coverage.

<sup>21</sup> See, e.g., IIPA 2021 at 24-25. In May 2020, China enacted a new Civil Code, which took effect in January 2021, that 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 counter-notice 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 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.

and publications.<sup>22</sup> After the case concluded in 2009, China eased several market access restrictions,<sup>23</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 the prohibition of foreign investment in audiovisual production studios is also a barrier facing U.S. record labels in China, Item 17 of the 2020 Negative Investment List permits foreign investment in online music services, which is a welcome and positive step. Rather than continue to pursue policies that impede access to its marketplace, China should meet its trade commitments and take steps to open its marketplace for the music, publishing, video game, and motion picture and television industries by eliminating the market access barriers discussed below.

**Online Publishing Rules:** 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>24</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, the State Administration of Press and Publication (SAPP) has tightened the approval process for the publication of video games and in August 2021, SAPP suspended the approval process altogether. SAPP should increase the number of approvals for foreign video games to match the number of approved domestic games. Finally, many of the increasing audiovisual market access barriers discussed below are applicable to online distribution.

In addition to existing online barriers, China has introduced several alarming draft measures that, if implemented, would discriminate against U.S. producers and distributors of creative content. For example, the draft Radio and Television Bill released by National Radio and Television Administration (NRTA) in March 2021 could tighten regulation standards for online audiovisual programs and restrict foreign producers from participating in radio and television activities, including online. 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>25</sup> 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. China has not approved a video game from an American publisher since June 2021.

**Extension of Content Review to Books Printed for Export:** China appears to now be applying 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 from China without issue. Extending the reach of its burdensome content review regime to books merely being printed in the country but otherwise intended

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<sup>22</sup> China—Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products, WT/DS363/AB/R, December 21, 2009, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:WT/DS/363ABR.pdf&Open=True>.

<sup>23</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>24</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).

<sup>25</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.

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.

**Content Censorship of Physical Goods:** Sound recordings that are imported into China in a physical format are required to undergo a strict content censorship procedure, comply with a series of formalities, and receive approval before distribution in the market. This requirement should be lifted.

**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. On June 1, 2022, the NRTA issued a new system of administrative licensing for domestic online audiovisual works, essentially applying the same censorship rules and standards for offline (theatrical) and online (VOD) content. The practice has been in place since 2019; the issuance of the new administrative licensing requirement will formalize the obligation for online audiovisual works. This reflects a further tightening of government oversight and the push for a higher censorship standard for the online content industry in China.

In 2014, the government-imposed rules capping the online distribution of foreign films and TV dramas at 30% and requiring online distributors to register content, obtain permits, and submit content for review, resulting in extended delays and further uncertainty. Furthermore, because there are only two opportunities to submit content for registration and review per year, U.S. producers are unable to submit a full season of a television series when that season is current due to the nature of television production. These rules have substantially reduced the number of U.S. film and television programs licensed in China for online distribution and in practice further reduced the foreign content caps to less than 30%. In September 2018, the NRTA proposed two draft regulations expanding the 30% cap for online distribution of foreign audiovisual content to broadcasting and applying the cap on a genre-basis to film, TV, animation, documentaries, and "other" programs.<sup>26</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.

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 or at least provide transparency as to the criteria used by content approval authorities and clear, predictable timelines. 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.

In addition, the 2016 Rules clearly intended to promote domestic 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>27</sup> A March 2016 Notice allowing refunds from the Film Development Fund to cinemas that report favorable

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<sup>26</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>27</sup> The June 2016 Statement and Rules on Importing Television 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

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>28</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 several longstanding discriminatory restrictions in the audiovisual sector that continue to harm the U.S. industry. For example, China prohibits foreign-owned investment in online video services, which would appear to violate China's General Agreement on Trade in Services (GATS) commitments. China also prohibits foreign investment in audiovisual production studios and distribution. As noted above, the June 2020 revision of the Negative Investment List maintained these prohibitions.<sup>29</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.

China needs to meet its trade commitments and open its marketplace to U.S. producers instead of continuing down its current protectionist path. It is critical to send a strong message that these policies are unacceptable—particularly when China is now the largest film market in the world—and should be reversed. As discussed below, China should instead focus its attention on complete implementation of the 2012 U.S.-China Film Agreement and fulfill its Phase One services purchasing obligations, including IP licensing of audiovisual works, as well as other market opening steps for the 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 then-Vice President Biden. Hailed as a “breakthrough,” the Agreement promised to economically uplift U.S. and Chinese producers and distributors.<sup>30</sup> Unfortunately, more than nine years after its signing, China has failed to meet its obligations under the Agreement. The result of not implementing key provisions of the Agreement has been a steady further deterioration of U.S. producers' ability to access the Chinese theatrical marketplace, as well as the broader marketplace for other types of distribution in China, such as via VOD and television (especially for independent producers).

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

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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>28</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>29</sup> Other examples of discriminatory restrictions 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.

<sup>30</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>.

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>31</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 China’s theatrical marketplace, with only 9 films theatrically released in the country in 2021, with a revenue of US\$10.68 million, which is 0.15% of the year’s total share of the theatrical box office revenue. Just 9 independent theatrical releases in China represents the lowest percentage of slots ever allocated for independent films recorded by the Independent Film & Television Alliance (IFTA). U.S. independent producers who rely on private distributors and the payment of minimum guaranteed or flat license fees to raise production financing and secure distribution have seen their licensing revenues plummet and, in many cases, stop altogether.

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. 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 Film Distribution Company Ltd. 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 enhance compensation in 2017 (such review has been delayed almost 5 years), liberalize the distribution market for private third party Chinese distributors, and finalize a new Memorandum of Understanding (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 fair and equitable 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) establish defined and prescribed content review time frames for theatrical and online distribution; increase the 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; and (8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and do not establish any regulation or policy that impedes the collection of license fees by American IP owners.

**Full Implementation of the Phase One Agreement:** The Phase One Agreement also includes purchasing requirements (Article 6.2) 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 and the number of U.S. films allowed into China.

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<sup>31</sup> Independent Film & Television Alliance (IFTA) IFTA Research and Analysis, “China Theatrical Market 2010–2019.”

## **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 GATS, TRIPS Agreement, and the Phase One Agreement (including Article 1.2 to ensure fair and equitable market access to persons that rely upon IP protection).<sup>32</sup> In terms of copyright protection and enforcement, the deficiencies outlined above regarding criminal enforcement procedures (e.g. thresholds that are too high or unclear, uncertainties regarding increased penalties against repeat offenders) are inconsistent with enforcement obligations under TRIPS, including Articles 41, 42, and 61. Finally, China must follow through on commitments it has made in other bilateral engagements, including the Phase One Agreement and prior commitments, specifically addressing many of the issues discussed above, including full implementation of the U.S.–China Film Agreement, enhanced enforcement against PDs, improved enforcement against online piracy, and enhanced protection of academic journals, including strengthening library copyright protection.

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<sup>32</sup> For example, in the 2021 Report to Congress on China's WTO Compliance, USTR noted: "NRTA and other Chinese regulatory authorities have also taken actions to prevent the cross-border supply of online video services, which may implicate China's GATS commitments relating to video distribution." See page 61, available at <https://ustr.gov/sites/default/files/enforcement/WTO/2021%20USTR%20Report%20to%20Congress%20on%20China's%20WTO%20Compliance.pdf>.

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2023.<sup>1</sup>

**Executive Summary:** India plays an important role in the growth of the creative content industries, with its large population of users and status as the second largest market in the world for Internet services and smartphones.<sup>2</sup> For both Indian and foreign-based creative industries, however, the promise of continued growth is threatened by piracy; an inadequate online liability framework; market access barriers; attempts to expand statutory licenses for broadcasting of literary and musical works and sound recordings to include Internet transmissions; criminal enforcement difficulties; inadequate term of protection; collective management issues and sub-par tariffs; and broad and unclear exceptions to copyright protection. India needs to consider strong copyright protection and enforcement that meets international standards and best practices, as well as effective legal remedies against the circumvention of effective technological protection measures (TPMs), which combined would help address many of these challenges and could transform India into a more engaging business environment for the creation and dissemination of copyrighted works.

India's copyright legal framework is missing key provisions, including with respect to TPMs that are crucial protections under the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties).<sup>3</sup> IIPA urges the Government of India to pursue the necessary legal reforms to fully comply with the WIPO Internet Treaties. IIPA also urges the Government of India to reform its online liability framework concerning infringing content, including to limit its overbroad safe harbors and to clarify the responsibilities of services eligible for them. This should be prioritized, particularly if India proceeds with its proposed Digital India Act, to ensure that online services cannot exploit opportunities created by the existing law to evade liability, disincentivizing them from seeking licenses from rights holders.

Regarding India's review of the Copyright Act of 1957, IIPA respectfully requests that USTR continue to monitor this process closely and to encourage India to pursue changes to its Copyright Act that comport with the country's international commitments and align the law with international best practices. IIPA greatly appreciates the U.S. Government's engagement with India regarding the highly concerning proposal to amend Section 31D of the Copyright Act to impose a statutory licensing system on Internet transmissions and welcomes the continued engagement of the United States to urge the Government of India to reject any attempt to impose a statutory licensing system on Internet transmissions. The uncertainty caused by this proposal will undermine the creative market in India and should be affirmatively rejected.

Criminal enforcement against Internet piracy continues to be challenging at both the national and state levels. The last major government study on piracy, published in 2010 by the Ministry of Information & Broadcasting (MIB) "Committee on Piracy," concluded that "piracy is low in terms of priority in the radar of law enforcement agencies" compared to other serious crimes.<sup>4</sup> It would appear that little has changed since this MIB report. A number of India-based piracy services have become global exporters of pirated content, such as the hosting service *DoodStream* which,

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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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

<sup>2</sup> CNA, *India's smartphone shipments drop 10% in Q3 as prices hit record* – IDC, November 14, 2022, available at <https://www.channelnewsasia.com/business/indias-smartphone-shipments-drop-10-q3-prices-hit-record-idc-3070631>.

<sup>3</sup> India is also party to and obligated to comply with the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement and is negotiating a free trade agreement with the UK, which it is hoped will impose more disciplines, especially in the area of enforcement.

<sup>4</sup> Arpan Banerjee, Cardozo Arts & Entertainment, Vol. 34, p. 609, *Copyright Piracy and the Indian Film Industry: A "Realist" Assessment*, available at <http://www.cardozoaeji.com/wp-content/uploads/2016/08/BANERJEE-ARTICLE.pdf> (citing Committee on Piracy, *Report of the Committee on Piracy*, p. 14 (2010)).

according to SimilarWeb, had 137 million visits in November 2022 alone. In addition, audiovisual rights holders continue to face challenges from pirate infrastructure providers that provide unauthorized turnkey solutions (Piracy-as-a-Service (PaaS)) to would-be pirate operators, such as *WHMCS Smarters*. While criminal enforcement in India is lacking, judicial enforcement, particularly through the Delhi High Court, has been successful. The seminal 2019 Delhi High Court decision in *UTV Software Communication Ltd. v 1337x.To and Ors.*<sup>5</sup> established permanent site blocking in India against flagrantly infringing “rogue” piracy sites. Later decisions following this precedent led to the closure of the notorious piracy site *Tamilrockers*, although *TamilBlasters*, *StreamBlasters*, and *TamilMV* have filled the void. In 2022, industry secured the first “pirate brand” order by which a site can be blocked based on the use of the same name or branding, and the first cyberlocker blocking order targeting the locker *mixdrop*. Orders are issued quickly and are “dynamic,” meaning that subsequent iterations of the same piracy service can likewise be blocked quickly and efficiently, and “doubly-dynamic” meaning new domains discovered prior to the final disposition of a case can be added to orders.

In recent months, there have been encouraging landmark judicial decisions. The Delhi High Court, in *Neetu Sing v Telegram* (2022), directed *Telegram* to disclose information about uploaders of pirated content. Moreover, a recent Supreme Court decision found that the crime of copyright infringement (or abetting copyright infringement) is a cognizable and non-bailable offense.<sup>6</sup> However, with copyright infringement remaining a low priority, the greater challenge involves investigation and arrest, rather than bail. IIPA urges the Indian government to better prioritize intellectual property (IP) crimes in addition to mobilizing to address these middleware services and other PaaS actors and to modernize its laws on secondary liability, knowledge, and constructive knowledge.

## **PRIORITY ACTIONS REQUESTED IN 2023**

### **Enforcement**

- Strengthen and standardize the national IP enforcement regime through a national central authority to coordinate with state-level enforcement units.
- Establish uniform, state-level cybercrime law (to include IP crimes) and enforcement procedures and state-level IP crime units across the country to ensure proper investigation of IP crimes, including Internet piracy.
- Encourage greater cooperation and cross-training between national and state law enforcement agencies and the creative industries.
- Resume the suspension of the use of domains if based on false or fraudulent Whois information by the National Internet Exchange of India (NIXI).

### **Legislation**

- Reject the proposal to amend Section 31D of the Copyright Act to broaden the statutory license to cover all Internet transmissions of sound recordings and musical works, as well as literary works, in breach of India’s obligations under the WCT, WPPT, and WTO TRIPS Agreement, and reject the 2016 Office Memorandum erroneously interpreting the current provision to include such transmissions.
- Ensure any ongoing review of copyright law and legislation relating to online liability is used as an opportunity to bolster IP protections for the online environment and does not result in the weakening of existing protections.
- Reform the Information Technology Act, 2000 (IT Act), particularly if India proceeds with its proposed Digital India Act, to:

<sup>5</sup> *UTV Software Communication Ltd. v 1337x.To et Ors.*, April 10, 2019, available at [https://indiankanoon.org/doc/47479491/?\\_cf\\_chl\\_tk=2Fw0s2GRI5l\\_czPzh7h1hTkdcT9UJiFPxl\\_uWUJe3Hq-1674682018-0-gaNycGzNCqU](https://indiankanoon.org/doc/47479491/?_cf_chl_tk=2Fw0s2GRI5l_czPzh7h1hTkdcT9UJiFPxl_uWUJe3Hq-1674682018-0-gaNycGzNCqU).

<sup>6</sup> *M/s Knit Pro International v The State of NCT of Delhi & Anr.*, Criminal Appeal No. 807 of 2022, Sup. Ct. India, May 20, 2022, available at <https://indiankanoon.org/doc/180042115/>.

- amend Section 79 to limit its overbroad safe harbors and to clarify the responsibilities of services eligible for them, (i) ensuring that there is a clear legal basis for the liability of active online services, (ii) clarifying that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities, and (iii) setting out the responsibilities of services eligible for safe harbors, including an obligation on hosting service providers to remove infringing content expeditiously; and
- encourage all relevant intermediaries to implement “know your business customer” (KYBC) policies to ensure they keep up-to-date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers.
- Amend the Copyright Act to fully comply with the WIPO Internet Treaties by appropriately defining TPMs, ensuring sanctions apply to both acts of circumvention and to trafficking in devices, software, components, and services that circumvent, and providing civil and criminal penalties for violating TPM provisions.
- Amend the Copyright Act to narrow the scope of Section 52(1)(b) and (c).
- Amend the Copyright Act to provide measures demonstrated effective in preventing or restraining infringement.
- Ensure the private or personal use exception under Section 52(1)(a)(i) is compatible with the three-step test.
- 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 the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority.”
- Eliminate the over-regulation of private contracts involving sound recordings in Section 39A of the Copyright Act.
- Increase the term of protection for works and sound recordings.
- Enact the proposed Cinematograph Amendment Bill, 2019, that will 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 or video) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording).
- Encourage all relevant intermediaries to implement KYBC policies to ensure they keep up to date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers.

## **Market Access**

- Eliminate local body entertainment taxes (LBET) imposed over and above national Good and Services Tax (GST).
- Eliminate high tariffs on video game software and hardware.
- Remove revisional powers of the central government in the proposed Cinematograph Bill amendments that would give the central government the authority to re-examine any certified film that has a valid certificate from the Central Board of Film Certification (CBFC) under Article 19(2) of the Constitution of India.
- Agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.

## **THE DIGITAL MARKETPLACE IN INDIA**

By the end of September 2021, India reached 794.88 million broadband Internet subscribers.<sup>7</sup> After China, India is the second largest Internet market by number of users in the world.<sup>8</sup> India was the 17<sup>th</sup> largest recorded music market in the world in 2021 by revenue, maintaining its position from 2020.<sup>9</sup> After the United States, China and India were the biggest markets for ad-supported audio streaming in 2021.<sup>10</sup> India had revenues of US\$83 million for ad-supported audio streaming in 2021.<sup>11</sup> Recorded music revenues in India increased by 20.3% in 2021, to a total of US\$219 million.<sup>12</sup> This growth was driven by a 22.5% increase in streaming, which accounted for 86.9% of the market’s

<sup>7</sup> Tanushree Basuroy, Statista, *Number of Internet Users in India 2020-2040*, July 27, 2022, available at <https://www.statista.com/statistics/255146/number-of-internet-users-in-india/>.

<sup>8</sup> Id.

<sup>9</sup> International Federation of the Phonographic Industry (IFPI), *2022 Global Music Report*, p. 157.

<sup>10</sup> Id. at p. 79.

<sup>11</sup> Id.

<sup>12</sup> Id. at p. 119.

overall revenue, up from 85.3% in 2020.<sup>13</sup> On the audiovisual front, India had almost 40 million households subscribing with 80 million subscriptions to legitimate video-streaming services in 2021, which is expected to grow to 60 million households paying for 110 million subscriptions by 2024.<sup>14</sup> The overall video viewership in India increased by 10% to reach 497 million people in 2021, and it is estimated this will grow to over 600 million people by 2024.<sup>15</sup> These subscriber numbers exclude YouTube, which has crossed 500 million monthly active users by the end of 2021.<sup>16</sup> Online gaming will continue to grow and is expected to reach 500 million gamers by 2025.<sup>17</sup> These figures remain well below India's full commercial potential.

**Online piracy:** Unfortunately, the widespread availability of high-speed Internet has also facilitated the proliferation of illegal linking, peer-to-peer (P2P) file sharing, video streaming, torrent, and stream-ripping sites, many of which feature and profit from advertisements, often of legitimate products. In addition, an increasing number of users are downloading apps that facilitate infringement, and some piracy devices (PDs) come either pre-loaded with apps that allow users to circumvent subscription services to access infringing content or are accompanied by instructions to download such apps. While the creative industries have made a dent in online piracy in India, particularly through the use of site-blocking orders at the Delhi High Court, IIPA notes that overall piracy trends are troubling. IIPA continues to request an explicit, stand-alone obligation to impose civil and criminal liability and penalties on piracy apps that provide streaming or direct download access to unauthorized versions of titles on mobile and desktop devices. The Government of India should also facilitate a standardized enforcement framework to enable the take-down of infringing apps, which may involve a national-level unit, coordinating with state-level enforcement if appropriate.

Internet piracy is the greatest threat to the copyright industry sectors in India. Major websites providing unauthorized access to film and television content continue to be popular, including *ExtraMovies*, *TamilMV*, and pirate brands like *KatmovieHD*.<sup>18</sup> India-based video-hosting services offering free storage, as well as premium services for priority encoding, such as *DoodStream*, are growing in popularity at a global level. *DoodStream* had 137 million visits in November 2022, according to SimilarWeb. *DoodStream* is not only popular with *Telegram* groups but is also utilized by many infamous piracy sites wherein site operators can simply embed the *DoodStream* link within their website. It is hosted by DDoS-Guard LTD in Russia and by OVH SAS in France. *Pikashow* is a piracy app which, according to Motion Picture Association (MPA) analysis, has been downloaded over 10 million times across various mobile application stores and *Telegram*. The application sources most of the content directly from the servers of copyright holders (live TV and video-on-demand (VOD)) by circumventing their TPMs and then hosts the stolen content on third-party cyberlockers and user-generated content platforms. The operator is believed to be located in India.

In addition to blocking pirate sites, as discussed in greater detail below, MPA is engaged in search engine delisting with *Google*, which has been shown to help increase the efficacy of site-blocking actions. The creative industries have become aware of *Telegram*'s role in piracy in recent years, and while industry is now engaging directly with *Telegram* to request that it better address piracy on its platform, *Telegram* should be more accountable in relation to infringements occurring or being facilitated over its service. To date, enforcement actions have been brought successfully in India requiring *Telegram* to disclose pirate users' details, but *Telegram* is appealing.<sup>19</sup> While the

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<sup>13</sup> Id.

<sup>14</sup> FICCI, EY, *Tuning into consumer: Indian M&E rebounds with a customer-centric approach*, March 2022, available at [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_in/topics/media-and-entertainment/2022/ey-ficci-m-and-e-report-tuning-into-consumer\\_v3.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2022/ey-ficci-m-and-e-report-tuning-into-consumer_v3.pdf), p. 12.

<sup>15</sup> Id. at p. 62.

<sup>16</sup> Id.

<sup>17</sup> Id. at 16.

<sup>18</sup> *KatmovieHD* changes domains frequently to avoid site blocking and tracking. This has resulted in 44 domains currently associated with the website. The most recent domain, *KatmovieHD.rs*, had 15.56 million visits with a total of 31.69 million visits over all currently active domains in August 2022, according to SimilarWeb. *KatmovieHD.rs* was ranked 4,083 globally and 361 in India in August 2022, according to SimilarWeb. All active domains utilize Cloudflare's reverse proxy service to mask their location. The Motion Picture Association (MPA) and other rights holders' organizations are targeting the sites and their social channels for takedown in India, Indonesia, and elsewhere.

<sup>19</sup> *Telegram* is an instant messaging service based in Dubai available on Windows, iOS, Android, and Linux that allows users to create channels and groups, upload and share content, and run livestreams. *Telegram* has an active userbase of around 550 million accounts, with particularly significant reach in Russia, India, and Indonesia. One of its growth drivers is the presence of infringing copyrighted content on the platform and core features that support the sharing and discoverability of unauthorized files, protect anonymity of uploaders, and make consumption easy and convenient, which supercharges the circulation of infringing content, whether deliberate or accidental. *Telegram*'s Terms of Service make no mention of copyrighted content. While there has been improvement in compliance rates for the

operators of *Telegram* are sometimes responsive to rights holders' requests to take action against infringements found or facilitated over its platform, IIPA recommends that more be done to encourage KYBC disciplines on intermediaries like *Telegram* and to encourage operators like them to responsibly cooperate.

Recorded music piracy is also a major issue in India. Despite considerable growth in the use of licensed streaming services, both domestic (e.g. *Gaana*, *JioSaavn*, *Wynk*) and international (*Amazon Music*, *Apple Music*, *Spotify*), globally India had one of the worst rates of music piracy in the world.<sup>20</sup> According to the International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2022 (MCS), almost three quarters of internet users (73%) used unlicensed or illegal ways to listen to music in India.<sup>21</sup> The major piracy issue facing the recorded music industry in India is stream ripping. The most popular stream-ripping site used by Indian Internet users is *ssyoutube.com*, which received more than 200 million visits from India in the third quarter of 2022. The site was the 56th most popular site of any kind in India in September 2022. Other popular stream-ripping services include *Savefrom.net*, which received over 66 million visits in the third quarter of 2022 and *Y2Mate*, which received over 49 million visits from India during the same period, according to SimilarWeb data.

However, stream ripping is not the only piracy problem in India. The most popular domestic music download site after *MXTube* is *pagalworld.pw* (previously *pagaworld.mobi*), which ranked the 206th most popular web site in India with more than 43 million visits from India during the third quarter of 2022. The Indian music download site *mr-jatt.im* received more than 11.0 million visits from India during the same period.

BitTorrent sites and cyberlockers also remain popular. For instance, the cyberlockers such as *AnonFiles* and *Zippyshare* received over 18 million and over 6 million visits from India respectively during the third quarter of 2022. India is the largest source of visits worldwide for many major piracy destinations, such as *ssyoutube.com*, *yt1s.com*, *masstamilan.in*, and *proxyrarbg.com*. Infringements of rights in sound recordings also are prolific on unlicensed user-uploaded content short form video apps. Other kinds of infringing mobile apps that are available on mainstream app stores and are popular in India include stream-ripping apps and MP3 download apps.

For 2021, the video game industry reports that India remained fourth in the world (where it ranked in 2021 and 2020) in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public P2P networks, as well as in infringement of games for PCs and mobile devices.

**Online Book and Journal Piracy:** The scale of online piracy of books and journals is likewise a threat to the publishing industry. *Sci-Hub* and *Libgen*, two notorious pirate sites, continue to provide access to millions of infringing copies of journal articles and books in the country. Despite the Delhi High Court having issued blocking orders against several notorious online sites engaged in the unauthorized distribution of pirated content, it is curious that a similarly expeditious grant of injunctive relief against an adjudged pirate site such as *Sci-Hub* has not yet occurred as proceedings continue. At the outset of the litigation initiated by two journal publishers in December 2020, the site operator agreed to refrain from further uploading of purloined articles to the site. Yet, in September 2021, the pirate operator—in open contravention of the obligation undertaken with the court—uploaded a further 2 million journal articles illegally obtained from journal publisher databases. To date, *Sci-Hub* boasts that it has over 88 million articles and books that it provides for free without permission from the copyright owner. In a positive development, in August 2022,

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removal of infringing links and channels, *Telegram*'s response to takedown notices varies greatly, from almost immediate to no response at all, despite multiple re-notifications. Furthermore, instances of online piracy accessed through *Telegram* remain high overall due to the ease with which the same content can be uploaded to other channels, discovery of infringing content that is facilitated by piracy bots, and inconsistent enforcement of its repeat infringer policy. In 2020, the European Commission placed *Telegram* on its Counterfeit and Piracy Watch List. Enforcement actions have been brought successfully in India to require *Telegram* to disclose information on alleged infringers, and in Israel and Italy requiring *Telegram* to block access to infringing content. *Telegram* continues to be a platform of concern.

<sup>20</sup> See Andy Chatterly, Muso, *Discover Piracy by Industry Data Review*, 2021, p. 9, available for download at <https://www.muso.com/wp6-2021-muso-discover-piracy-by-industry-data-review>.

<sup>21</sup> IFPI, *Engaging with Music 2022*, p. 25, available at [https://www.ifpi.org/wp-content/uploads/2022/11/Engaging-with-Music-2022\\_full-report-1.pdf](https://www.ifpi.org/wp-content/uploads/2022/11/Engaging-with-Music-2022_full-report-1.pdf).

a domestic publisher successfully obtained a court order requiring Internet service providers (ISPs) to block access to four domains of *Z-Library*, a notorious *Libgen* mirror.<sup>22</sup>

**Unauthorized Book Copying, Digitization, and General Indexes:** The publishing industry continues to be concerned with the unauthorized commercial-scale photocopying<sup>23</sup> and unauthorized reprint of trade consumer books, academic textbooks, and professional books (for both the domestic and export markets). While India-only, lower-priced editions of textbooks are made available in the domestic market to meet domestic needs, these editions continue to be found in several 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). There are also concerns regarding book scanning and digitization efforts using high-quality book scanning hardware that may provide the scanned and digitized copies to unauthorized online repositories of infringing digitized book content as well as so-called general indexes that enable search functionality, which either leads to aforementioned scanned and digitized books or infringing digital copies of books obtained via online platforms that engage in large-scale commercial level exploitation of pirated files (e.g. *Sci-hub* and *Library Genesis*).

**Unauthorized Camcording:** Unauthorized camcording of films during their initial release windows is an ongoing problem in India, and criminal referrals against suspects to date have not resulted in meaningful steps to deter such activities. For example, in the 2015 high-profile case *Rahul Mehta v State of Madhya Pradesh*, the Jabalpur police arrested a piracy syndicate responsible for camcording and distributing *Baahubali*, one of the highest grossing Indian movies of all time. The accused were granted bail by the trial court. However, as of 2022, the case remains pending, and there is no record of any hearings occurring after 2017. Frustratingly, the accused were arrested again in 2017 for camcording *Baahubali 2*, the film's equally successful sequel. Due largely to the pandemic, numbers for 2020 and 2021 are anomalous. The high number of past audio cams reflects the strong demand for local language audio files, which are sourced for various international release groups. State authorities should undertake efforts to tackle this pervasive problem. The Government has included anti-camcording provisions in the 2021 Cinematograph (Amendment) Bill, which awaits clearance in Parliament. India should swiftly enact legislative amendments to outlaw unauthorized recording of all or part of an audiovisual work in a cinema, which would improve enforcement.

**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**

India is hindered by widespread piracy and a challenging enforcement environment, both at the National and State level. The courts in certain states like Delhi are functioning well, but overall enforcement coordination efforts throughout the states are uneven and require a more robust and proactive approach to address some of the serious problems the creative industries face, such as the proliferation of pirate video hosting and pirate infrastructure services like *DoodStream.com* and *WHMCS Smarters*, as well as piracy apps such as *Pikashow*.

The courts have expanded their reach incrementally, now addressing “proxy portal” sites used principally to circumvent injunctive orders, and in 2022, the Delhi High Court issued orders to block pirate brand domains and a cyberlocker that facilitated massive infringement in India. Data indicates that these actions are having a positive impact in reducing traffic to piracy sites and migrate users to legal VOD services. This said, India remains one of the world's most challenging major economies with respect to the protection and enforcement of IP, in no small part due to the

<sup>22</sup> See Aron Deep, Entracker, *Delhi district court behind Z-Library block in India*, August 18, 2022, available at <https://entrackr.com/2022/08/exclusive-delhi-district-court-behind-z-library-block-in-india/>.

<sup>23</sup> Unfortunately, the 2017 decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

absence of a centralized and nationally coordinated enforcement department. It is unfortunate that the NIXI ceased suspending the use of domains if based on false or fraudulent Whois information. The current unavailability of timely and accurate Whois identifying information, which is in part due to NIXI's view of General Data Protection Regulation (GDPR) online privacy obligations imposed in Europe, is now taking its toll on enforcement efforts in India.

**Criminal Enforcement and Case Developments:** The Telangana Intellectual Property Crime Unit (TIPCU), which launched in 2016, was unfortunately disbanded in recent years. The Maharashtra IP Crime Unit (MIPCU), formerly the Maharashtra Cyber Crime Unit (MCCDCU), has been active since 2017. MPA was heartened to see MIPCU's first enforcement action in July 2021 against a pirate service called *Thop TV*; however, this remains the Unit's only criminal enforcement action to date. MIPCU has also started to invoke Section 160 of the Code of Criminal Procedure to escalate cases when app operators do not comply with infringement notices. In addition, some practical hurdles remain in relation to the record industry's priority services, such as stream-ripping and cyberlocker services which, so far, have not been subject to any blocking orders.

The lack of enforcement against online piracy operators remains inadequate given the current scale of the problem. Enforcement agencies' lack of understanding of IP crimes, a 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 are all areas that need to be addressed. Additionally, the prospect of seeking criminal enforcement for IP violations is very daunting due to the absence of a centralized IP enforcement authority, the lack of effective inter-agency cooperation at the national and state levels, and the overarching lack of prioritization afforded to IP crimes. 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 urgently elevate the priority afforded to IP crimes and to improve the coordination of its enforcement framework against criminal piracy syndicates.

In May 2022, the Supreme Court of India held that offenses under Section 63 of the Copyright Act, 1957 are cognizable and non-bailable offenses.<sup>24</sup> Offenses under section 63 being cognizable allows the police to conduct investigations and register first information reports (FIRs) without the permission of a magistrate and allows arrests of persons against whom there is an allegation of knowingly committing or abetting copyright infringement without a warrant, putting the crime of copyright infringement in the category of more serious criminal offenses. Further, the person cannot be granted bail as a matter of right but will have to approach the court for the same. The decision essentially gives the police greater ability to respond in an agile manner to copyright infringements being committed within their jurisdictions. IIPA urges the Ministry of Commerce and Industry to analyze and, as necessary, seek to amend, any penal provisions or ancillary provisions related to Section 63 that may still lead to conflict with this important Supreme Court judgment.

In June 2022, the Delhi High Court granted an interim injunction in favor of plaintiffs directing the domain registrars and ISPs to block access to the infringing Android-based apps and websites that provide .APK (Android Package Kit) files that enable the sideloading of such apps.<sup>25</sup> This decision is a positive development in relation to the availability of injunctions with respect to intermediaries that support the distribution of infringing mobile apps. IIPA hopes that this case will serve as a precedent to help address the issue of infringing mobile apps, particularly in light of the large-scale infringement occurring via short form video apps.

IIPA also recommends the following steps: (i) India should focus on inter-state operations of organized crime units engaged in piracy and establish state-level enforcement task forces that are coordinated, systematic, and efficient; (ii) India should establish a National Copyright Enforcement Task Force (NCETF), including the Enforcement Directorate and Central Bureau of Investigation (CBI), that is overseen by the Department for Promotion of Industry and Internal Trade (DPIIT) and directed at copyright infringement occurring online and on mobile devices; (iii) India

<sup>24</sup> *M/s Knit Pro International v The State of NCT of Delhi & Anr.*, Criminal Appeal no. 807 of 2022, Order dt. May 20, 2022, available at [https://www.livelaw.in/pdf\\_upload/copyrightinfringementcognizable-418594.pdf](https://www.livelaw.in/pdf_upload/copyrightinfringementcognizable-418594.pdf).

<sup>25</sup> *Star India Pvt. Ltd. & Anr. v Ashar Nisar & Ors.*, CS(COMM) 214/2022, June 4, 2022, available at <https://dot.gov.in/sites/default/files/letter%20to%20ISPs%20dated%2006-09-2022%20CS%20Comm%20.pdf?download=1>.

should establish a centralized IP crime unit within the CBI's Cyber Crime Detective Unit; and (iv) India should focus on training prosecutors and police officers on the seriousness of IP offenses and their links to organized crime.

**Civil Enforcement and Case Developments:** In April 2019, the Delhi High Court firmly established permanent injunctive relief as a remedy to curtail online infringement in India. In *UTV Software Communication Ltd. v 1337x.To and Ors*,<sup>26</sup> 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 Hindilinks4u.To*, in which the court created a “doubly dynamic” system wherein domains can be added to an injunctive order while a case is still being adjudicated. In May 2022, the Delhi High Court issued the first “pirate brand” orders in *Universal City Studios LLC & Ors. v Vegamovies[.]run & Ors.*, CS(COMM) 265/2022,<sup>27</sup> meaning persistent infringers who use the same name or branding can now be blocked. No fault injunctive relief actions are now starting to address some of the more cutting-edge piracy problems like direct download cyberlockers (notably, MPA obtained orders to block the cyberlocker *mixdrop* on October 13, 2022, in *Universal City Studios LLC & Ors. v Mixdrop.co & Ors.*, CS(Comm) No. 663 of 2022),<sup>28</sup> as well as targeting other streaming video-hosting sites and services.<sup>29</sup> These positive precedents are encouraging, but more must be done to ensure pirates cannot simply circumvent the orders by changing domains, and India should address extremely high levels of piracy more holistically.

In another positive development, the Delhi High Court Intellectual Property Rights Division Rules entered into force in February 2022. The rules establish an IP Division of the Delhi High Court and seek to ensure that the judges hearing IP cases are well versed in IP laws and practice. These rules have had a positive impact on the adjudication of IP cases to date and could provide a model for other states.

However, despite these positive developments, India is home to pirate infrastructure providers that provide the backbone for piracy turn-key solutions that are used worldwide, such as *WHMCS Smarters*.<sup>30</sup> The law remains unsettled as to whether the commercial provision of infrastructure services to pirate operators, or other PaaS, is actionable. The jurisprudence is outdated with actual knowledge of a specific infringing act required. This should be clarified since, to date, operators of almost all turn-key services that provide pirates with the blueprint for their operations have been able to skirt liabilities. These home-grown providers, including services like *WHMCS Smarters*, can be stopped only if Indian laws keep pace by providing appropriate rules on secondary liability, knowledge, and constructive knowledge.

**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 *.in* domain registrations used by commercial-scale copyright infringers, and the state-based enforcement units, such as the MIPCU, to suspend the *.in* domains used by commercial-scale copyright infringers. Registrars like *GoDaddy* were also cooperative in cancelling these registrations based on false or fraudulent Whois data. However, a few years ago, NIXI ceased suspending the use of domains if based on false or fraudulent Whois information. The current unavailability of timely and accurate Whois identifying information, which NIXI blames on implementation of the EU's GDPR, is taking its toll on enforcement efforts in India.

**Misinterpretation of Section 31D:** Following the 2012 revision to the Copyright Act, the Department of Industrial Policy & Promotion drafted a 2016 Office Memorandum that sought to extend the Section 31D statutory license to Internet transmissions. The Bombay High Court held that the 2016 Office Memorandum went too far and

<sup>26</sup> *UTV Software Communication Ltd. v 1337x.TO et ors* April 10, 2019, available at [https://indiankanoon.org/doc/47479491/?\\_cf\\_chl\\_tk=2Fw0s2GRi5I\\_czPzh7h1hTkdcT9UJiFPxl\\_uWUJe3Hq-1674682018-0-gaNvcGzNCqU](https://indiankanoon.org/doc/47479491/?_cf_chl_tk=2Fw0s2GRi5I_czPzh7h1hTkdcT9UJiFPxl_uWUJe3Hq-1674682018-0-gaNvcGzNCqU).

<sup>27</sup> *Universal City Studios LLC & Ors. v Vegamovies.run & Ors.* CS (COMM) 265 of 2022, available at <https://indiankanoon.org/doc/106006995/>.

<sup>28</sup> *Universal City Studios LLC & Ors. v Mixdrop.co & Ors.* CS (Comm) No. 663 of 2022, available at <https://dot.gov.in/sites/default/files/Letter%20to%20ISPs%2004-10-2022%20CS%20Comm%20663%20of%202022.pdf?download=1>.

<sup>29</sup> For example, MPA was successfully able to block *vidcloud9.com* in India in 2021.

<sup>30</sup> *WHMCS Smarters* is an IPTV turnkey solution. Its IPTV software solution offers website design and development, customized apps on several platforms (including iOS, Android, and Windows), and a billing platform. They also offer an IPTV media player through the *IPTV Smarters Pro* app. The *IPTV Smarters Pro* app and *WHMCS Smarters* were developed by New Spark Technology, a company based in Mohali, India.

that Section 31D applies only to television and radio broadcasting and not Internet transmissions.<sup>31</sup> The decision in this case was most recently upheld on appeal in September 2022.<sup>32</sup>

**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. Following the initial and unexpected denial of its registration by DPIIT, PPL has approached the Delhi High Court asking the court to vacate the DPIIT decision. The case remains pending; however, DPIIT should reconsider its decision on its own initiative and re-register PPL, which represents the majority of domestic and international rights in India. The lack of accreditation for PPL India is causing confusion in the market and, worse, encourages users to avoid entering licenses for their uses of recorded music.

**Section 31D Royalty Rates:** Moreover, on December 31, 2020, the Indian Intellectual Property Appellate Board (IPAB) handed down its decision on the Section 31D royalty rate to be paid by commercial radio stations for the broadcasting of sound recordings and the underlying works. While the decision set new “needle hour” rates that increased the rate from the existing rate of 2% of the net advertising revenue rate, it still undervalues the rights in question. The decision has therefore been appealed to the New Delhi High Court. The validity of the determined rates was, however, extended only to September 30, 2021, because in February 2021, a new law was passed dissolving various tribunals in India, including the IPAB. Its powers and duties were transferred to the High Courts and Commercial Courts (including related to copyright matters). The process highlights a serious problem with the speed and lack of commercial certainty related to the statutory licensing and the rate-setting process in India. The recording industry’s priority is to secure a rate that represents the economic value of the use of sound recordings to broadcasters.

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

In 2012, Section 31D of the Copyright Act created a statutory license for the use of musical works and sound recordings for radio and television broadcasting (see above). In July 2021, the Department Related Parliamentary Standing Committee on Commerce (DRPSCC) Report on Review of the Intellectual Property Rights Regime in India recommended amending and extending Section 31D of the Copyright Act to include “internet or digital broadcasting” within the existing statutory licensing for radio and television broadcasting of literary and musical works as well as sound recordings found within that section. The Government of India held a consultation on the DRPSCC recommendation to amend Section 31D in September 2021, and IIPA, as well as other industry representatives, filed comments in opposition.<sup>33</sup> Since then, the Government of India has regularly convened stakeholder roundtables to raise the matter, which continues to create uncertainty over the proposed extension of 31D. IIPA is grateful for the U.S. Government’s intensive engagement with India, including as part of the U.S.-India Trade Policy Forum (TPF) meetings, the TPF Intellectual Property Working Group, and other bilateral engagement. The proposal to amend the Copyright Act remains inconsistent with India’s obligations under the WCT, the WPPT, and the WTO TRIPS Agreement. IIPA urges the Government of India to affirmatively reject the proposal and to provide certainty by committing to not extend the Section 31D statutory license to Internet transmissions.

In June 2022, the Ministry of Electronics and Information Technology (MeitY) proposed amendments to the existing Intermediary Guidelines and Digital Media Ethics Code. These proposed amendments were approved as final on October 28, 2022. In August 2022, MeitY also announced its intention to introduce legislation, the Digital India Act, which will replace the IT Act and will aim to ensure an open, safe, trusted, and accountable Internet for its users. IIPA

<sup>31</sup> See *Tips Industries Ltd. v Wynk Music Ltd. & Anr.*, N.M(L) 197/2018 in C.S. I.P(L) 114/2018, Bombay High Court (April 23, 2019), available at <https://indiankanoon.org/doc/156695842/>.

<sup>32</sup> See *Wynk Ltd. & Anr. v Tips Industries Ltd.*, Bombay High Court (Division Bench) (Commercial Appeal No. 424 of 2019)

<sup>33</sup> See IIPA Comments on India’s Review of the Intellectual Property Rights Regime in India by the Department Related Parliamentary Standing Committee (DRPSCC), September 3, 2021, available at <https://www.iipa.org/files/uploads/2021/10/IIPA-Comments-on-Review-of-the-Intellectual-Property-Regime-in-India-Final.pdf>.

urges the Government of India to use these reforms as an opportunity to improve the currently inadequate online liability framework in India.

On February 25, 2021, MeitY introduced the 2021 IT Rules, extending the scope of obligations on intermediary platforms. Although the 2021 IT Rules provide increased accountability and obligations on intermediary platforms, they do not improve the inefficient notice and takedown regime. By way of example, Rule 3(1) of the 2021 IT Rules provides for a takedown mechanism pertaining to complaints regarding copyright infringement. However, it directs the ISP to take down infringing content only upon being notified by an appropriate government authority. Further, the 2021 IT Rules provide a 36-hour deadline for removal, which is too long for infringing content to remain on the internet. Indian legislation currently provides ample opportunities for digital services, including User Upload Services, to avoid liability for copyright infringing content on their platforms. The recently adopted 2021 IT Rules have placed increased obligations on platforms; however, the rules lack clarity. Further, the 2021 IT Rules do not go far enough to address the flaws in the system. While the National E-Commerce Policy, 2020, includes positive proposals, it is not clear whether legislative action will follow.

It remains unclear how the Copyright Act and the IT Act interact, which is a cause of legal uncertainty and results in loopholes in copyright enforcement. In particular, the notice and takedown mechanism should be improved to prevent the reappearance of the same infringing content. IIPA suggests this should be an opportunity to meaningfully improve the ISP safe harbor provisions (and online copyright enforcement more generally).

To resolve the situation with the online liability regime, the Indian government should use the ongoing introduction of the Digital India Act to amend Section 79 of the IT Act, 2000 and corresponding IT Rules to limit its overbroad safe harbors and clarify the responsibilities of services eligible for them. Such changes are essential to ensure that Indian content creators and content owners are fairly rewarded and that the legal framework in India supports the sustainable growth of the digital content market, instead of shielding copyright infringing services in India. In doing so, the Indian government should (i) limit, to begin with, safe harbor protection to purely technical, automatic, and passive intermediaries; (ii) have ISPs implement measures that have been demonstrably effective in preventing or restraining infringement, including, among other things, disabling access to the specific 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. Despite the importance of this issue, no revised drafts or policy proposals have been seen since.

India is a member of the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement, and the WIPO Internet Treaties. While the Government of India believes its current law is treaties’ compliant, IIPA members believe the law falls short of full compliance in some respects. 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:

- 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 infringing content identified by the rights holder.
- Amend Copyright 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 52(1)(c):
  - Section 52(1)(c) establishes that “transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy” is not an infringement of copyright. However, the provision should be narrowed to be consistent with other jurisdictions and provide certain conditions.

- 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 clarify that service providers mentioned in Section 52(1)(c) must remove or disable access to the copyright infringing content or links to such content expeditiously when (i) the material has previously been removed from the originating site or access to it has been disabled; and (ii) the party giving the notification includes a statement confirming that the material has been removed from the originating site or access to it has been disabled, not only when a court orders it.
- 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 and devices;
  - Establish civil and criminal sanctions for acts of circumvention, trafficking in circumvention devices and software, and offering circumvention services; and
  - Eliminate the requirement of proof of a nexus between an act of circumvention and copyright infringement;
  - Narrow the scope of the overbroad and vague exception in Section 65A(2)(a), namely “doing anything referred to therein for a purpose not expressly prohibited by this Act.”
- Section 52(1)(b) establishes that the transient or incidental storage of a work in the technical process of an electronic transmission or communication to the public is not an infringement of copyright. However, the provision should be narrowed to include specific conditions.
- Chapter V—As applicable, increase the standard term of protection from life of the author plus 60 years, to at least life of the author plus 70 years to meet contemporary international standards of protection, and increase the term of protection for sound recordings and films from 60 to at least 70 years accordingly (The current 60 years is shorter than the term of protection in the United States, the EU, and in at least 73 countries worldwide).
- 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 three-step test codified in the Berne and WTO 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 rights holders’ right of public performance in respect of “the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority” (i.e., “social festivities associated with a marriage”). Although it is not uncommon for national laws to include limited exceptions for the use of certain copyrighted works in religious ceremonies, this exception extends to purely social festivities associated with a marriage, which are customarily subject to the public performance right.
- Enact proposed Cinematograph Bill amendments that would make it unlawful to use an audiovisual recording device to make or transmit an unauthorized copy of a motion picture (in whole or in part, audio or video) while it is being performed in a motion picture exhibition facility. Such amendments would address the problem of unauthorized camcording and illegal transmission of unauthorized content through cinemas.

**Information Technology Act and Information Technology Rules (2021 IT Rules):** The express inclusion of IP infringement as a ground for no fault injunctive relief under the IT Act or under the Information Technology (Intermediary Liability and Digital Media Ethics Code) Rules, 2021 (2021 IT Rules) would represent a major improvement in the IP enforcement system. It would also further increase the effectiveness of the current system in which some website blocking orders have been issued, including notable dynamic injunctions by the Delhi High Court, and would complement the work of law enforcement agencies in the area of domain name suspensions, where Indian authorities had previously made progress, before NIXI ceased suspensions. However, more progress is needed in tackling unlicensed services using alternative domain names, which is the most common practice.

## **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 include:

**Local Body Entertainment Tax (LBET):** In 2017, India rolled out a unified GST nationwide. Cinema tickets are subject to 12% and 18% GST rates, depending on ticket price. Effective October 1, 2021, the GST rate for “content licensing, right to broadcast and show original films” is taxed at a single rate of 18%. However, the 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 (particularly cinema tickets) 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 on cinema tickets 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.

**Cinematograph Bill:** The government should remove the revisional powers of the central government in the proposed Cinematograph Bill amendments. These powers would give the central government the authority to re-examine any certified film that has a valid certificate from the CBFC under Article 19(2) of the Constitution of India.

**WTO E-Commerce Moratorium:** IIPA urges the Government of India to agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2023, due to ongoing serious legislative, market access, and enforcement challenges, including collective management issues. IIPA also requests suspension or withdrawal of Indonesia’s Generalized System of Preferences (GSP) benefits, in whole or in part if, at the conclusion of the GSP investigation, the Government of Indonesia has not made adequate progress remedying the deficiencies identified below.<sup>1</sup>

**Executive Summary:** Indonesia is an important growth market for the creative industries. Several years ago, the Government instituted several positive changes to its copyright law and enforcement system and made progress towards liberalizing Indonesia’s investment framework. More recently, however, the Government shifted, maintaining screen quota and dubbing restrictions for imported films released theatrically, and contemplating changes that would weaken existing copyright protections and upend rights holders’ longstanding commercial arrangements. In addition, rights holders have noticed a slowdown and some uneven results related to disabling access to persistently infringing websites.

Under the revised Copyright Act and Regulation Nos. 14 and 26 of 2015, rights holders have successfully petitioned the Indonesian government to disable access to 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 ensuring faster response times to rights holders that apply through the Directorate General of Intellectual Property (DGIP) (as rights holders from the motion picture and television industry and the recording industry report recent significant delays in scheduling “verification meetings”). Those industries also urge the Government of Indonesia to provide a more efficient mechanism to address “domain hopping,” a common tactic pirates use to evade government-ordered site blocking. The Government of Indonesia also should 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*, *Ik21*, 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 2023 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 close existing gaps in protection. The DGIP 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 would be timely to revisit the revision of the Copyright Law given that the Indonesian Parliament ratified the Regional Comprehensive Economic Partnership (RCEP) in August 2022. It is critical that any new exceptions or limitations are confined to the three-step test, consistent with Indonesia’s international obligations, that existing problematic exceptions are narrowed or deleted, 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. 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 applicable to transfers of rights in musical works and performers’ rights, 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

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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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

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 to a protectionist path. Moreover, IIPA is concerned that the Government of Indonesia continues to threaten to dismantle the WTO e-commerce moratorium and has already issued regulations requiring importers to file a customs declaration to be made for any import of intangible goods through electronic transmission, a potential pre-cursor to implementing customs duties. Such duties could significantly harm the country's market for creative digital content and related services. Indonesia should reverse course and address the many 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.

## **PRIORITY ACTIONS REQUESTED IN 2023**

### **Enforcement:**

- Improve enforcement of the Copyright Law and Regulation Nos. 14 and 26 of 2015 to disable access to piracy sites and domains, by speeding processing times from application to verification meetings, and by establishing and implementing an efficient, dynamic, site-specific blocking to cover variants, new primary domains, redirects, mirrors, and proxy domains and sites; and, develop a comprehensive roadmap for addressing online piracy in consultation with both domestic and foreign copyright stakeholders.
- Combat unauthorized camcording piracy by enacting regulations or guidelines confirming that this activity is illegal, followed by implementation of a government program to socialize any amended regulations.
- Monitor the marketplace and take enforcement action to combat the proliferation of piracy devices (PDs) (including illicit streaming devices/set-top boxes) and piracy apps, as well as piracy syndicates operating sites such as *Indoxxi*, *lk21LkK21* (also known as *Dunia21* and *Layarkaca21*), and *Bioskopkeren*.
- Increase the number of enforcement actions against commercial-scale digital piracy services and bring criminal prosecutions through to convictions.

### **Legislation:**

- Amend or clarify Regulation Nos. 14 and 26 of 2015 on site blocking to speed timeframes from application to verification meeting, and to prevent “domain hopping” by providing that variants, new primary domain redirects, mirrors, and proxy sites can be added to the blocking list quickly and easily.
- Any revision of the Copyright Law should include amendments and implementing regulations in line with international commitments and best practices that repeal the articles on reversion of rights as well as broad copyright exceptions; clarify the rights of making available and communication to the public in line with Indonesia's treaty commitments and international best practice; 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; provide clear guidelines or regulations explaining that live streaming and camcording in cinemas are illegal; extend the copyright protection term of protection; strengthen the protection of RMI and TPMs; and properly define “piracy” to encompass acts of online copyright infringement and to remove the requirement of financial gain.

### **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.

- Remove barriers created by MR 34/2019, which maintained the 60% local screen quota, dubbing restrictions on imported films released theatrically, and further limited screen time by a single distributor, importer, or producer to 50% and engage international stakeholders in the process.
- Ensure that over-the-top (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 video-on-demand (VOD) providers and avoiding localization requirements.
- Improve regulations related to collective management 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 collective management organization (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 prohibiting customs duties on 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 some efforts to fight online piracy, all actions the government takes are based on applications by or information from the industry. The most significant concern continues to be online piracy, where enforcement action against commercial-scale piracy websites and services has been limited and has failed to noticeably reduce levels of online piracy or provided much needed deterrence. Homegrown piracy sites and “brands” such as *Ik21*, *Nonton*, and *Dunia21* have harmed the creative industry ecosystem for years, and the audiovisual industry is now seeing new phenomena, such as the use of dedicated Internet protocol addresses that evade domain name-based blocks, as well as the rapid growth in popularity of international repertoire such as anime, Korean and Chinese dramas (with Bahasa and English subtitles).<sup>2</sup> The motion picture and television and recording industries report such sites engage in domain hopping, and even after administrative site-blocking actions initiated by the creative industries and implemented by the government, the sites remain available through alternative domains and copycat sites. These industries assert the government should address this issue of domain hopping by allowing for quick disposition of blocking orders related to the “hopped” domains and copycat sites and 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.

**Internet Piracy and Mobile Network Piracy:** Increasing access to the Internet in Indonesia, including through mobile devices, means enormous potential exists for the legitimate commercial market for online dissemination of copyright works: services like iTunes, Spotify, JOOX, Netflix, Disney+, Hotstar, iFlix, CatchPlay, Vuie, Genflix, Mola TV, and several other international streaming services now operate in Indonesia. However, infringing cyberlocker, video linking and streaming sites, direct download sites with pirated content, as well as e-commerce marketplaces through which pirated content is sold, 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 thousands of piracy websites and domains since the process began in 2016. At the end

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

of 2022, Internet service providers (ISPs) were ordered for the first time to block over 100 stream-ripping sites. 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, and copycats abound.<sup>3</sup> The rising popularity of anime as well as Korean and Chinese dramas in Indonesia means sites like *anoboy*, *gogoanime*, and *9anime* have proliferated, while global top 25 piracy sites like *Soap2Day* continue to operate. 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. 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. 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.

*Telegram* is an instant messaging service based in Dubai, but with particularly significant reach in Indonesia. *Telegram* is available on Windows, iOS, Android, and Linux and allows users to create channels and groups, upload and share content, and run livestreams. *Telegram* has an active userbase of around 550 million accounts. One of its growth drivers is the presence of infringing copyrighted content on the platform, core features that support the sharing and discoverability of unauthorized files, protect anonymity of uploaders, and make consumption easy and convenient, supercharging the circulation of infringing content, whether deliberate or accidental.<sup>4</sup> *Telegram*'s Terms of Service make no mention of copyrighted content. Enforcement actions have been brought successfully in India to require *Telegram* to disclose information on alleged infringers, and in Israel and Italy to require *Telegram* to block access to infringing content.

The piracy app *LokLok* is popular in Indonesia and a major problem for the audiovisual industry. This website has grown significantly in popularity in Southeast Asia in recent years, in particular in Indonesia, the Philippines, and Malaysia. It appears the app was developed in China by local operators, who evade local detection and enforcement action by implementing a China geoblock. According to SimilarWeb, *loklok.com* and *loklok.tv* together attracted more than 3 million monthly visits by more than 800,000 unique visitors in August 2022. Even though it has been taken down six times in the Google Play Store, listings have quickly reemerged, and three *LokLok* app listings are still available there that have been downloaded more than 2 million times.

**Music Piracy:** Online copyright piracy in Indonesia, like elsewhere, keeps evolving. Piracy is tenacious and efforts to thwart it must remain powerful and nimble. In recent years, stream ripping emerged as the major piracy threat to the recorded music industry, and both international and domestic language stream-ripping sites have provided Internet users with the bulk of illegal downloads. The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2022 (MCS) found that 80% of those interviewed (a nationally representative sample of 2,000 16- to 44-year-olds in Indonesia) had pirated music in the previous month. This was the second highest piracy rate in the MCS and significantly above the global piracy average of 30%. Three-quarters (74%) in Indonesia said that they regularly used stream ripping to illegally download music.

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<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 Internet protocol 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*. 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> In 2020, the European Commission placed *Telegram* on its Counterfeit and Piracy Watch List.

The most popular stream-ripping site in Indonesia was *Y2mate.com*; according to the MCS, 25.7% of respondents said they had used the site in the previous month to download music. Data from SimilarWeb supports the popularity of this site: there were more than 86.7 million visits to *Y2Mate* from Indonesia alone in the fourth quarter of 2022. The site is the 35th most popular website of any kind in Indonesia. IFPI's survey also found that 19.9% used stream-ripping site *SaveFrom*. Again, SimilarWeb data supports these findings, recording 59.2 million visits to *YTMP3* from Indonesia in the fourth quarter of 2022. Stream-ripping sites aimed at an Indonesian audience and focused on domestic music content were also popular. *Downloadlagu321.net* had 9.4 million visits from Indonesia in the fourth quarter of 2022 and *metrolagu.site* had 13.3 million visits over the same period; 93% of all visits to *downloadlagu321* and 63% of visits to *metrolagu* were from Indonesia. Stream-ripping apps are also popular in Indonesia, as are apps that impermissibly provide access to music content from streaming searches, such as YouTube.

Indonesia also has a major issue with a number of well-known cyberlockers. IFPI's MCS found that 49% of respondents used cyberlockers to download pirated music. Cyberlocker *Zippyshare.com* remained the single most popular cyberlocker in Indonesia, visited by 18.5% of the MCS sample. SimilarWeb recorded 72.7 million visits to the site from Indonesia in the fourth quarter of 2022. More people visited the site from Indonesia than from any other country in the world.

**Unauthorized Camcording:** Illicit camcording continues to pose a threat in Indonesia. Because of the widespread closure of theaters in 2020, 2021, and into 2022 due to the COVID-19 pandemic, illicit camcord data for the region is anomalous. However, illegal camcording and live-streaming piracy remains a big concern as theaters have re-opened. The government should issue clear guidelines and regulations on illegal camcording and live-streaming piracy, including expressly outlawing these activities and prioritizing a decrease in these illegal acts. Further, the government should seek to strengthen enforcement against illicit camcording by: (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>5</sup>

**Piracy Devices (PDs) and Apps:** Streaming devices that run with proprietary infringing apps that enable access to live channels and VOD content are readily available in Indonesia via online marketplaces, including popular illicit streaming devices (ISDs) *UnblockTech*, *EVPAD*, *SVI Cloud* (all manufactured in China), and *SYBER TV*. This content may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale as an "after sale" service, or loaded by the users themselves. Sellers of PDs often do not install the infringing apps and thus claim that the manufacture or sale of the devices themselves is not illegal. However, in a 2021 survey conducted under the auspices of the Asia-Pacific Economic Cooperation (APEC) Intellectual Property Enforcement Group, the Indonesian government expressed that Indonesian law may indeed prohibit the boxes.<sup>6</sup> 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, as well as to take action against key distribution points for devices that are being used illegally. As mentioned above, the *loklok* piracy app remains a significant problem for the audiovisual industry.

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<sup>5</sup> Preferably, an express provision would have been added to the Explanatory Memorandum to the 2014 Copyright Law, 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, November 11, 2011.

<sup>6</sup> In an Asia Pacific Economic Cooperation (APEC) initiative in 2021, Indonesia participated in an "Intellectual Property Experts Group" (IPEG) survey of laws and activities designed to obtain information about the domestic treatment of ISDs in APEC economies. The government indicated in that survey that it believes "the current civil damages and/or penalties provided for in your economy viewed as being sufficient to deter the sale or distribution of ISDs." See Report on Results of Survey Questionnaire on Domestic Treatment of Illicit Streaming Devices by APEC Economies Intellectual Property Experts Group, March 2021, available at <https://www.apec.org/publications/2021/03/apec-report-on-domestic-treatment-of-isds> (noting that ISDs are a "serious problem" and noting relevant laws, including "Joint Ministerial Regulations Between Minister of Law and Human Rights and Minister of Communication and Informatics Number 14 Year 2015, Number 26 Year 2015 Regarding Implementing Closure of Content and /or Access Rights to Use Violations of Copyright and/or Related Rights in the Electronic System.").

## **ENFORCEMENT UPDATES**

Although the Indonesian government has taken 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. The Indonesian video piracy landscape, for instance, is dominated by three syndicates: *Indoxxi*, *Lk21* (also known as *Dunia21* and *Layarkaca21*), and *Bioskopkeren*. The government needs to increase the priority afforded intellectual property (IP) enforcement with specific focus on these three crime groups. Levels of online piracy are unlikely to decrease unless the government takes meaningful enforcement action against the owners/operators behind these syndicates.

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. With rare exceptions, online piracy operators rarely receive deterrent-level penalties.<sup>7</sup> 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 with a focus on close collaboration between police cybercrime units and local and international rights holders and a government/industry anti-piracy consumer awareness campaign, with the goal of encouraging consumers to migrate to legitimate offerings.

**Regulation Nos. 14 and 26 of 2015:** Under the revised Copyright Act, and Regulation Nos. 14 and 26 of 2015, rights holders have successfully petitioned the Indonesian government to disable access to over 5,000 domains resolving to sites that primarily infringe or facilitate infringement of copyright, including sites like *Fmovies.to*, *Soap2Day*, and *Rarbg.to*, as well as those linked to the aforementioned criminal groups running piracy sites like *Indoxxi*, *Lk21*, and *Nonton*. The Regulations have led to disruptions of piracy and can be further improved by ensuring faster response times to rights holders (as required under the Regulations) who apply to the government and seek verifications from the government that the sites are suitable for blocking. Rights holders from the motion picture and television industry and the recording industry urge that these “verification meetings” should occur with due speed (in line with the Regulations) and should be accompanied by changes to allow rights holders to address “domain hopping” – a common tactic pirates use to evade enforcement – by implementing dynamic blocking (through further notification, or similar to that being carried out more efficiently in other markets, such as Korea).

Moreover, other than administrative enforcement, enforcement in relation to online copyright infringement is generally lacking, and even with administrative enforcement, speed of action appears to have slowed and become more difficult during the COVID-19 pandemic. Indonesian authorities should act in accordance with the regulations and with efficiency as the pirates are currently able to adjust quickly meaning any delays in enforcement exacerbate the problem. It is hoped that authorities will take the further step of criminally investigating and holding to account the operators of major online piracy services.

**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>

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<sup>7</sup> The operator of *Dunia21* was arrested in September 2020 and convicted of violating several provisions of the Criminal Code. He received a sentence of fourteen months imprisonment by the Jambi District Court in April 2021. See Dedy Nurdin, *TribunJambi.com*, *Perpetrator of Spruce Family Film Hijacking Sentenced to 14 Months in Prison*, April 27, 2021, available at <https://jambi.tribunnews.com/2021/04/27/pelaku-pembajakan-film-keluarga-cemara-dihukum-14-bulan-penjara>.

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

## **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 Regulation Nos. 14 and 26 of 2015, which sought to implement 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 WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).

**Concerning Provisions in the Copyright Law:** DGIP has considered a partial revision of the Copyright Law, focusing on copyright ownership and collective management issues, as well as exceptions and limitations. While revision is welcome in principle as it provides an opportunity to address a number of long-standing concerns of rights holders, the direction of planned reform is far from clear. 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, DGIP 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. The priority for the Indonesian government should be to remedy the concerns listed by IIPA in its submissions on copyright shortcomings and delineated below. 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., WTO TRIPS Agreement, Article 13). Imposing collective management 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.

As mentioned, any revision of Indonesia's Copyright Law should address, in the first place, certain provisions that raise serious concerns, including, in some cases, clarifying such provisions through implementing regulations. These provisions include:

**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 WTO TRIPS Agreement, the Berne Convention, WCT, and WPPT. For these reasons, it should be deleted in its entirety.

**Termination of Transfers:** Articles 18 and 30 of the Law provide that rights in literary and musical works and performers' rights that are transferred pursuant to a flat fee shall revert automatically to authors and performers after 25 years, while Article 122 extends the effect of this rule retrospectively to all transfers before the entry of Articles 18 and 30. This 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 and business uncertainty. One apparent result of this 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 definition 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 to 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-deterrent 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 defining a number of different uses for a wide array of purposes as not copyright infringement, 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 the WTO TRIPS Agreement, the Berne Convention, WCT, and WPPT, despite a well-intentioned, 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 the WTO TRIPS Agreement, the Berne Convention, WCT, and WPPT.

**Rights Management Information (RMI) Violations and Technological Protection Measures (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, Invalidation, 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 provision appears to be 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, no legal remedies, such as preliminary injunctions, are available to the claimant

before submitting the claim. In that respect, Indonesian law does not meet the standards of the WTO 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 *inaudita altera parte*.

**Statutory Damages:** Indonesian copyright law does not provide statutory damages. 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 grant damages based on only 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 also inconsistent with Article 61 of the WTO 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 to remove the requirement of financial gain.

**Regulation 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>9</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. Regulations should be introduced that provide a clear legal basis to prohibit camcording (as well as live streaming) in cinemas and 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 extension will provide greater incentives for production, 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>10</sup> There is no justification for such varied treatment, and protection should be extended accordingly.

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<sup>9</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>10</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:** Because 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:** The Indonesian government should seek to improve transparency and accountability of online service providers and intermediaries. It should encourage 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. Regulations should: (i) 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 (ii) 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,” which would allow rights holders to take direct action. The regulations 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 if they have actual or constructive knowledge of infringing content or links on their services or networks, 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 for those intermediaries that have actual or constructive knowledge of infringing content or links on their services or networks.

## **MARKET ACCESS AND RELATED ISSUES**

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 to a protectionist path. Indonesia should reverse course and address the many 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.

**Negative Investment List (NIL):** 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>11</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.

**Problematic Provisions in the Film Law and Regulations:** In September 2019, without official notice, “Ministerial Regulation (MR34/2019) Concerning the Procedure for the Distribution, Exhibition, Export, and Import of Film” was issued. While these regulations have yet to be enforced, they maintain the 60% local screen quota and dubbing restrictions and add further limitations on screen time by a single distributor, importer, or producer to 50%. In recent years, domestic films have accounted for a growing and substantial share of the market and local films are seeing greater investment without the imposition of heavy-handed regulations. Moreover, these restrictions undercut Indonesia’s laudable 2016 decision to remove the film sector from the NIL.

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 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

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<sup>11</sup> The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

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.

**Over-the-top (OTT) Regulations:** The Ministry of Communication and Information Technology (KOMINFO) issued MR5, which came into effect in late 2020. MR5 requires domestic and foreign OTT service providers to register, comply with content takedown requests from authorities, and grants law enforcement authorities access to electronic systems and data. KOMINFO subsequently set a deadline for all platforms operating in Indonesia to comply with MR5 by the end of July 2022 or be blocked. Such requirements have the potential to stifle business development and add a significant barrier to market entry.

While a constitutional court case brought by two Indonesian broadcasters arguing that VOD services should be regulated under the Broadcasting Law (No. 32 of 2002) was ultimately unsuccessful, a long-anticipated revision of the Broadcasting Law could still be undertaken in 2023. IIPA remains concerned that a future revision of the Broadcasting Law could seek to extend existing problematic content quotas, content censorship (conducted by the Indonesian Broadcasting Commission – KPI), and ownership restrictions on television services (which collectively, have raised costs, created barriers to entry, and reduced consumer choice in the Pay-TV sector) to VOD services.

**Collective Management Organizations (CMOs):** 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. However, 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.

CMO regulations, including Implementing Regulations of Government No. 56 of 2021, “Government Regulation on the Management of Copyright Royalties of Songs and/or Music,” should be amended such that entities falling within the definition are owned or controlled by their member rights holders as well as confirming the non-profit nature of the organization, which are essential characteristics of a CMO. Further, CMO regulations should be introduced in accordance with international good practices and cover issues of transparency, accountability, and good governance. It is also essential that the tariffs set for the use of the collectively managed rights reflect the economic value of their use in trade.

**Advertising Restrictions:** Indonesia's Broadcasting Law 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, KPI's 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. As noted above, 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:** Indonesia’s Ministry of Finance issued a new regulation (Regulation No. 190/PMK.04/2022) requiring importers to file a Customs declaration to be made for any import of intangible goods through electronic transmission. This burdensome requirement severely disadvantages creative content seeking to enter the Indonesian market. Moreover, 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 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 VOD services.

## **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 (IPR) and market access issues and to determine whether Indonesia still qualifies for beneficiary status under the GSP. Under the statute, the President of the United States 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>12</sup> While the Indonesian government has made past progress towards meeting the GSP criteria, these efforts have stalled in recent years 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 the WTO TRIPS Agreement, 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, the Government of Indonesia may fail to provide equitable and reasonable market access to foreign rights holders in certain areas, as set forth in the GSP criteria.

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<sup>12</sup> 19 U.S.C. §§ 2462(c)(4) and (5).

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be placed on the Priority Watch List in 2023.<sup>1</sup>

**Executive Summary:** Since 2020, the Government of Mexico has made significant improvements to the country's intellectual property (IP) regime as part of the government's endeavors to implement its obligations under the U.S.–Mexico–Canada Agreement (USMCA), which entered into force on July 1, 2020. These improvements include revising its Copyright Act and Criminal Code, as well as the Federal Protection of Industrial Property Act. Although Mexico ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) in 2002, the country did not implement these treaties until 2020. Two significant 2020 reforms include the addition of protection against the circumvention of technological protection measures (TPMs) and protection for rights management information (RMI)—key components of the WIPO Internet Treaties that gave rise to content delivery models like streaming and on-demand services. These developments are very positive, but insufficient because, in the absence of these provisions, the growth of the digital marketplace in Mexico has been significantly hampered by an IP legal framework that is decades behind international norms. One of the main problems in Mexico is not only the lack of implementing regulations for the 2020 reforms and other needed legislation, but also the lack of enforcement of existing laws.

Obstacles remain in compliance with high-level international standards for the recognition and protection of intellectual property rights (IPR), particularly those related to the digital environment and enforcement procedures. The 2020 reforms have not been translated into concrete results for the protection of IPR. Moreover, Mexico implementing the WCT, the full implementation of the WPPT, and the USMCA, with its reforms to the Federal Copyright Act and the Federal Criminal Code, is endangered by the constitutional challenges that were filed by the National Human Rights Commission and a minority of the Mexican Senate. Parts of the 2020 legal reforms are being challenged in court on constitutional grounds. Although the new laws remain in force in the interim, the challenges generated a chilling effect on practical implementation of the reforms, because authorities are not willing to address cases based on a law that has been questioned. Moreover, as of today there are no regulatory provisions, even when said provisions are necessary to fully implement the 2020 reforms. Furthermore, in 2021 and 2022, a series of legislative initiatives were developed to counteract the reforms made in the Mexican Copyright Act, with proponents of these initiatives claiming that the reforms unlawfully restrict freedom of speech. However, considering that the reforms to the Copyright Act were grounded in the new obligations of the USMCA, the challenges and initiatives to overturn them should be rejected. If the constitutional challenges or the legislative initiatives were to succeed, it would create a significant setback for IP rights holders and make Mexico less globally competitive. IIPA calls on the Mexican government to take the necessary actions to ensure that existing laws are fully enforced. IIPA also urges the Government of Mexico's executive and legislative branches to robustly defend the 2020 Copyright Reform from the constitutional challenges and bills that endanger Copyright Act key provisions. This task is crucial to secure the progress achieved. Moreover, these new laws will need to be properly enforced and adjudicated, with proper staffing and resources.

For a long time, criminal enforcement activity pertaining to IP infringement in Mexico has been uncoordinated and generally weak, slowed by procedural and structural deficiencies, a lack of prosecutorial initiative, and a lack of adequate resources. Unfortunately, the legal reforms of 2020 did not fully address these deficiencies. Under existing law, 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

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<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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

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. The Criminal Code, Copyright Act, and Federal Protection of Industrial Property Act need to be amended to delete “for profit” provisions and replace them with “acts carried out for commercial advantage or financial gain” and “significant acts not carried out for commercial advantage or financial gain that have a substantial impact on the interests of the copyright or related rights holder.” In this way, criminal penalties would be available in Mexico for commercial scale infringements without a direct economic benefit.

Due to the lack of political will to prosecute IP crimes, enforcement in this area has become non-existent. Additionally, budget cuts in recent years, including in several key IP enforcement agencies, particularly the Attorney General’s Office (FGR), have led to reductions or curtailments in effective enforcement activities, seizures, and campaigns. In many cases seized materials are not destroyed, and instead re-circulate into the marketplace.

Even though the Mexican Institute of Industrial Property (IMPI) has consistently ordered the destruction of infringing goods, the Federal Industrial Property Protection Law should be amended to ensure that in all cases that infringing goods be destroyed without unwarranted delay at the right holder’s request, and to clarify and simplify the existing procedures. Currently, the law requires an agreement between the parties to decide the destination of the infringing goods. Mexico should amend its current laws to require, at the rights holder’s request, that infringing goods be destroyed in all cases, and the IP-related laws be expanded to include that courts may order the destruction or disposal outside of commerce of “materials and implements that have been used in the manufacture or creation of the infringing goods” as stated in Article 20.81 of the USMCA.

Additionally, in late 2022, the president began the militarization of customs as a way to combat corruption, drugs, and smuggling. As of today, this action has not hindered customs functions. However, such militarization of customs in Mexico may lead to higher prices in international trade processes, by slowing administrative functions.

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, 2020 saw the enactment of new laws that 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, these amendments have not been in practice in Mexico’s legal regime due to the constitutional challenges before the Supreme Court of Mexico, as well as the lack of implementing regulations of the said amendments. The IP legal regime in Mexico is still missing some of the basic tools to address online infringements, including by spurring cooperation between rights holders, website owners, and service providers. For example, the current law specifies only general liability instead of a clear principle of secondary liability for those inducing or promoting copyright infringement, which would incentivize Internet service providers (ISPs) to take preventive actions.

## **PRIORITY ACTIONS REQUESTED IN 2023**

IIPA recommends that the Government of Mexico prioritize the following legal reforms and enforcement measures for 2023:

### **Legal Reforms**

- The Secretary of Culture and the Copyright Office (INDAUTOR) should publish the implementing regulations of the 2020 Copyright Act amendments. These regulations are a key element of the full implementation of numerous important provisions from the legislation based on the USMCA provisions.
- Implement all legal reforms required under the USMCA and other treaty obligations—in the Copyright Act, as well as in the Industrial Property, Criminal, and Criminal Procedure Codes by:
  - Ensuring full compliance with the reforms required under the USMCA, which remain incipient;

- 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;
- Implementing the presumption of copyright protection arising from copyright notices, exceptions to the circumvention of TPMs, and providing civil remedies for satellite and signal piracy;
- Granting Customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that the 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 (Mexico needs to amend its Copyright Act to provide for “pre-established” and/or “additional damages” consistent with the USMCA Article 20.82.6 that are “an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm” as set forth in Article 20.82.8);
- Enacting legislation to provide clear modern rules establishing secondary liability for copyright infringement, including for parties contributing to, 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.
- Reject a draft bill to reform the General Health Act (GHA) to include videogames as a General Health Issue.
- Clarify the scope of the Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities, in a manner that brings greater legal certainty for all stakeholders.
- Reject the Draft Decree repealing Section IX of Article 223 of the Federal Telecommunications and Broadcasting Law that aims to regulate translation contracts.

### **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 police and prosecutorial resources, and prominently using (and properly resourcing) the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI) 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); the reform does not clearly cover in civil laws “trafficking in devices or services or software” that circumvent TPMs and does not include proper sanctions in civil or criminal law for these activities as required by the USMCA;
  - Ensuring timely destruction of illegal goods seized in criminal and administrative actions to prevent their entry into the market;
  - Eliminating the welfare marketplaces initiative; and
  - Using *ex officio* authority to enforce the new anti-camcording criminal penalties.

### **Administrative Enforcement**

- Fully implement the USMCA enforcement obligations by providing the IMPI with sufficient resources, improved coordination with the Federal Police, and coordinated investigative and other support from the Scientific Police (in the National Guard).
- Providing INDAUTOR (Mexican Copyright Office) with more resources to increase and strengthen its mediation capabilities, including appointing a Director General, a position that has been vacant since October 2020.
- Encouraging the administrative bodies that enforce IP to cooperate with rights holders to effectively enforce IP in the digital realm.

## 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 IP 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 and 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 has increased the consumption of unauthorized materials, and, to a lesser extent, it has also driven traffic to legal sites. Although some large pirate websites are hosted locally, many infringing sites and services routinely accessed by individuals in Mexico are hosted outside of the country (e.g., in Peru, Chile, Colombia, Argentina, Germany, and France, among others).

A major concern that inhibits the growth of healthy legal markets is the increased availability of piracy devices, also referred to as illicit streaming devices (ISDs), including media boxes, set-top boxes, or other devices that allow users, in combination with illegal software applications (apps), to stream, download, or otherwise access unauthorized content from the Internet. The motion picture industry reports that subscription television piracy and the use of piracy devices are the two fastest growing piracy challenges in Mexico. The use of hardware devices and apps to pirate television programming, including subscription streaming services, is sophisticated and ubiquitous, with these devices widely available in Mexican illegal and grey markets. This type of piracy 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 pre-loaded with the apps, the apps are added as an after-sale service, or users can easily obtain the apps themselves to access infringing content.

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, per capita music revenue in Mexico is only US\$2.17 per year, compared with US\$29.45 per capita in the United States.<sup>2</sup> At the same time that music streaming services are developing, the most widespread source of music piracy is stream ripping. The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2022 (MCS) found a music piracy rate of 53% in Mexico, one of the highest in the world. The study showed that 49% of Internet users said they used a stream-ripping website or mobile app to download pirated music in the previous month, while 23% reported using a cyberlocker site to obtain pirated music in the same period. Reinforcing the popularity of pirate site *y2mate*, 9.3% of all Internet users aged 16 to 64 in Mexico said they had visited the site to download music in the last month. Popular stream-ripping sites include *y2mate.com* (34.3 million visits), *mp3y.download* (10.8 million visits), and *savefrom.net* (9.1 million visits) in the third quarter of 2022 based on SimilarWeb data. Cyberlockers are also widely used: *Mega.nz* received 32.5 million visits from Mexico in the same period, *1Fichier.com* received over 9.7 million visits, and *Zippyshare.com* received more than 5.4 million visits, all during the same period, based on SimilarWeb data.

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<sup>2</sup> International Federation of the Phonographic Industry (IFPI) Global Music Report 2022, p. 164 and 188.

The Entertainment Software Association (ESA) reports that in 2022, Mexico ranked 13th globally for the number of peer-to-peer (P2P) detections of infringing console-based video game files. 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”). Online communities, such as Team Xecuter FB on Facebook, further promote chip installation. Circumvention devices are typically manufactured overseas and shipped in component pieces that are then assembled in Mexico. Sellers on online marketplaces offer infringing goods and circumvention devices, including via some new marketplaces that have entered the region, and notably on *shopee.com.mx*, *mercadolibre.com.mx*, *linio.com.mx*, and *clasf.mx*. Top sellers on certain online platforms offer a wide variety of mod chips and mod services, and sell thousands of units of each, an indication of their high-volume business. ESA members report that sellers on online marketplaces offer loaded game cards with pirated games sold for between MXN\$8,000 and MXN\$10,000 (approximately US\$390 - US\$500) and circumvention devices for approximately MXN\$599 (approximately US\$30). Members, however, also report very high compliance rates with these marketplaces, including *Mercado Libre*, for the removal of these listings. One video game company reports having conducted 1,641 enforcements in Mexico in 2022, 82% of which involved circumvention devices.

Members generally report very high compliance rates with these marketplaces for the removal of these listings. However, an increasing concern is the appearance online of “plug and play” systems, on which copyrighted content is loaded but difficult to identify, because the online sellers are removing information about the games included within. Platforms then reject enforcement requests without evidence of sample purchases for each product, a costly and lengthy exercise for rights holders due to the volume and ease of manufacturing these products. Until the 2020 amendments, enforcement actions against distributors of circumvention devices have 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 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.

Arcade pirated consoles have become increasingly popular in online marketplaces, making their way into legitimate online marketplaces, such as *Mercado Libre* and Walmart, as well as in physical markets, including several popular department stores. Piracy is exacerbated by the presence of organized crime, and the lack of enforcement from criminal prosecutors. As an emerging and harmful form of piracy, digital streaming has been identified as a growing threat to video game rights holders that has superseded other sources of online infringing activities, such as downloads and cyberlockers. Furthermore, video game piracy is not only a challenge with respect to physical devices, such as counterfeit preloaded gaming consoles, modification, or circumvention devices, and other infringing video game accessories, it is also a major concern with respect to digital goods, such as cheats, hacks, and illegal primary and secondary game accounts.

**Camcord Piracy:** Criminal enforcement against illicit 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. 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, in recent years, many Motion Picture Association (MPA) member films have been sourced from illicit camcords in Mexican theaters. Following the 2020 theater closures due to the COVID-19 pandemic, camcords have resurfaced as a piracy problem in Mexico upon theaters reopening in 2021, and it is hoped the new laws and improved enforcement will properly address this problem. The independent sector of the film and television

industry (namely, the Independent Film & Television Alliance (IFTA)) is especially concerned about Internet piracy because of its harm to the legitimate online distribution platforms and services that provide revenue for financing the development of new creative works worldwide.

**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). Prior to 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. 2020 also saw Mexico amend the right of public communication in the Copyright Act 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. Thus, Mexico provides limited criminal sanctions for the manufacturing, importation, sale, or lease of devices or systems carrying satellite signals, but not for carrying cable signals. It also provides limited sanctions for acts of interrupting or interfering with cable and satellite signals and for decrypting satellite signals, but only if undertaken “for profit.” In accordance with the USMCA Article 20.86.3, Mexico should provide civil and criminal remedies for cable piracy, as well as satellite piracy. Additionally, Mexico needs to amend its Criminal Code to eliminate the “for profit” requirement for acts of decryption of satellite signals and include cable systems in the decryption laws.

**Hard Goods Piracy:** Although the copyright industries have prioritized the fight to stem digital piracy, hard goods piracy continues to present a challenge on the street and at physical markets. Three physical markets were on the U.S. government’s Notorious Markets 2021 List (released in February 17, 2022).<sup>3</sup> 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 counterfeit goods, video games, modified consoles, and game TPM circumvention devices; and (2) *Mercado San Juan de Dios* in Guadalajara, the largest indoor market in Latin America, with close to 3,000 vendors selling pirated films, music, video games, and video game TPM circumvention devices (sold by an estimated one-third of all of the market’s vendors). A third market, *La Pulga Rio* in Monterrey, which was added in 2020, has 300 stalls selling video games (as well as counterfeit apparel and products). One video game company reports that Mexico’s customs authorities seized over 35,000 units of preloaded consoles with unauthorized video games in 2022, most of which would have been sold via online marketplaces or informal markets.

## **COPYRIGHT ENFORCEMENT IN MEXICO**

The piracy situation in Mexico has gotten worse in the past year. Budget cuts in recent years, including in several key IP enforcement agencies (e.g., IMPI), have led to reductions or curtailments in effective enforcement activities. One of IIPA’s long-recommended enforcement measures 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 plan would help in many regions of the country where state and municipal government anti-piracy efforts continue to be weak overall, including local authorities that rarely work on combating piracy at all. Instead of a centralized coordinator for copyright enforcement, three federal agencies are 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 Act. 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 (*Secretaria de Gobernacion*) have assisted rights holders by providing information on illegal software websites and seizing the domain names of infringing sites. On the other hand, the president announced the militarization of customs as a way to combat corruption and for improving the fight against drugs and smuggling. Such militarization of customs in Mexico has led to higher

<sup>3</sup> USTR, 2021 Review of Notorious Markets for Counterfeiting and Piracy, February 17, 2022, available at <https://ustr.gov/sites/default/files/IssueAreas/IP/2021%20Notorious%20Markets%20List.pdf>.

prices in international trade processes by slowing administrative functions. Besides the costs, the delays may run contrary to the effort at the regional and multilateral levels to facilitate trade as provided in Chapter 7, Customs Administration and Trade Facilitation, of the USMCA and the Trade Facilitation Agreement of the World Trade Organization (WTO), where there are international commitments for the facilitation and clearance of goods, including those in transit.

## Criminal Enforcement

Since Mexico transitioned to an adversarial justice system in 2008, despite the availability of *ex officio* action in the Criminal Code, in practice prosecutors no longer prosecute criminal copyright cases without the filing of a complaint against an infringer. This change has resulted in prosecutorial delays of IP-related crimes, including at FGR. A complicating element in combating 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 requirement is followed as a general practice, even though the law does not explicitly require it. This complicates online or digital matters where no hard goods are involved. Furthermore, it is crucial that prosecutors understand that expert opinions are not required in every case to analyze genuine and counterfeit specimen. 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 result is delays and, in some cases, investigations have been dropped due to undertrained prosecutors, leading brand owners to re-introduce actions often against repeat offenders. The *peritos'* reports are a formalistic requirement that take much too long to complete, and the *peritos* are insufficiently trained in digital issues and often reluctant to cooperate with investigations and prosecutions. Rights holders then must appeal those decisions through a Control Judge, adding to the expense and delay of effective enforcement.

Additionally, although Article 5 of the Copyright Act 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. This is an additional formalistic practice of Mexican authorities that is contrary to the main purpose of international commitments on IP recognition and protection. 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 Act for all works (it exists for sound recordings), even after the 2020 amendments.

Lastly, Mexican courts generally do not consider file sharing via online networks to be a serious legal violation; this is a continuing obstacle to effective criminal enforcement. Consistent with its WTO TRIPS obligation, Mexico should have “effective” criminal remedies,<sup>4</sup> including “imprisonment and/or monetary fines,” available in cases of “willful . . . copyright piracy on a commercial scale.”<sup>5</sup> Unfortunately, Mexico’s remedies for commercial-scale piracy have not been effective and are hampered by the noted procedural hurdles.

Under the current Administration, FGR and UEIDDAPI have been reluctant to prosecute IP crimes, and there have been very few criminal enforcement actions regarding piracy and counterfeit goods, both in the online and physical realms. There exists a general understanding in all government offices that few to no actions against piracy and counterfeit goods are taken. Also, inside the UEIDDAPI is a general order to not perform any search warrants for these types of cases. Notwithstanding the significant and commendable progress made by the Government of Mexico in its efforts to strengthen the country’s IP regime consistent with its obligations under USMCA, there does not appear to be any political will to prosecute IP crimes in Mexico at this time.

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<sup>4</sup> The WTO TRIPS Agreement, Article 41.

<sup>5</sup> *Id.* at Article 61.

**Structural Reforms and Jurisdictional Issues:** IIPA continues to recommend several detailed “structural” reforms and agency actions to improve criminal enforcement that have been detailed in previous submissions.<sup>6</sup> IIPA urges the Government of Mexico to undertake, and to prioritize, the implementation of a national *ex officio* anti-piracy campaign. Another recommendation is for FGR to significantly improve its criminal enforcement actions against digital piracy. The piracy situation is getting worse in Mexico.

Mexico’s “welfare marketplace” (in Spanish: “*tianguis del bienestar*”) initiative, which takes goods that have been seized by the authorities and offers them to the general public, is problematic from a consumer health and safety standpoint,<sup>7</sup> and it clearly violates the “effective protection” clauses in the USMCA, the WTO TRIPS Agreement, and more than 30 trade agreements to which Mexico is a party.

A third structural recommendation is to coordinate municipal, state, and federal government criminal enforcement actions (across Mexico’s 32 states and 2,400+ municipal governments). Also, another long-standing IIPA recommendation has been 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 Act) gives IMPI the authority to order the destruction of infringing goods 15 days after a final court decision, which is an accelerated timetable. The copyright industries have also successfully utilized the *Ley Federal de Extinción de Dominio* (Federal Law for Property Forfeiture) in piracy cases, but materials seized in the FGR enforcement operations continue to find their way back into the black market. A fourth recommendation that is important to 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.

**Intellectual Property Rights (IPR) Expertise in the Judiciary:** A continuing weak spot in Mexican IP criminal enforcement is the judiciary. Training to improve IPR expertise among judges is an ongoing need—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*). The Supreme Court should 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 Octies). 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 and there are administrative penalties (fines) for non-compliance with notices. However, Mexican law should also require an ISP with actual knowledge of an infringement or that is aware of facts or circumstances from which infringement is apparent (so-called “red flag” knowledge), to take down material. Moreover, these amendments are subject to constitutional challenges before the

<sup>6</sup> See, e.g., IIPA 2019, 46-47, available at <https://iipa.org/files/uploads/2019/02/2019SPEC301MEXICO.pdf>; IIPA 2022, p. 68-69, available at <https://www.iipa.org/files/uploads/2022/01/2022-SPEC301-3.pdf>.

<sup>7</sup> See the U.S. Department of Homeland Security’s (DHS) Immigration and Customs Enforcement’s characterization of counterfeit goods as a danger to public safety here: <https://www.ice.gov/features/dangers-counterfeit-items>. See also, the DHS report from 2020 here: [https://www.dhs.gov/sites/default/files/publications/20\\_0124\\_plcy\\_counterfeit-pirated-goods-report\\_01.pdf](https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf). Finally, see the United Nations Office on Drugs and Crime Fact Sheet on counterfeit goods here: [https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit\\_focussheet\\_EN\\_HIRES.pdf](https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf).

Supreme Court that are still pending for final resolution, and the Mexican government has not issued domestic regulations to the Copyright Act to allow an effective implementation of the USMCA commitments.

The Mexican legal system includes general liability principles contained in the Civil and Criminal Codes, but it does not include explicit secondary liability for copyright infringement for ISPs and similar parties in the Civil Code. The safe harbors imply that such potential secondary liability exists, but IIPA urges the Government of Mexico to make such liability explicit in its law. 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 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.

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 termination of service contracts if subscribers infringe IPR. 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 Act 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 for statutory damages (e.g., additional or pre-established damages), and the USMCA-related amendments implemented in 2020 did not address 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, including 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.

## Border Enforcement

FGR and UEIDDAPI have ceased executing border measures to detain containers with pirated goods, including counterfeit video game consoles, controllers, and merchandise bound for the local market or stop in-transit shipments and trans-shipments. IMPI and Customs have created an effective partnership to fill in the void. These agencies have delivered timely and decisive results in the border measures field. In 2020, the video game industry brought seven suits with IMPI regarding border measures. As a result, approximately 40,030 miscellaneous infringing items were seized, most of which are illegal gaming consoles. 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 (Article 20.84).<sup>8</sup> Under the current code, Customs’ authority is unclear regarding seizures and retention of infringing materials. There are unnecessary, formalistic, and onerous requirements to initiate border actions. For example, absent an official order from IMPI, Customs authorities will not seize infringing products entering the country or detain them for more than a few hours, even where the material is infringing. Nonetheless, as of today IMPI has effectively addressed this issue through expeditious communications with customs to seize infringing goods.

<sup>8</sup> USTR, United States-Mexico-Canada Agreement (USMCA), Article 20.84, available at <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20%20Intellectual%20Property%20Rights.pdf>.

## **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), implementing its treaty obligations in 2020.

**Federal Law on Copyright (1996, as amended):** The 1996 Copyright Act 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; protection for TPMs and RMI; explicitly provide a making available right and right of communication to the public for works and recordings, as well as adaptation or transformation of the phonogram and rent of the original or copies of the phonogram; and sanctions for camcording, as well as against satellite and cable signal theft. However, more revisions are needed:

- Article 232bis limits liability and excludes certain activities relating to the manufacturing of, 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.
- While the reforms explicitly provide a making available right and right of communication to the public for works and recordings (see above), the Copyright Act should be amended to the extent Article 131, applicable to sound recordings, does not currently cover electronic reproductions of copies (i.e., phonograms) of sound recordings. The Copyright Act should also be amended to provide a reproduction right for performances.

For all the laws that were enacted, INDAUTOR is now preparing draft implementing regulations; unfortunately, this process is proceeding slowly for these much-needed new changes. This delay is very troubling considering the constitutional challenges underway, as well as the vocal opposition from many copyright opponents already seeking to weaken amendments to laws not yet implemented in an attempt to undermine the new reforms.

Some of the other key reforms that are needed, but were not achieved through the 2020 changes include:

- Establish explicit secondary liability;
- Raise civil penalties to deterrent levels—and including statutory, pre-established, or “additional” damages and the recovery of costs and attorney’s fees;
- Amend the Criminal Code to delete the “for profit” provisions (with the exception of the fix already 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”;
- Amend the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates;
- Amend the Administrative Code, Tax Code, and Criminal Code to (i) provide tax crime prosecution of copyright infringement (when it implicates tax liability) and (ii) increase administrative sanctions;
- Create presumptions of copyright ownership in civil, administrative, and criminal cases;
- Add criminal provisions to enforce against the production or distribution of piracy devices; and
- Severely restrict or eliminate exceptions to infringement for certain public performances where retransmission is not “for profit-making purposes” (Article 150, transmissions of works) and “no direct economic benefit is sought” (Article 151, neighboring rights). These exceptions are too broad, exceeding what treaties permit.

**Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities (Cultural Heritage Law):** On January 17, 2022, the “Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities” (the Cultural Heritage Law)<sup>9</sup> was published in the

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<sup>9</sup> *Ley Federal de Protección al Patrimonio Cultural de los Pueblos Indígenas y Afromexicanos*, January 17, 2022, available at <https://www.diputados.gob.mx/LeyesBiblio/ref/lfppccpcia.htm>.

Federal Official Gazette. The Law entered into force on January 18, 2022. The regulations to this law should have been issued within the 180 days following its publication. However, INDAUTOR asserts that the law can be enforced even in the absence of secondary regulations. The Law aims to register, classify, and document the traditional cultural expressions (TCEs) of indigenous communities, while also broadening their scope of protection, acknowledging their economic rights, and introducing an enforcement scheme. Although some of its objectives are aligned with WIPO's stance on the protection of indigenous peoples' traditional knowledge and TCEs, the way the Law is drafted creates legal uncertainty for a range of creative industries, given the absence of guidelines for the granting of authorization, the lack of clarity as to which communities are associated with a particular expression, and the fact that some expressions could be removed from the public domain.

The law also lists a catalog of administrative infringements that are unclear and ambiguous and establishes fines that range from US\$2,240.00 to US\$224,000.00. The law also establishes criminal penalties for the improper use and exploitation of the elements of cultural heritage of indigenous and Afro-Mexican communities or peoples, and for the cultural appropriation of elements of the cultural heritage of indigenous communities or peoples. Criminal penalties range from two to 10 years of imprisonment (double if the conduct results in "cultural ethnocide"). The U.S. Government should encourage Mexico to implement this initiative with transparency, broad stakeholder engagement, and adherence to good regulatory practices and USMCA commitments.

**General Law of Libraries:** On June 1, 2021, the General Law of Libraries (GLL)<sup>10</sup> was published in the Federal Official Gazette. The law establishes the Legal Deposit of Publications and mandates that copies of works (including audiovisual works) and phonograms need to be deposited with the Library of Congress, the Library of Mexico, and the National Library, in the case of materials other than press works (audio and audiovisual) and delivered to the Library of Mexico. A draft bill amending Articles 33, 39, and 43, and adding Article 34bis to the General Law of Libraries was presented before the House of Representatives on February 1, 2022. Instead of curing issues with the GLL that IIPA has delineated in previous filings,<sup>11</sup> the draft bill introduces new issues, such as requiring the delivery of works within 90 calendar days following the date of their commercial distribution.

**Bill to Amend the Federal Copyright Act:** On February 15, 2022, a draft bill, which adds Chapter VIII, "Literary Translation Contracts," to Title III of the Federal Copyright Act, and Articles 76bis to 76sexties was introduced in the House of Representatives. The Bill aims to regulate translation contracts from the perspective of literary creation and as a tool for the dissemination of culture and knowledge, and it could have implications for dubbing and subtitling of audiovisual productions. The Bill provides that any remuneration paid to the translator shall be proportional to the income obtained from the exploitation of the work, and in the event that the translator chooses to receive a fixed and determined consideration and this proves to be inequitable with the income obtained from the exploitation of the work, the translator may demand compensatory remuneration. This Bill also prohibits the publication of the translated work with alterations, additions, deletions, or any modification made without authorization of the translator.

**Decree Repealing Section IX of Article 223 of the Federal Telecommunications and Broadcasting Law:** A Draft Decree repealing Section IX of Article 223 of the Federal Telecommunications and Broadcasting Law was introduced in the Senate on February 10, 2022. The decree proposes to repeal a provision that could infringe freedom of expression principles, so it is positive for creative industries.

## Case Law

**Constitutional Challenges to Copyright Act Reform:** Soon after the Copyright Act reform passed, two constitutional challenges were filed seeking to repeal key provisions of the amendments. The first challenge was filed by the National Commission of Human Rights, seeking to repeal provisions related to notice and stay down and protection for TPMs. The second challenge was filed by a group of around 30 senators from opposition parties in

<sup>10</sup> General Law of Libraries (*Ley General de Bibliotecas*), June 1, 2021, available at [http://www.diputados.gob.mx/LeyesBiblio/pdf/LGB\\_010621.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LGB_010621.pdf).

<sup>11</sup> See, e.g., IIPA's 2022 Special 301 submission on Mexico ("IIPA 2022"), p. 72-73, available at <https://www.iipa.org/files/uploads/2022/01/2022-SPEC301-3.pdf>.

Congress and based on similar grounds as the first challenge. In both cases, AMPROFON, IFPI's national affiliate in Mexico, INCAM, and some other relevant stakeholders, filed *amicus curiae* briefs defending the amendments. Numerous support letters from industry bodies in many countries were also delivered to the Supreme Court in support of the notice and stay down provisions adopted in 2020.

At the same time, two additional challenges were filed in lower courts, seeking judicial protection for individual plaintiffs. One of these lawsuits was filed by Televisa (the biggest broadcasting conglomerate in the country). A second challenge seeking individual protection from the amendments was filed by the Authors and Composers Society (SACM), arguing that the 2020 copyright amendments equalized the protection of neighboring rights with that of copyright, and that itself constitutes a serious threat to the rights of authors and composers.

## **MARKET ACCESS ISSUES**

**Pay-TV Advertising Limits:** Pay television is an important outlet for foreign programmers and continues to be subject to more stringent advertising restrictions than free-to-air broadcast television, which is supplied by domestic operators. Pay television programmers have long been allowed to follow the industry practice of inserting up to 12 minutes per hour for advertising without exceeding 144 minutes per day, a practice upheld by Mexico's court in 2015 as consistent with Mexico's statutes. In February 2020, the industry regulator abruptly reversed course, stating that pay-TV channels must adhere to a strict six-minute per hour advertising limit, including during primetime. This change significantly reduces advertising revenue for foreign (e.g., U.S.) film and television program producers and raises concerns about the non-discriminatory provisions and principles in the USMCA.

**Foreign Ownership Restrictions:** A second market access concern is the 49% limit placed on foreign ownership of broadcast networks, which is further reduced to the share permitted for Mexican broadcasting investment in the company's country of origin. However, this reciprocity does not extend to countries with a higher permissible foreign investment share, including the United States, where the Federal Communications Commission permits foreign entities to own 100% of broadcast networks (subject to case-by-case reviews), creating another instance of discriminatory treatment.

**Local Content Quotas:** On a regular basis, Mexican lawmakers and policymakers propose protectionist policies, such as the imposition of local content quotas in both theatrical and streaming, over-the-top (OTT) windows, as well as limits to the number of screens in which a given movie can be exhibited or regulating the dubbing of the features regardless of the market preferences. If adopted, such measures would severely limit the exhibition of U.S. films in Mexico and would potentially contravene Mexico's USMCA commitments. Instead, Mexican policymakers should encourage open markets, investments, and collaborations that would result in job creation, knowledge transfer, and the internationalization of the alignment of local industry with international best practices for the benefit of both Mexican and U.S. industries.

**Investment Obligations:** There are several legislative efforts establishing performance requirements to investments in the form of a financial contribution in favor of the Mexican audiovisual industry. If adopted, such measures would be discriminatory and harmful to the audiovisual services platforms that operate within Mexico and may be contrary to USMCA commitments.

**Bill to Reform General Health Act (GHA):** Additionally, on July 6, 2022, a bill to reform the General Health Act (GHA), was introduced before the House of Representatives to include videogames as a General Health Issue. The Bill aims to amend Article 3, Section XXI of the GHA to include a matter of general health in the design and implementation of public policies and actions to prevent, treat, and control the problematic use of and addiction to video games.

## **Cooperation and Training**

IMPI has entered a Memorandum of Understanding (MOU) with ESA to enforce and protect video games' IP. IMPI seems to be committed to creating IP enforcement activities, including infringement referrals, online inspection visits, and investigations, and promoting the importance of IP to creative and innovative industries. Practical efforts to execute the MOU have already begun, including ESA-led training for over 60 members of the IMPI enforcement team on issues specifically impacting the video game industry. IMPI has further engaged in training with the motion picture and recording industries on issues related to those industries.

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 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 2023.<sup>1</sup>

**Executive Summary:** This submission is provided against the backdrop of Russia's invasion of Ukraine, the attendant sanctions against Russia by the U.S. and its allies, the suspension of operations in Russia by many U.S. companies, and a disturbing trend in Russia to ignore the intellectual property rights (IPR) of companies that have withdrawn from the market. Regarding the discussion of Russia's legal framework, this submission largely draws from IIPA's submissions from prior years.

The Government of Russia recently has introduced several problematic proposals that would weaken existing intellectual property (IP) protections, including plans for a compulsory licensing scheme to permit exploitation of a copyrighted work if a partner from an "unfriendly state" (including the United States) partially or completely unilaterally repudiated the license agreement on grounds not related to the violation of such contract by a licensee. If Russia follows through on these proposals, it would be tantamount to state-sanctioned piracy on a massive scale. This would be an unprecedented step for a WTO member, contravening the rule of law and serving as a *de facto* expropriation of U.S. IP.

Further, the draft law that would convert the anti-piracy Memorandum of Understanding (MOU) between key Russian Internet companies and rights holders from a voluntary procedure into an obligation has stalled since its introduction in June 2021. An addendum to the MOU, MOU 2.0, that provides for several new measures to stop search engines from providing easy access to infringing services is subject to adoption of the draft law and has not been enforced.

Russia has addressed 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. These measures include allowing Russian courts (in particular, the Moscow City Court) to disable access to infringing material, including clone, proxy, and mirror websites containing infringing content and requiring online search services to exclude infringing websites identified in the court orders from search results. An additional 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 apply to only passive and neutral intermediaries that do not contribute to infringing activities.

While these civil and procedural reforms have disabled or slowed access to some major infringing sites and services, unfortunately these procedures are being directed predominantly against infringing activities of users in Russia, not against Russian sites and services that undermine foreign markets by catering to users outside the country. As a result, Russia presents a substantial and persistent online piracy problem with no borders, as users in major markets outside of Russia access infringing content from sites and services located in or operated from Russia. Russia's actions to take down infringing content have little lasting deterrent effect without civil, and especially criminal, prosecutions directed at operators and owners of piracy sites.

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

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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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

transparency or good governance rules consistent with international norms. The other enforcement priority is to address the camcording of motion pictures that results in many American feature films being illegally copied in theaters and migrating online worldwide. Furthermore, law enforcement should take steps to prevent or disrupt proliferation of illegal screenings of films in Russian theaters that has occurred in 2022.

## **PRIORITY ACTIONS REQUESTED IN 2023**

- Continue to resist efforts to implement state-sanctioned IP theft, which would have serious, long-term implications for Russia's economy and creative ecosystem.
- Improve enforcement against online piracy by:
  - Increasing the number and effectiveness of criminal copyright digital piracy cases, especially deterrent criminal actions directed against organized criminal syndicates, including against those parties involved in piracy retail chains that continue to sell pirated entertainment software, music, and movies.
  - Enacting the draft legislation to convert the MOU into law, making it applicable to all copyrighted works and all rights holders, with legally mandated obligations for ISPs and appropriate sanctions for non-compliance.
  - Enforcing the addendum to the MOU that provides several new measures to stop search engines from providing easy access to infringing services.
  - Amending the Civil Code, the Copyright Law, or other relevant law to address the issue of “domain hopping” that occurs after the Moscow City Court issues an initial content-removal order to expedite applications for additional relief against repeated copyright infringement.
- Implement regulations on the operation of collective management organizations (CMOs) 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 CMO, and if so, which one, as well as 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, encourage, or facilitate the infringement of copyright and related rights and do not take reasonable steps to prevent such activities to prevent knowing facilitators from enjoying these safe harbor benefits; and
  - clarify the eligibility requirements to qualify for safe harbor protections, to benefit only passive and neutral intermediaries that do not contribute to infringing activities.
- 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. Also, amend the Administrative Code to sanction camcording.
- Amend the Administrative Code by eliminating the for-profit requirement in Article 7.12 (Administrative Offenses), raise administrative penalties to deterrent levels by implementing higher fixed fines for violations by legal entities and individuals, and increase enforcement under this provision.
- Take action to prevent or disrupt the unauthorized screenings of the motion pictures in cinemas.

## **THE COPYRIGHT MARKETPLACE IN RUSSIA**

**Internet Use and Piracy:** The overall situation with online piracy remains the same when compared to 2021. Russia remains host to several illicit sites that cater to English-speaking audiences, negatively impacting markets worldwide. Many pirate sites have moved to foreign hosting locations after several legal reforms that allow rights holders to seek injunctions through the Moscow City Court. However, the lack of explicit liability provisions for hosting providers creates a supportive environment for infringing services to use the infrastructure in Russia. Infringement on Russian social media and hosting platforms such as *VK*, *OK*, *Telegram*, and *DDoS-Guard* remains a significant concern for rights holders.

Internet access, including mobile phone access, continues to grow in Russia. Despite the civil law reforms intended to mitigate online 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, peer-to-peer (P2P) downloading and streaming sites, stream-ripping sites, linking sites, and cyberlockers, offering access to unauthorized music, film, video games, books, and journal articles. Another problem is the significant movement of pirated content to mobile apps, such as *Telegram*. Russia remains first globally when it comes to P2P piracy for the video game industry. Many of these sites cater to English-speaking and other non-Russian users. 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. The development of technologically advanced pirate cloud systems (e.g., piracy as a service, often consisting of content delivery network-based video providers that are accessible to only pirate streaming website operators), which provide Russian streaming websites with pirate video content, likewise continues to grow.

Although the civil law reforms have improved enforcement by the courts, absent these court orders, most ISPs and website operators do not comply with takedown notices; instead, they merely forward notices to users without taking down infringing material. Often, as a delaying tactic, the Russian websites insist on proof of copyright ownership before even considering compliance with takedown requests. Following Russia's invasion of Ukraine, certain platforms hosting user-generated content demonstrated low compliance with takedown notices. For example, VK's compliance reportedly decreased to 10-20%. On the other hand, OK continues to comply at a high rate, up to 90%. The advertising agencies and payment processors that financially support infringing sites continue to resist cooperation with the copyright industries. The only alternative has been the voluntary MOU, signed in November 2018 and extended until March 2023, between some ISPs and certain local rights holders regarding delisting of infringing sites from search engines.

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. Many commercial-scale sites in Russia, including those sites on the Notorious Markets List, operate without deterrence, offering unauthorized copies of films, TV programs, music, books and journal articles, and video games. In February 2022, the U.S. government included six Russian online sites on its Notorious Markets List, including *Sci-Hub*, *Libgen* (and its related sites), *VK.com* (*vKontakte*), and *MP3juices*.<sup>2</sup>

The motion picture and television industry is particularly concerned about *VK.com*, which is one of the most popular sites in the world and the most popular social network in Russia, along with *OK*, which is also an infringement hub. 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* has demonstrated improvements over the past few years in their responsiveness to takedown notices and has limited access to third-party apps, thus making it more difficult for users to download content directly. Dozens of groups dedicated to movie and TV piracy with millions of users have been illegally uploading and sharing infringing content on *VK.com* for several years, despite multiple removal requests from rights holders. The publishing industry (particularly trade book publishing) is similarly affected by e-book piracy on the site. Although the site responds to notifications of infringement, piracy remains unabated given the ease with which the site's users can continuously upload and make available pirated e-books and audiobooks. In 2021, *VK.com* was still one of the main platforms for promoting video game piracy sites and marketplaces. Social networks have improved their responsiveness to take-down notices from the video game industry. These sites promptly remove any infringing material, including cheats and other unauthorized digital goods (UDGs).<sup>3</sup> However, video game piracy remains a significant problem in Russia and fuels piracy in other markets.

<sup>2</sup> See USTR, "2021 Review of Notorious Markets for Counterfeiting and Piracy," available at <https://ustr.gov/sites/default/files/IssueAreas/IP/2021%20Notorious%20Markets%20List.pdf>. The February 2022 report also included three physical markets in Russia, all of which are on the list for the prevalence of counterfeit materials.

<sup>3</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

The video game industry reported that P2P websites remain the main search request and method of content distribution for video games for PCs and consoles. Mobile games are distributed mainly through forums, cyberlockers, and direct download sites. Since the 2018 anti-piracy MOU does not include the video game industry, links to pages with infringing content are available without the option of delisting, except through direct takedown notices. The video game industry reports overall very weak compliance with takedown notices from these sites, and the very quick reposting of materials that are taken down. In general, BitTorrent sites remain the main sources for downloading illegal copies of video games. However, action by the courts and injunctive relief related to mirror sites has reduced the traffic to these sites by at least 40%. In 2021, direct download sites, cyberlockers, and legitimate cloud storage services (such as *cloud.mail.ru* or *yadi.sk*) continue to be actively used primarily by pirate sites with a narrow audience. For example, pirate server sites use third-party sites for hosting their game and patch files. Wider audiences have direct download sites with mobile games, cheats, and other small gaming files. In 2021, more than 350 pirate video game sites were blocked, which consists of more video game sites blocked since the enactment of the anti-piracy law in 2013. One of the main drivers of piracy in Russia is the continued lack of a culture of legal video game consumption and an awareness regarding the threats of distributing unauthorized content, such as malware and phishing. In 2021, the compliance rate of hosting providers to takedown notices from video game providers is only approximately 41%.

The market for recorded music should be much stronger than it is for a country the size of Russia. According to a 2022 industry report, the per capita music revenue in Russia is only US\$2.25 per year, compared with US\$29.45 per capita in the United States.<sup>4</sup> The most prominent forms of music piracy in Russia are the use of BitTorrent sites and stream ripping. The most popular BitTorrent site in Russia is *rutracker.org* (having received over 44 million visits from Russia in the three months between June and August 2021). Visits to the site remain high as Russian users are circumventing the permanent block imposed on the site to access the large amounts of both English and Russian content available on it. The continued popularity of the site is demonstrated in its position as the 123rd most visited site of any kind in Russia. The most popular stream-ripping sites in Russia are *savefrom.net* and *Y2Mate.com* (with the sites having received over 27.3 million and 6.9 million visits from Russia respectively during the three months prior to August 2021, according to SimilarWeb). Russia remains home to many services supporting large-scale infringing websites, including web-based and P2P downloading and streaming sites, linking sites, stream-ripping sites, BitTorrent sites, and cyberlockers that operate globally. For example, *Newalbumreleases.net* is a popular linking site that has a large library of newly released popular music available, and *Music.Bazaar.com* and *mp3va.com* are sites that have the look and feel of legal music sites like Amazon or iTunes but sell downloads at a considerable discount. These sites undermine the sale of licensed music on legitimate platforms and remain targets for action.

Most concerning to book and journal publishers are the Russian-operated online book and journal piracy websites. *Sci-Hub.io* (formerly *Sci-Hub.org*) continues to be the most problematic site for journal publishers. Infringing journal articles purloined by the site's operator are likewise available on a network of sites collaborating under the "Library Genesis Project" (now *libgen.io*). As of November 2021, *Sci-Hub* claimed its servers hold nearly 88 million copyright-protected journal articles, as well as millions of books found on *LibGen*, *Z-Library*,<sup>5</sup> and numerous other mirror sites.<sup>6</sup>

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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.

<sup>4</sup> International Federation of the Phonographic Industry (IFPI) Global Music Report 2022, p. 191.

<sup>5</sup> In November 2022, *Z-Library* domains were seized by the Department of Justice, and the network of some 244 sites taken offline. The alleged operators, two Russian nationals, were also arrested in Argentina and await extradition. See <https://www.justice.gov/usao-edny/pr/two-russian-nationals-charged-running-massive-e-book-piracy-website>.

<sup>6</sup> *Sci-Hub* provides access to nearly all scholarly literature. See <https://www.insidehighered.com/news/2020/01/17/universities-ignore-growing-concern-over-sci-hub-cyber-risk>.

To further its infringing activities, *Sci-Hub* gains unauthorized access to university systems and publisher databases, typically through compromised user credentials obtained through phishing schemes. Through this unauthorized access, *Sci-Hub* illegally harvests copyrighted journal articles and books, which it hosts on its own server network and simultaneously makes these copies available to the *Libgen* network of mirror sites.<sup>7</sup> *Sci-Hub* is an adjudged pirate entity, with two Association of American Publishers (AAP) members securing judgments against the site and its operator in 2017 and 2015 in two U.S. courts, resulting in injunctions requiring U.S. domain name registries to suspend the site's U.S. administered domains.<sup>8</sup> In October 2018, publishers successfully sought an injunction to block the sites' primary domain in Russia. In 2019, a permanent block issued against *Libgen.org*, while a permanent injunction against several *Sci-Hub* mirrors in Russia, took effect in 2020.

In addition to these large-scale book and journal piracy platforms, Russian Internet users use P2P file-sharing services. An AAP member has registered 2.8 million P2P downloads of their pirated books by Internet users in Russia since May 2021, with 1.5 million of those downloads by Internet users in Moscow. Finally, publishers have identified more than 70 pirate platforms (including *VK*, *Rapidgator*, *Vdoc.pub*, *Takefie.link*, and *Documen.pub*) hosted in Russia that either host pirated books or link to pirated content. *DDOS-Guard* also plays a prominent role in hosting at least seven highly popular book piracy platforms.

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 that 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 that 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. Because 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, video game, and book and journal publishing industries want Russia to take steps to keep infringing content on sites 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 Bilateral WTO Market Access Agreement Side Letter on Intellectual Property Rights (2006 IPR Side Letter), 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, 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), and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.”<sup>9</sup> Also in 2012, Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, *inter alia*:

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<sup>7</sup> Id.

<sup>8</sup> In a 2015 case brought by an Association of American Publishers (AAP) member company, *Sci-Hub.org*, the Library Genesis Project (*Libgen*), and their operators were found by a court of the Southern District of New York to have engaged in infringing activity, for the unauthorized reproduction and distribution of journal articles and to have violated the Computer Fraud and Abuse Act for *Sci-Hub*'s intrusions into publisher databases. Damages in the amount of \$15 million were awarded, and a permanent injunction issued. In November 2017, following another case brought by another AAP member company, a district court in Virginia issued a second default judgment against *Sci-Hub* (then at *Sci-Hub.io*) of \$4.8 million, enjoining *Sci-Hub* and “those in active concert or participation with them” from infringing the publisher's copyright, and also ordered “any person or entity in privity with *Sci-Hub* and with notice of the injunction, including Internet search engines, web hosting and Internet service providers (ISPs), domain name registrars, and domain name registries, cease facilitating access to any or all domain names and websites through which *Sci-Hub* engages in unlawful access to, use, reproduction, and distribution” of the publisher's trademarks or copyrighted works.

<sup>9</sup> WTO Working Party Report (paragraph 1339).

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.<sup>10</sup>

The Government of Russia should fully and properly implement these obligations.

**Civil Enforcement Against Online Piracy:** Civil judicial and administrative remedies have improved over the years (with legal reforms in 2013, 2014, 2017, and 2020), but enforcement difficulties continue.<sup>11</sup> The civil injunctive relief mechanism continues to allow rights holders to enjoin notoriously infringing sites, but critical gaps remain. These include the lack of relevant laws targeted at online piracy, “domain hopping” of pirate sites that occurs after the Moscow City Court issues an initial content-removal order, and the liability of hosting providers. Current regulations were designed in the offline environment, and some provisions are difficult to apply to diversified online piracy, particularly regarding timelines, evidence fixation, and damages calculation.

Moreover, pirates have found tools to navigate around the content protection tools provided in recent legal reforms. Part of the problem lies in how Yandex, the major search engine in Russia, indexes sites. Neither internal Yandex policy nor laws oblige Yandex to improve search and retrieval algorithms to reduce the number of pirate sites and links to infringing content. Yandex algorithms instantly or even automatically include updated mirror sites. Another tactic is to use an empty site with a relevant domain name for search engine results, which redirects to a site with infringing content. Significant changes and improvements in the piracy situation will require adoption of anti-piracy laws and policies that are relevant to the current issues affecting the creative industries.

In addition, court practice related to title-specific civil injunctions has worsened. The Moscow City Court, under the influence of the first appellate court, changed its approach to decisions in title-specific civil injunction cases. Previously, the court prohibited a site from using the title on the site in general. Now, the court prohibits the use of the title on only the page on which it was captured. Thus, any change of the URL allows the site to avoid enforcement under the court decision.

In June 2021, legislation was proposed in the Duma to convert the ISP-rights holder MOU into legislation. The Duma was to consider the bill in February 2022 but has not taken any action. The legislation should provide sanctions for non-compliance with takedown notices and should be applicable to all platforms and search engines and all copyrighted works. An addendum to the MOU, MOU 2.0, was signed in December 2021, but it is subject to the adoption of the legislation and has not been enforced. MOU 2.0 provides for several new measures to stop search engines from providing easy access to infringing services. New measures include removal of repeat offender sites from search results, removal of sites displaying over one hundred links to infringing content from search results, and measures to defeat “domain gluing.”<sup>12</sup> The deadlines for the removal of pirated links from search results by search engine operators will also be reduced.

Overall, the results of the reforms to civil laws and procedures have been positive. Some sites have seen dramatic decreases in traffic right after such court orders, and some sites have even moved out of the country. Unfortunately, without the deterrence of criminal prosecutions against the owners and operators of notoriously infringing sites and services, many simply resurface in new guises.

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<sup>10</sup> U.S.–Russia Intellectual Property Rights (IPR) Action Plan (2012).

<sup>11</sup> Prior IIPA filings have detailed the 2013, 2014, 2017, and 2020 legal reforms, which implemented ISP liability and safe harbors and injunctive relief against infringing content online. See, e.g., IIPA 2022 at 79–80.

<sup>12</sup> Domain gluing” is a process used by operators of infringing services allowing them to return to the same search ranking from which they were removed by “gluing” pages together.

While civil measures are not capable of providing the requisite level of deterrence against large-scale digital piracy, they can be a useful tool for some industries or in some instances. For independent creators, however, 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, many inadequacies remain. 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 Agreement requirements.

There is a troubling, long-pending proposal to lower fines (i.e., statutory damages) from their current levels, below the minimum levels set in the Civil Code (approximately US\$140 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 to amend Article 1252 of the Civil Code. It should not be adopted, and instead, damage awards should be increased.

**Criminal Enforcement Against Online Piracy:** Russia needs to increase its enforcement activity beyond current levels to provide adequate and effective enforcement against IPR violations, including deterrent criminal penalties. A critical element of the 2006 IPR Side Letter is Russia's obligation to provide effective enforcement of IPR online. Currently, criminal cases for online piracy do not reach courts due to outdated provisions of the Criminal Code that are hard to enforce for online infringements, specifically, the definition of the "value of the crime" that sets the threshold for liability. The copyright industries continue to report high levels of piracy and declining levels of criminal enforcement, continuing a trend of the past several years. Official statistics of the Ministry of Interior demonstrates a continuous decrease in the number of registered copyright-related crimes, dropping from 423 cases in 2020 to 317 cases in 2021, a 22% decrease, and as of August 2022, there were zero copyright infringement cases in 2022.

To be effective, IPR enforcement in Russia needs a clear nationwide governmental directive 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 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, and strengthening administrative penalties that to date have been largely ineffective.

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. Because 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. Such coordination 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 the Government of Russia create a dedicated digital IPR enforcement unit to focus on online piracy. For example, combatting 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 acted on such cases in the past. 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 IP 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 the enterprise does not charge a direct fee.

Changes to criminal procedure that placed copyright infringement cases into the category of serious crimes have enabled Russian law enforcement agencies to conduct thorough and comprehensive investigations against owners and operators of piratical operations, at least in theory. 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 and identifying the individuals responsible for criminal activities. As a result, few such cases are ever brought and even fewer are tried to a conclusion. The problem has been an inability of police and prosecutors to adopt a unified formulation for 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.

For the past several years, the quality and quantity of criminal raids and police activity against IP 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 reduction in resources, as well as changes in government priorities and an unwillingness to pursue large-scale online infringers. Though rare, Russian courts have imposed some deterrent sentences, including a handful aimed at serious repeat offenders.

The Government of Russia should also examine and redress the lengthy criminal investigative process, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining, and prosecuting IP 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 seized products take months. The video game industry continues to report delays in examination reports from government experts, because of 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. The Government of Russia should modernize the rules so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this integration would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. Some courts reportedly 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 to 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 these remedies and instead, treat these cases 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 Article 146 of the Criminal Code, which increased such thresholds.

Another recommended measure to increase the efficiency of IP criminal investigations is the appointment of IP special prosecutors, investigators, and police officers at both the federal and regional levels throughout Russia. IIPA recommends that Russia establish 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 development 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.

Finally, 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 corporate director) can be found criminally liable and only upon a showing that he or 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.

**Administrative Enforcement:** In addition to criminal enforcement, the relevant administrative agencies 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. The Administrative Code (Article 7.12) provides a range of fines for infringement by 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 legal entities themselves (30,000 to 40,000 rubles, US\$400 to US\$533) and permits the confiscation and destruction of pirated products. The police or agencies file administrative cases, but the courts of general jurisdiction levy fines. 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. Moreover, enforcement under the Administrative Code has been ineffective due to the lack of enforcement actions. In 2021, there were 676 cases under this article, in which only 449 cases included fines for a total of 5,129,000 rubles (approx. US\$70,000).

**Camcord Piracy:** A long-standing problem in Russia is the camcording of motion pictures. Traditionally, Russia has been the source of many feature films being illegally copied in theaters and migrating online. Piracy operators obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet and sell illegal hard copies. Russia remains the home to some of the world's most prolific criminal release groups of motion pictures.

In August 2021, the Government adopted a Decree establishing the rules for film exhibition in theatres that cover the rights and obligations of both exhibitors and viewers. The Decree replaced the older document from 1994 and extended the exhibitors' rights to remove from the screening room viewers who disregard the exhibition rules, including those who attempt to record the film illicitly. While the Decree provides an explicit framework to address viewers who illicitly attempt to record a film in the theater, it does not resolve the issue of lack of liability for camcording.

To adequately address the camcording problem requires changes in the Russian legal framework, as well as dedicating sufficient resources and government willpower to engage in effective enforcement. Owing to the complex burden of proof procedure that the Administrative Code requires for copyright infringements, law enforcement is reluctant to investigate camcording incidents. Separate provisions addressing illegal recording in theaters and tailored to that specific form of infringement, could enhance enforcement. The Government of Russia should amend the Administrative Code to add liability for camcording to the general liability provisions on copyright infringements (Article 7.12) and to provide criminal law penalties as well. In 2020, the Government of Russia prepared changes to a new Administrative Code to address camcording, but the timing for revising the Code is unclear. 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, no proposals exist to amend the Criminal Code or to add any criminal sanctions for camcording pursuant to Russia's WTO and bilateral obligations. In addition to these needed legal reforms, IIPA recommends that the Government of Russia properly resource enforcement actions and undertake more effective enforcement against illegal camcording of motion pictures.

**Unauthorized Theatrical Screenings:** As noted above, after Russia's invasion of Ukraine in February 2022, the U.S. film industry, along with many other industries, suspended operations in Russia. Unfortunately, third-party

operators have recently begun organizing illegal screenings of U.S. films in theaters throughout Russia. The theaters do not advertise the screenings openly, referring to them as “private club” events, and have escaped enforcement by claiming that renting out their premises for a fixed fee to a third-party waives liability for any unlawful actions during the rental period. The content shown at these illegal screenings are sourced from pirated Digital Cinema Packages (DCP) that are illegally distributed online. Moreover, there is evidence of camcording occurring at these illegal screenings, compounding the harm.<sup>13</sup>

**Collective Management of Rights:** The long-standing problems concerning the collective management of music rights in Russia needs to be addressed properly. The ability to exercise one’s rights through proper collective management is a WTO TRIPS Agreement obligation, and Russia made specific commitments on these issues as part of its accession to the WTO. In the Working Party Report, 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.<sup>14</sup> That commitment had a deadline of 2013. The 2006 IPR Side Letter had similar obligations to correct this problem.

After years of missed deadlines, Russia adopted new legislation in 2017 (in force, May 2018) that instead of fixing the collective management system in Russia, did not address key relevant issues and created even more problems. The new collective management system denies transparency to rights holders and good governance consistent with international norms, as well as best practices for CMOs 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 does not allow rights holders to see how much money their RMOs collect or distribute to their members. Moreover, in terms of a lack of good governance, the law does not allow rights holders to control their RMOs.

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 rights holders. The new law creates “supervisory boards” for each of the various authors’ CMOs (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 structure 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. 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 RMOs or can effectively opt out of collective management. This change would result in fair representation characterized by direct representation of rights holders on the board in a manner that is proportionate to relevant market share and reflects commercial realities, with no conflicts of interest in the governance structures. Many models for proper governance of RMOs exist, including WIPO best practices, international rights holder group best practices, as well as U.S. and European Union (EU) 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 CMOs.

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<sup>13</sup> On August 23, 2022, Webwatch reported a partial capture of *Top Gun: Maverick* from Moskva Cinema in Moscow.

<sup>14</sup> WTO Working Party Report (Paragraph 1218).

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

Since its invasion of Ukraine, Russia has introduced several troubling legal reforms that would negatively impact the copyright industries. For example, on May 27, 2022, the Russian President issued Decree #322 regarding the payment of remuneration to foreign rights holders from “unfriendly” countries (i.e., the countries that imposed sanctions against Russia in response to its invasion of Ukraine). The Decree orders that Russian persons (including the Russian authorities, organizations, companies, and residents) make payments for the use of IP to foreign rights holders in rubles to a special O-type bank account opened in the name of the foreign rights holder. Russian entities have no obligation to make payments to foreign rights holders until the rights holder agrees to the new method and rights holders may not transfer funds from O-type bank accounts outside of Russia without government permission. The Decree restricts the rights holders subject to the Decree from receiving license payments other than under Governmental approval.

On May 30, 2022, the Russian Government terminated the application of the MOU between the Russian Federation and the United States on the principles of cooperation in the field of culture, humanities, social sciences, education, and mass media. The MOU, signed in 1998, included a provision encouraging the parties to facilitate the establishment of contacts between interested governmental and non-governmental organizations to develop programs and joint projects in fields of mutual interest that help strengthen bilateral ties. The MOU listed TV, film, and audiovisual materials. Although it had no direct impact on IPR protection, the MOU was a positive step towards establishing a proper legal framework. Termination of the MOU illustrates a general trend in Russia to deprioritize international obligations.

In mid-April 2022, Russia began drafting legislation that, if enacted, would drastically undermine exclusive rights. This unprecedented bill would allow a Russian licensee of a copyrighted work to apply to the court for a compulsory license to exploit a copyrighted work if a partner from an “unfriendly state” (including the United States) partially or completely unilaterally repudiated the license agreement on grounds not related to the violation of such a contract by the licensee. As U.S. industries have suspended operations in Russia in the wake of Russia’s invasion of Ukraine, such a bill, in effect, would legalize piracy of copyrighted materials owned by U.S. rights holders, in clear violation of Russia’s WTO obligations—essentially amounting to state-sanctioned IP theft. On August 19, 2022, the first version of the draft was submitted to the State Duma. However, after the pushback from the local industry association, the sponsor of the bill stated the bill would be withdrawn and an alternative version would be drafted. The amended text will reportedly cover only compulsory licensing for theatrical distribution of audiovisual content, leaving out over-the-top (OTT) and TV services, but this would still violate Russia’s obligations under international treaties, including the Berne Convention.

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, as well as 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, Russia’s law does not define secondary liability. The law should be clarified regarding the liability of online infringing websites and services, including that those safe harbors should apply to only passive and neutral intermediaries that do not contribute to infringing activities. Further, it is critical that Russia amend its regime to allow for civil injunctive relief that is quick and effective and applicable to all works.

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 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 making corresponding changes in the respective procedural codes.

## **MARKET ACCESS ISSUES**

While U.S. industries have largely suspended operations in Russia, significant market access barriers remain, including a discriminatory VAT; foreign ownership restrictions in broadcasters, mass media entities, and OTT services; and an advertising ban on Pay-TV. In 2022, in response to sanctions imposed on Russia following the invasion of Ukraine, the Russian government adopted several restrictive measures targeting foreign investors from unfriendly jurisdictions. The measures include an obligation for the foreign shareholders of the Russian joint-stock and limited liability companies to obtain governmental approval for any deals involving their shares.

In addition to these barriers, the video game industry also faces significant market access issues in Russia. For example, Russia imposes customs duties on the royalty value of some imported audiovisual materials, including some video games, rather than solely on the value of the physical carrier medium, contrary to standard international practice. Furthermore, on June 17, 2021, the State Duma adopted a law mandating foreign Information Technology (IT) companies with a daily audience over 500 thousand users to open a branch, a representative office, or an authorized legal entity in Russia, which could potentially affect the video game industry.

# SOUTH AFRICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR place South Africa on the Priority Watch List in 2023.<sup>1</sup> IIPA further recommends that through the ongoing Generalized System of Preferences (GSP) review, the U.S. government continue to indicate that the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB) as they currently stand are fatally flawed and to 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 fails to meet 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 impede increased access to creative content. 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 that: (i) rights holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their content and develop new legitimate services; (ii) these rights are not subjected to unjustifiable exceptions and limitations; and (iii) 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 (IP) and its desire to bring its laws into compliance with international treaties and commitments. However, IIPA remains seriously concerned about the pending CAB and PPAB. In June 2020, South Africa's President referred the bills back to the National Assembly given reservations regarding the bills' compliance with South Africa's Constitution and its international commitments. The National Assembly's Portfolio Committee on Trade, Industry, and Competition (Portfolio Committee) subsequently made minor revisions to the bills without addressing the major concerns, and the National Assembly adopted the revised bills in September 2022. The bills are currently under consideration by the National Council of Provinces (NCOP).

The revised bills remain inconsistent with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) and, if enacted, would also violate South Africa's obligations under the WTO TRIPS Agreement and the Berne Convention, potentially violate South Africa's Constitution, and move South Africa even further away from international norms. 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,

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<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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

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.

The bills require substantial redrafting, not only to address their fundamental deficiencies as has been repeatedly outlined by the overwhelming majority of stakeholders (local and international) and by independent copyright law experts, including the South African Institute of Intellectual Property Lawyers (SAIPL), since the bills were first introduced, but also to reduce ambiguity and thereby establish greater certainty in the law for rights holders and users alike. Provisions that are not compliant should be redrafted or deleted from the bills, and any redrafting should be based on a meaningful economic impact assessment study (which the Department of Trade, Industry and Competition (DTIC) still has not produced as required) and the advice of independent and qualified copyright and constitutional law experts and practitioners. As currently drafted, the bills would harm U.S. exports and put South African creators and artists at a serious disadvantage relative to their counterparts in other countries.

As South Africa is an important market in sub-Saharan Africa that other countries in the region may seek to emulate, the stakes are very high. 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 emphasize that the bills remain fundamentally flawed and that South Africa's Parliament should not rush its reconsideration and make only minor revisions. Instead, consistent with the President's directives, South Africa's Parliament should reassess the bills in their entirety for compliance with South Africa's Constitution, its international obligations, and best practices. As it stands, the bills fail to meet these standards and threaten the health of the creative economy in South Africa, both for U.S. exports and the local creative sector. IIPA is hopeful that the process of reconsideration by the NCOP on the bills in their entirety will provide an opportunity to remedy these deficiencies.

## **PRIORITY ACTIONS REQUESTED IN 2023**

- Redraft the CAB and the PPAB to ensure compatibility with international agreements, commitments, and best practices, based on an independent economic impact assessment study as required by the government's Socio-Economic Impact Assessment System (SEIAS) guidelines and in consultation with stakeholders and independent IP law experts.
- Engage in effective enforcement against online piracy, including by providing effective mechanisms and statutory remedies to address services that infringe domestic and foreign content, such as *Fazaka.com*, appointing cybercrime investigators, and developing a cybercrime security hub recognizing copyright as a priority.
- Ratify and fully implement the WIPO Internet Treaties.
- Improve enforcement education and capacity commensurate to the increased threat of online piracy.

## **COPYRIGHT LAW IN SOUTH AFRICA**

Significant reforms are needed to South Africa's Copyright Act and Performers' Protection Act to bring the country's laws into compliance with international agreements, including the WTO TRIPS Agreement and the WIPO Internet Treaties.<sup>2</sup> As previously reported, in 2018, the South African Parliament adopted the first major revision of the country's 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 failed to consider whether the proposed changes would be compliant with South Africa's Constitution and international obligations. Further, as part of its required SEIAS process, the government did not publish a SEIAS report to adequately measure the economic impact of the bills on South Africa's creative sector.

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

<sup>3</sup> See IIPA's 2020 Special 301 Report on South Africa, <https://www.iipa.org/files/uploads/2020/02/2020SPEC301SOUTHAFRICA.pdf> at 76.

In June 2020, South Africa's President referred the CAB and the PPAB back to the National Assembly based on reservations regarding the bills' compliance with South Africa's Constitution and its international commitments. The National Assembly concurred with the President's assessment that the bills were processed incorrectly under the Constitution and recommended that the bills be referred to the Joint Tagging Mechanism Committee to re-tag the bills for processing under the proper constitutional provision (Section 76), which requires the provincial governments to consider the bills as well. In 2021, the Portfolio Committee held public hearings and received written submissions from stakeholders and the public on certain provisions. During the hearings, the SAIPL observed that the Institute's Copyright Committee identified at least nineteen sets of provisions in the CAB that raised treaty and constitutional compliance concerns. SAIPL and other stakeholders also requested release of the economic impact assessment study on the CAB. Unfortunately, the Portfolio Committee failed to address the core problems plaguing the bills, making only minor revisions, and on September 1, 2022, the National Assembly adopted both revised bills. The bills are currently under consideration by the NCOP where the majority of provinces must approve for the revised bills to go back to the National Assembly before being transmitted to the President for his assent. At that point, the President would have the option to refer the bills to the Constitutional Court to adjudicate any remaining constitutional concerns.

Enactment of the bills in their current form would place South Africa out of compliance with international norms, the obligations of the WTO TRIPS Agreement, the WIPO Internet Treaties, and the Berne Convention, as well as the eligibility criteria of both the GSP and the African Growth and Opportunity Act (AGOA) regarding IP.<sup>4</sup> It is critical that South Africa's Parliament does not rush this process nor make only cosmetic revisions; instead, consistent with the President's directives, South Africa's Parliament should reassess the bills in their entirety for compliance with South Africa's Constitution and its international obligations. Provisions that are not compliant should be redrafted or deleted from the bills, and any redrafting effort should be based on a meaningful economic impact study, as required under the government's SEIAS protocols (which to date has not been produced by DTIC), and the advice of independent and qualified copyright and constitutional law experts and practitioners. 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>

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

The bills contain many provisions that lack clarity, risk major negative disruption of the creative industries, and pose significant harm to the creators they purport to protect. Major issues of immediate and primary concern to the copyright industries, which are maintained in the drafts that passed the National Assembly, despite numerous submissions from local stakeholders, are the following:

- The bills would severely restrict the contractual freedom of authors, performers, and other rights holders, 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 to freely license and otherwise derive value from their copyrighted works, performances, and sound recordings. For example, as explained below, both the CAB and the PPAB limit certain assignments of rights to a maximum

<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 <http://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 2022 African Growth and Opportunity Act (AGOA) Eligibility Review, available at <https://www.iipa.org/files/uploads/2022/06/International-Intellectual-Property-Alliance-Comments-on-2023-AGOA-Eligibility-Review.pdf>.

<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).

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 an expansive “fair use” rubric (not in line with the U.S. doctrine) appended to a large number of extremely open-ended new exceptions and limitations to copyright protection (on top of the existing “fair dealing” provision), resulting in an unclear thicket of exceptions and limitations.
- The bills would unjustly interfere with and over-regulate the relationship between creative parties, including mandating the mode of remuneration for audiovisual performers (requiring payment of royalties), which would destroy producers’ ability to finance content, and would block the ability of rights holders to exercise exclusive rights in their copyrighted works and sound recordings. Instead, the bills should provide a flexible and robust legal framework for the protection of creative content and investment in production, enabling private parties to freely negotiate the terms of their relationships and the exploitation of copyrighted works and sound recordings.
- 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 over broad exceptions to prohibitions on the circumvention of such measures would further impinge on the ability of legitimate markets for copyrighted materials to further develop.

These provisions are inconsistent with South Africa’s international obligations, for example, by far exceeding the scope of exceptions and limitations permitted under the WTO 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.

Beyond their individual failings, the two bills suffer from fundamental systemic failings that are not amenable to discrete fixes, nor correction through implementing regulations.<sup>6</sup> Without a fundamental course correction of its copyright reform process, South Africa will be taking a step backward in its effort to strengthen copyright incentives and 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 unreasonable restrictions on contractual freedoms, to allow the creative communities to increase investment in the South African economy to meet the growing demand for creative works of all kinds, in all formats, at all price points. This is particularly important in light of the President’s clear objective to improve levels of domestic and 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 legislation. 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

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<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.

to set out the nature of copyright in sound recordings, which would be 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. *Unjustified Interference into Contractual Freedom*

Several provisions in the CAB and the PPAB constitute unjustified interference 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(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 assignment, 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 by proposing to limit the term of contracts between performers and copyright owners to a maximum term of 25 years, which would detrimentally disrupt the well-established practices of the recording industry in South Africa for the creation and use of sound recordings. These provisions also would risk serious harm to the recording industry, performers, and other creators in South Africa, because a major incentive for investment would be removed as the term of assignment of recordings effectively would be halved from 50 years to 25 years.<sup>7</sup>

In effect, these provisions would make it impossible to clear rights in many works and sound recordings after 25 years, rendering this content unusable, with no one able to receive any revenues from such works and sound recordings. For example, 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.

The 25-year limitation is described in the CAB's memorandum of objects as a "right of reversion," but a reversion right is substantially different from a fixed time limit on all assignments of copyright in literary and musical works. Section 22(3) of the CAB is therefore fundamentally flawed. While the Copyright Review Commission in 2011 proposed a right of reversion to be considered in certain special cases in the music industry, highly sophisticated legal mechanisms are required to address bespoke situations where such reversions may be needed to address highly specific market failures. Without any economic impact assessment, legal study, or other assessment of the perceived industry problem that Section 22(3) seeks to address in the first place, the enactment of a general limitation of all assignment terms would certainly result in a series of negative, unintended, and completely avoidable consequences.

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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.

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 against film companies' acquiring literary and musical properties for adaptation into film and TV shows. As such, Section 3A 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. Furthermore, the proposals would impose unwarranted contractual formalities on all contractual partners. These provisions are not only unjustified but are seemingly premised on a lack of understanding of the myriad 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. It would also introduce the unnecessary legal risk of impermissibly delegating executive legislative authority to the Minister by permitting the Minister to unilaterally determine the manner in which trade and investment in South Africa's creative sectors can occur, without the required Parliamentary oversight if future legislative amendments are deemed necessary to address any properly assessed and clearly determined market failure.

For example, 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. The relationship and contractual agreement between the featured artist and the 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.

**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, the substantive provisions of Section 8A were never published for public consultation, rendering it constitutionally flawed.<sup>8</sup> Section 8A(5) has since been found to bring about arbitrary deprivations of property rights, and the Portfolio Committee resolved to remove it. 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 undermine the feasibility of productions and cause substantial harm to performers.

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<sup>8</sup> Section 8A was not included in the text of the first draft of the CAB that was the subject of the August 2017 public hearings. Instead, it was written into the text of the bill after the public hearings by the Portfolio Committee under the previous Parliament, without being subjected to an economic impact assessment or full public consultation, which has constitutional implications. This fundamental procedural irregularity was raised by numerous stakeholders during the August 2021 public hearings.

Section 8A, combined with the contract override provision in Section 39B(1) discussed below, prescribes a compulsory statutory royalty remuneration mode that practically removes the possibility of lump-sum payments.<sup>9</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. Under proposed Section 8A, 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 happen only if the work in question actually succeeded in generating revenues. The current commercial practices avoid that outcome by paying performers on a lump-sum basis, irrespective of whether the works in which they perform succeed. Audiovisual works are comprised of performances by lead/featured performers and extra/non-featured performers. Lead/featured artists are remunerated in accordance with the terms they have negotiated with the producer, and these terms almost invariably are on a lump-sum basis. Extra/non-featured performers, in particular, are remunerated by way of lump-sum payments given their minor roles. Section 8A 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. Furthermore, for certain modes of distribution, such as subscription video-on-demand (VOD), where revenue is received in return for access to an entire catalogue of works, it is not possible to allocate specific revenue to specific works. Therefore, the possibility of paying a share of any such revenue to any stakeholders in individual works (performers or otherwise) is not feasible.

The penalty clauses introduced by Sections 8A(6) and 9A(4) of the CAB may also have constitutional implications due to the disproportionate nature of the penalties prescribed for the failure of rights holders and licensed users of audiovisual works and sound recordings to submit timely reports to all performers featured in such works and sound recordings regarding each commercial activity relating to the use of such works. Criminal liability and fines of up to 10% of a company’s annual turn-over are prescribed for a failure to comply with the new reporting obligations. By unnecessarily raising the legal risk of doing business in South Africa, these penalties could discourage investment in new content production projects. The manner of reporting to all performers is not prescribed in the CAB, and no impact assessment was performed to determine whether this proposal would be even practically feasible or capable of being operationalized without undue risk of liability arising for parties who make legitimate and licensed commercial uses of audiovisual works and sound recordings in South Africa.

**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 or waive any rights provided by 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, several 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 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

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<sup>9</sup> Section 8A, on its face, states that performers have a statutory right to royalties. Combined with the contractual override provision of Section 39B(1), this statutory right to royalties is not waivable, even in instances in which the performers concerned might prefer an alternative remuneration model.

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 protection 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 WTO TRIPS Agreement (and Article 9 of the Berne Convention and the corresponding provisions in the WIPO Internet Treaties).

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> The fair use provision, which is supported and entrenched further by the contract override provision (Section 39B(1)), is inconsistent with the three-step test for the following reasons:

- First, South Africa lacks the 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 United States 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 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 African proposal includes language 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 several additional

<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.

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

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,” which 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 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 several extremely broad new exceptions and limitations to copyright protection, all of which have the potential to adversely impact the legitimate market for educational texts, sound recordings, 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 copyright owners the exclusive rights and 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 which uses of a work are permissible without a license.

As detailed above, the proposed fair use provision is overly broad (significantly broader than the U.S. fair use doctrine), and its scope and application are uncertain due to the lack of supporting case law, new and broader language, and the “hybrid” combination with the existing fair dealing system. As a result, the proposed provision is not limited to “certain special cases,” and there is a substantial risk that it would be applied in a manner that conflicts with the normal exploitation of a work or unreasonably prejudices the legitimate interests of the right holder. Thus, the provision clearly falls outside the limits of the three-step test. If the proposed legislation is enacted, South Africa’s legal framework for exceptions and limitations to copyright protection would violate South Africa’s international obligations,

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<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 United States. 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 PricewaterhouseCoopers, *The expected impact of the ‘fair use’ provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry*, July 2017, available at <https://publishsa.co.za/pwc-report-the-expected-impact-of-the-fair-use-provisions-and-exceptions-for-education-in-the-copyright-amendment-bill-on-the-south-african-publishing-industry/>. The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP and 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.

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.

In addition, 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 United States rely on to deter and remedy infringement, and enforcement in South Africa has been historically inadequate.<sup>16</sup> In South Africa, civil damages may be claimed for copyright infringement only after a rights holder meets a statutory requirement to first prove that an infringer had “guilty knowledge” of infringement. As a result, in most instances damages would be claimable for infringing acts committed by a defendant only after a court has determined that the defendant cannot rely on the fair use defense. 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-deterrent enforcement is the archetype for inadequate and ineffective protection of IP rights.

Finally, the risks posed by the fair use provision, and the other unclear and very broad exceptions discussed below, 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).

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

In addition to the proposed 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:

**A.** Sections 12B(1)(h) 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 United Kingdom 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. Section 12B(2)(c) also permits copying in an “electronic storage medium,” which is highly unusual and risks undermining existing licensing practices for 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)(e) 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 WTO 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

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<sup>16</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 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).

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

falls outside the bounds of the three-step test, because it fails to account for 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 the transmission of the 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 commercial significance to these acts.” This provision also allows copying for reformatting, where such copies are an integral and essential part of a 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 use of 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, and without limiting the use to avoid conflict with the normal exploitation of the work or unreasonable prejudice to the legitimate interest of the rights holder. The result is an exception that appears to permit quotations in virtually all instances, 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. Without clear limits to the extent and purpose of a quotation, the exception fails to meet the three-step test limitation of “certain special cases” and would 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. Section 12D(7)(a) on open access for “scientific or other contribution[s]” is overreaching and will likely undermine the rights of authors and publishers and deny authors academic freedom. Section 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 12B(1)(b) introduces an unreasonably broad so-called “ephemeral exception” for the reproduction of sound recordings by a broadcaster. To ensure that this exception is properly confined by the three-step test, reasonable limits should be introduced including: (i) the time limit must be such that it limits the copies made to truly “ephemeral” copies (e.g., copies may not be kept for longer than thirty (30) days); (ii) copies must not be used for transmission more than three (3) times; and (iii) the exception should not allow broadcasters to use it to create permanent databases of copyright works for use in their broadcast activities.

**G.** 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 provision 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)**

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 sectors 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(k) 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, IIPA also recommends that the definition of “technological protection measure circumvention device or service” be amended to include devices or services that (a) are manufactured, promoted, advertised, marketed, or sold 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 and services, 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 or service by a user was not to perform an act permitted by an exception.<sup>18</sup> Additionally, a provider of an unlawful circumvention technology (e.g., device or service) 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.”

## **7. Penalties for Infringement**

The revised CAB amends section 27 to include (5A), (5B), and 5(C) to provide liability for online infringement and violations of protections for TPMs and copyright management information. This is in keeping with Article 18 and Article 19 of the WPPT, which require adequate legal protection and effective legal remedies against the circumvention of effective technological measures and infringement of electronic rights management information. However, (5B)(a)(i) should be amended to clarify that the offering and other dealing with circumvention devices or services are already illegal, without the need to show that the illegal device is subsequently used to infringe copyright. The current wording, “knows that the device or service will, or is likely to be used” to infringe copyright in a work protected by an effective technological protection measure, sets the bar for liability so high such that it would render the entire provision ineffective. Moreover, given the scope and scale of the problem of online piracy, which remains a persistent and growing threat to the creative industries, 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 copyrighted 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 29A through 29H in the CAB 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. Further, it should be clarified that rights holders may elect to bring claims to the Tribunal *or to the Courts*, and that the Tribunal shall hear and determine matters referred to it expeditiously.

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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.

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 in the CAB, 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 SAMPRO CMO, which administers “needletime” rights on behalf of both recording artists and record labels. This interpretation 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. Section 5 also empowers the Minister to designate “local organizations” to be vested with all rights of copyright in works made under the direction or control of such organizations. This could result in designated local organizations being vested with full rights of copyright in works of South African authors without agreement between the parties to this effect. This departure of the standard rules of engagement as established for copyright transfers in the Copyright Act may have constitutional implications and result in arbitrary and unjustifiable deprivations of property rights and unwarranted restrictions on the freedom to trade.

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

At present, sound recordings receive a term of protection of only 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 at least 70 years, in line with the international standard. 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.

## 12. ***Certain Definitions Incompatible with International Treaties***

The definitions of “broadcast,” “producer,” and “reproduction” in Section 1 of the PPAB are inconsistent with corresponding definitions in the international treaties including the WPPT.

- The definition of “broadcast” is extended beyond wireless transmissions to include transmissions “by wire,” which is incompatible with the definition of “broadcast” in international treaties including the WPPT (as well as Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations). “Broadcast” is defined in the WPPT as limited to “transmission by wireless means.”
- The definition of “producer” should be clarified to ensure that it covers both natural and legal persons as provided for in Article 2(d) of the WPPT.
- The definition of “reproduction” should be clarified to confirm that it means the copying of the whole or a part of an audiovisual fixation or sound recording, consistent with Article 11 of the WPPT.

## **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 removing these quotas to ensure that businesses have the freedom to determine content programming according to their business models and relevant consumer demands.

**Online Value-Added Tax (VAT):** 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. This tax should be removed.

**“Must Provide” Requirements:** In April 2019, ICASA published its draft findings on the “Inquiry into Subscription Television Broadcasting Services” and proposed a new licensing regime that would severely impact the contractual freedoms of rights holders to license their content in South Africa, thereby undermining their exclusive rights. Unfortunately, the report’s methodology, and therefore its conclusions, are flawed because ICASA failed to consider the impact of OTT media services on the market, nor did it consult with rights holders on who the proposed measures would affect. IIPA encourages the U.S. government to engage with the South African government to ensure that any regulatory interventions into the pay-TV market are informed by international best practices and current market realities and preserve the contractual freedoms of all parties concerned, while developing a legislative and regulatory framework that promotes investment and growth.

**Video-on-Demand (VOD) Quotas:** In October 2020, The Department of Communications and Digital Technologies (DCDT) published a Draft White Paper, “Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020,” which seeks to adapt South Africa’s content regulatory framework to the online marketplace and unfortunately recommends the imposition of a local content quota up to 30%. IIPA understands that the DCDT will publish a Second Draft White Paper after its deliberations conclude.

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

Creative sectors in South Africa are growing but face the challenge of illegal services 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 and has worsened since the outbreak of the COVID-19 pandemic. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. Statistics released by software security and media technology company Irdeto earlier this year show that Internet users in five major African territories (South Africa, Kenya, Nigeria, Ghana, and Tanzania) made a total of approximately 17.4 million visits to the top 10 identified piracy sites on the Internet.<sup>19</sup> Of the African countries that were tracked during this survey, South African Internet users made the second-most visits to the Top 10 tracked pirated sites (around 5 million, almost double that of Nigeria and Ghana, and only trailing Kenya where 7 million users accessed these sites).<sup>20</sup>

South Africa also has one of the highest rates of music piracy worldwide. According to a 2022 music consumer study, nearly two-thirds (65.4%) of all Internet users in South Africa between 16-64 admitted downloading pirated music, a piracy rate below only Nigeria, India, China, and Indonesia.<sup>21</sup> Stream ripping was the major music piracy issue in the country, with 61% of all users and 74% of 16- to 24-year-olds saying they had downloaded illegally via stream ripping. Twenty-one percent of users stated they had downloaded pirated music from BitTorrent in the prior month from sites such as *ThePirateBay* and *1337x*, and 32% had downloaded from cyberlockers using sites such as *Mega* and *Zippyshare*. Local piracy sites were also popular. MP3 download sites such as *Fakaza.com* (used by 26.5% of all Internet users) and *Zamusic* (used by 10.0% of users) deliver pirated copies of South African and wider African music to many visitors from South Africa. An Association of American Publishers (AAP) member publishing house also reported that 2,348,973 books have been downloaded via P2P file-sharing platforms by South African Internet users since May 2021.

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 effective injunctive relief for rights holders, especially against foreign defendants who do not own assets in South Africa against which judgements can be executed and South African courts' jurisdiction can be confirmed to hear infringement matters, consumer access to these infringing sites continues unabated.<sup>22</sup> To combat online piracy, South Africa needs a legal framework that enables rights holders to address unauthorized use in all ways, and, as discussed below, the Government of South Africa should increase consumer education and awareness programs and improve enforcement.

**Piracy Devices (PDs) 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. Some companies develop devices pre-loaded with

<sup>19</sup> See Benjamin Emuk, ChimpReports, *Piracy Hits African Creative Industries as Millions Find Illegal Content Online*, <https://chimpreports.com/piracy-hits-african-creative-industries-as-millions-find-illegal-content-online/>.

<sup>20</sup> Id.

<sup>21</sup> International Federation of the Phonographic Industry (IFPI), *Engaging with Music 2022*, available at [https://www.ifpi.org/wp-content/uploads/2022/11/Engaging-with-Music-2022\\_full-report-1.pdf](https://www.ifpi.org/wp-content/uploads/2022/11/Engaging-with-Music-2022_full-report-1.pdf).

<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 IP 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.

infringing music content for use in various stores, pubs, and taverns. Many examples of enforcement and consumer education programs that are effective in other markets 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. The lack of protection against parallel imports raises concerns and interferes with rights holders' ability to license and protect their IP rights.

**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, costs are high, and damages are low because, as noted above, South Africa lacks statutory damages or punitive damages and proving actual damages and the amount of economic harm is notoriously difficult in copyright cases. In addition, criminal enforcement suffers from a lack of specialized prosecutors and judges equipped to handle IP cases. A particular problem for South Africa is infringing services that are impossible to locate or are hosted outside of the country, which undermine the legitimate online marketplace. South Africa needs a mechanism for no-fault injunctions 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, the European Union (EU) has addressed this problem through Article 8.3 of the EU Copyright Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content. There are also numerous examples in Asia and Latin America that could be a reference point for South Africa.

South Africa has 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 is hopeful that the implementation of the Cybercrimes Act (CBA) No. 19 of 2020 will increase awareness and stricter enforcement of piracy issues, although it has not yet yielded enforcement improvements. The CBA focuses on cyber-related crimes, including copyright infringement through peer-to-peer networks. Justice and Constitutional Development Minister, Robert Lamola, whose office is responsibility for implementation of the Cybercrimes Act, pronounced in March that the government is intent on increasing collaborations with the private sector to assist the

fight against content piracy.<sup>23</sup> While there appears to be an interest within the Department to combat content piracy, no concrete actions have been taken yet.

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 (IPIIC). Law enforcement should take advantage of these initiatives, including the IPIIC 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 IP 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 United States 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 ongoing GSP review, the U.S. government continue to send a clear message that the proposed CAB and PPAB as they currently stand 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 above and in IIPA’s previous submissions. If, at the conclusion of the review, the Government of South Africa has not made the requisite improvements, IIPA requests that the U.S. government suspend or withdraw GSP benefits to South Africa, in whole or in part.

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<sup>23</sup> See <https://businesstech.co.za/news/media/571472/government-to-clamp-down-on-pirated-movies-and-shows-in-south-africa/>.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2023.<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. Vietnam has become a global exporter of piracy services and Vietnamese operators have been associated with some of the world’s most popular piracy websites, which cause significant damage to both the local and international marketplaces. The Government of Vietnam should recognize that securing the country’s “first” criminal copyright conviction would provide significant reassurance to companies that are considering investing in local content and provide rights holders with a better understanding and assurance regarding the required criminal process.

Deterrence against infringement in Vietnam is lacking due to the unwillingness of Vietnamese authorities to follow through and implement the Criminal Law and the Criminal Procedure Code to mete out deterrent penalties against blatant piracy operators located in the country. Greater deterrent penalties are also needed for administrative copyright offenses. While the Authority of Broadcasting and Electronic Information (ABEI), under the Ministry of Information and Communication (MIC), and the Ministry of Culture Sports and Tourism (MCST) took a step forward and began enforcing a decree to disable access to hundreds of infringing copyright websites in Vietnam (albeit limited to live sports sites), unfortunately disablement in Vietnam does not stop Vietnam-based piracy services and operators from harming overseas markets, including the U.S. market. Moreover, for U.S. rights holders, enforcement is hampered by procedural difficulties and other deficiencies, including: (1) the government’s unwillingness to follow through on criminal referrals, regardless of how much evidence is provided by foreign governments and industry of blatant digital copyright piracy (e.g., the *Phimmoi* criminal case); (2) the lack of transparency and objective criteria for the Vietnamese government to prosecute a criminal case; (3) restrictions on foreign investigations; and (4) the unavailability in general of *John Doe* civil suits.

Amendments to the IP Code, passed in June 2022, entered into force on January 1, 2023, and contain improvements, including certain measures that may allow rights holders to seek civil or criminal relief against online infringers. The implementing regulations are currently being drafted, and we encourage the government to continue to incorporate feedback from rights holders to ensure enhanced procedural transparency and smooth implementation of the improved intellectual property (IP) Code. The Government of Vietnam should now take steps to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) at the earliest opportunity, extend the term of copyright protection in line with evolving global norms and its obligations under the Bilateral Trade Agreement (BTA) with the United States, and further improve its enforcement framework to address online piracy including, for example, bringing the definition of “commercial scale” into line with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and evolving global norms. The government should also address deficiencies with the Copyright Office of Vietnam (COV), which has not taken any action to reform the dysfunctional collective management organization (CMO) for the music industry.

Vietnam’s piracy problems would also be mitigated if its restrictive market access barriers were removed. Vietnam should 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 U.S. creative content.

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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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## PRIORITY ACTIONS REQUESTED IN 2023

### 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 of effective enforcement actions and critically bring criminal prosecutions through to convictions and apply objective criteria against commercial-scale digital piracy services. This would include: addressing notorious piracy sites like *Fmovies*, *BIPTV/BestBuyIPTV*, *Abyss.to*, *Fembed*, *2embed.to*, *Phimmoi*, *MyFliXer*, and *Chiasenhac*; issuing criminal sanctions for commercial-scale infringement cases that are sufficient to deter online piracy; and ensuring administrative orders for non-commercial-scale piracy cases are properly enforced and penalties provide appropriate deterrence.
- Clarify the rules and procedures regarding enforcement of related regulations on content to disable access to infringing websites in Vietnam, ensuring that the technical measures used to disable the infringing websites are effective and that there are no costs associated with such actions.
- Clarify the availability of *John Doe* civil relief in Vietnam when enough information can be ascertained regarding the piracy service (e.g., the domain, registrar contact details, etc.) to address the problem of pirate operators evading detection by providing false identity and contact information.

### Legislation:

- Make necessary changes to laws and implement Resolutions, Decrees, and Circulars, including the Criminal Code and the IP Code, to ensure Vietnam is in full compliance with the WIPO Internet Treaties, the BTA, the WTO TRIPS Agreement, and other international obligations and evolving global norms, including by:
  - Adopting a Resolution that clearly defines and interprets “commercial scale” consistent with Vietnam’s international obligations including:
    - criminalizing “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 noting 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 rightsholder in relation to the marketplace”); and
    - taking 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.
  - Introducing an express provision to allow rights holders to apply for no-fault injunctions requiring intermediaries to disable access to infringing websites (both those hosted in Vietnam and hosted or operated in other countries but available in Vietnam), as well as clear and deterrent penalties for Internet service providers (ISPs) that fail to comply with such orders.
  - Ensuring that safe harbors under the amended IP Code apply to only passive and neutral services that do not contribute to infringement, and that strong incentives are provided for neutral intermediaries to work with rights holders to address infringement on their services.
  - Providing sound recording producers with exclusive rights for broadcasting and communication to the public, or, at minimum, implementing Article 33(1) of the IP Code in a manner consistent with Vietnam’s international obligations, for example along the lines of WPPT, Article 15. This includes making sure the implementing regulation does not limit remuneration rights by exempting certain users of music from payment, nor make interactive uses subject to a mere remuneration right.
  - Eliminating the legal and procedural impediments, providing greater procedural transparency, and easing the evidentiary requirements, all of which interfere with the ability to take effective action against piracy websites, live-streaming piracy, and Internet protocol television (IPTV) piracy and applications.

- Extending the 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.
- Ensuring that certain shortcomings on collective rights management regarding governance, tariff setting, and distribution of collected monies are addressed to bring them in line with international best practices.
- Closing certain gaps in the IP Code, notably regarding certain definitions and the scope of certain exceptions, to align them with those of international treaties. For example, implementing regulations should clarify that all forms of interactive on-demand transmissions, including acts such as stream ripping, are covered under the making available right.
- Provide clear criminal liability for the act of circumvention of technical protection measures (TPMs) and trafficking in circumvention devices or services.

### Market Access:

- Ensure that amendments to Decree 71 (the former Decree 06 amendments) remove the local presence requirement and do not impose additional barriers to e-commerce.
- Ensure that implementation of the recently amended Cinema Law and related Decrees is not more onerous than necessary, including by ensuring that the decree for the Cinema Law eliminates foreign investment restrictions, screen quotas, and broadcast quotas and adopts a business-friendly video-on-demand (VOD) self-classification system.
- Eliminate caps on the number of foreign pay-TV channels in pay-TV regulations; requirements for local advertisement insertion 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 CMOs is required.

## PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

**Challenges Facing the Growing Online Marketplace:** 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.<sup>2</sup> Vietnamese piracy operators have been associated with some of the world's most egregious websites and piracy services, like *fmovies*, *123movies*, *BestBuyIPTV*, piracy-as-a-service (PaaS) *fembed*,<sup>3</sup> and *Chiasenhac*, which cause significant damage to the local and international marketplaces and make Vietnam a piracy haven.<sup>4</sup> The criminal enforcement path available against these sites and their operators remains excessively long and lacks transparency. Illegal content generally can be accessed via online and mobile network

<sup>2</sup> Media Partners Asia 2022 study on creative industry losses in Vietnam caused by online piracy is summarized here: [https://nhandan.vn/hop-tac-ngan-chan-vi-pham-ban-quyen-truc-tuyen-tai-viet-nam-post706584.html?zarsrc=31&utm\\_source=zalo&utm\\_medium=zalo&utm\\_campaign=zalo](https://nhandan.vn/hop-tac-ngan-chan-vi-pham-ban-quyen-truc-tuyen-tai-viet-nam-post706584.html?zarsrc=31&utm_source=zalo&utm_medium=zalo&utm_campaign=zalo).

<sup>3</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>4</sup> In addition, several globally popular stream-ripping sites are operated from Vietnam, including *Y2mate.com*. Enforcement efforts in Vietnam by the music industry against *Y2mate* proved futile.

piracy, such as streaming sites, linking sites, apps, video hosting sites, download sites, peer-to-peer (P2P) networks, stream-ripping sites, search engines, and social media platforms. Piracy service operators often take advantage of free platform file hosting resources, including those from Facebook and Google, to store and share pirated content and stream the infringing content via piracy sites and apps.

Stream ripping was the most popular form of music piracy in Vietnam, with more than 30 million visits from Vietnam in Q4 2022. The five most popular stream-ripping sites alone received well over 23 million visits in the same period. The ecosystem was dominated by *Y2Mate.com* (13 million visits from Vietnam in Q4 2022 and the most popular single piracy site of any kind), but sites like *y2meta.com* (4.2 million visits from Vietnam during the same period), *ssyoutube.com* (2.8 million visits), and *savefrom.net* (2.6 million visits) were also widely used. These sites all offer the ability to illegally download music from YouTube as an MP3. The music industry has also seen an increasing problem of stream-ripping sites operated from Vietnam.

Cyberlockers were also a popular piracy method. *Mega.nz* remained the most visited cyberlocker in the country (4.3 million visits from Vietnam in Q4 2022) with *rapidgator.net* (0.85 million visits during the same period) and *zippyshare.com* (0.50 million visits) also 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 1.8 million visits in Q4 2022 and was the sixth most popular piracy site of any kind in Vietnam. Apps that impermissibly source content from streaming platforms such as Youtube, and MP3 download apps are also popular in Vietnam with many MP3 download apps targeting domestic artists.

Streaming and IPTV piracy remains the most common type of online piracy in Vietnam. The operator of the notorious streaming piracy network of sites *Fmovies* has over 60 associated domains, many of which are known pirate brands such as *Bmovies*, *9anime*, *Putlocker*, and *Solarmovies*, provides unauthorized access to popular movies and TV series, and is domiciled in Vietnam.<sup>5</sup> In August 2021, the alleged founder and two employees of the notorious piracy site *Phimmoi* were identified and called in for questioning by the Vietnamese police.<sup>6</sup> The administrative action taken by the MPS was widely covered in the media.<sup>7</sup> The *Phimmoi* domains were subsequently taken offline; however, *Phimmoi* copycat sites soon appeared, some of which have become very popular in a short period of time.<sup>8</sup> Despite outreach efforts by the rights holders, including a letter to the Minister of the MPS, there has been no government feedback in the intervening 18 months regarding what action the government took against the *Phimmoi* operators and employees following the August 2021 interdiction.

Vietnam is also home to notorious markets IPTV piracy service *BestBuyIPTV*, which has over 10,000 live TV channels from 38 countries and an estimated 20,000 VOD titles in multiple languages. *BestBuyIPTV* is particularly popular in Europe.<sup>9</sup> Vietnam also hosts emerging PaaS businesses such as, *2embed.to*, a versatile PaaS that had 691 million combined visits in November 2022 and remains a key threat to the global piracy landscape. The service recently revived its Android app under a new name “*OnStream*,” which offers full movies for free and can be downloaded directly from sites based on the *2embed* content management service (CMS). In November 2022, *2embed* also spun-off a live sports website *9goal.tv*. IIPA is also aware that *2embed* is used to provide content to *MyFlixer*, a ring of popular ad revenue streaming sites that provide streams of film and television content to a global audience for free.

<sup>5</sup> According to SimilarWeb, in October 2022 *Fmovies* had a global ranking of 798 and had 84 million global visits. The site has been blocked in many countries, including India, Australia, Denmark, Malaysia, Indonesia, and Singapore. Its former domain, *Fmovies.se*, was blocked in nine countries.

<sup>6</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 22<sup>nd</sup> most popular website in Vietnam and averaged over 69 million visitors per month from 10.69 million unique visitors, according to SimilarWeb.

<sup>7</sup> See, e.g., <https://thanhnien.vn/cong-an-iphcm-yeu-cau-ong-chu-phimmoinet-nguyen-tuan-tu-den-lam-viec-voi-cqdt-post1102856.html>.

<sup>8</sup> Copycat domains, including *Phimmoiplus.net*, *Phimmoi.online*, *Phimmoi247.com*, *Phimmoi.be*, and *iphimmoi.net* were identified by local media and used similar domain names, website designs, and a logo to appear to be associated with the original *Phimmoi* and thus attracted users who are unable to find the original *Phimmoi* site. In October 2021, *iphimmoi.net* was ranked as the 453<sup>rd</sup> most popular site in Vietnam, according to SimilarWeb data.

<sup>9</sup> *BestBuyIPTV* 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.

Other Vietnam-based PaaS sites include *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. 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*. Other PaaS services hosted in Vietnam include *Fembed*, a CMS commonly used by pirate movie streaming websites.<sup>10</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 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). A few examples: (1) *fendici.com* is an infringing site operated by a Vietnamese defendant, against whom publisher plaintiffs obtained a \$10.5 million default judgment; the site, which at one point listed over 300,000 digital textbooks for sale, is currently down; (2) *genterbook.com* is an infringing site operated by a group of infringers, including multiple Vietnamese operators, against whom publisher plaintiffs obtained a \$10.75 million default judgment; the site, which attempted to hide at least 17,000 digital textbooks for sale via an innocuous storefront, is currently down; and (3) *mytextbooks.org* is a site operated by Vietnamese defendants, against whom publisher plaintiffs obtained a \$10.1 million default judgment; the site and five of its mirror sites are down and currently display a notice indicating that, pursuant to a court order, the publisher plaintiffs have seized the domains.

**Enforcement Is Ineffective:** Ineffective copyright enforcement in Vietnam is a serious concern. Without significant changes and closer engagement with both the local and international copyright industries, Vietnam’s current criminal enforcement system and legislative framework will remain ineffective and unable to deter online piracy. Regardless of extensive evidence of commercial-scale copyright piracy provided by both foreign governments and 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, including criminal prosecutions. Administrative and criminal processes in Vietnam are cumbersome and eventual penalties lack any deterrence. On a positive note, Article 198a of the new IP Code passed in 2022 is expected to help reduce some of the burden of proof for rights holders, as long as it is properly applied. Regarding civil enforcement, the difficulty in identifying infringers (because infringers provide false identity and contact information to domain registrars and web hosting companies) makes civil actions in the online environment nearly impossible because rights holders have been advised that actions against an unknown infringer (i.e., *John Doe* civil action) will not prevail, 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.

**Injunctive Relief to Disable Access to Online Piracy:** Over the past few years, MIC’s ABEI worked with several rights holders to help combat online piracy, resulting in sanctions against infringing websites and the first-ever site blocks in Vietnam against egregious websites infringing the rights of Vietnamese television rights holders. There are now hundreds of infringing domains blocked in Vietnam, mostly under the ABEI process and by the MCST. While this is a useful step forward, the majority of the sites that were “fully blocked” were live sports sites with the aforementioned authorities demanding an unattainable evidential threshold to fully block commercial-scale sites offering unauthorized VOD and live channels, even if such sites had already been blocked in other jurisdictions. Despite continuing efforts by rights holders to engage with ABEI and MCST and share current site blocking best practices in the Asia-Pacific region and Europe, they appear unwilling to adopt such effective site-blocking procedures. Moreover, disablement in Vietnam does not stop these Vietnam-based services from harming overseas markets, including the

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<sup>10</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.

U.S. market. Procedural difficulties also remain for U.S. rights holders.<sup>11</sup> The process for submitting sites should be transparent, with documentation setting out the process and explaining the technical measures in which the sites will be blocked, time-frames for site-blocking referrals to be actioned by government and complied with by ISPs, and measures available to ensure ISP compliance. Vietnam should introduce an express provision in its law to allow rights holders to apply for no-fault injunctions requiring intermediaries to disrupt or disable access to infringing websites (both those hosted in Vietnam and hosted or operated in other countries but available in Vietnam), as well as clear and deterrent penalties for ISPs that fail to comply with such order orders.

**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 need to be removed (found in Decree No. 45/2010/ND-CP). The COV 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.

Amended article 56 of the IP Code introduces positive elements for greater transparency and more clarity regarding the tasks that a CMO will undertake. However, it lacks detail on rights holder involvement in the decision-making process, good governance, transparency for the benefit of right holders, distribution of income, and prohibiting discrimination. These issues are currently being implemented by regulation. Unfortunately, the draft under discussion still fails to address a number of shortcomings, as discussed below. Regarding distribution of monies collected by CMOs, the amended IP Code provides for funds collected by CMOs to be dedicated to cultural and social activities and that undistributed monies (orphan works) be paid to the “competent state agency.”

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection and enforcement in Vietnam is governed by the IP Code (as amended in 2022), 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. Vietnam passed amendments to the IP Code in June 2022, and the copyright-related provisions entered into force on January 1, 2023. As discussed below, these amendments made several changes to the IP Code, including adding important protections required by the WIPO Internet Treaties. IIPA understands that implementing regulations are currently being drafted by the COV under the MCST and encourages the Government of Vietnam to continue to incorporate input from rights holders to ensure smooth implementation of the new IP Code. IIPA is very pleased that the government acceded to the WCT on November 17, 2021, effective February 17, 2022, and acceded to the WPPT on April 1, 2022, effective July 1, 2022, as required under the CPTPP and Vietnam’s Free Trade Agreement with the EU.<sup>12</sup> 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 Criminal Code consistent with Vietnam’s obligations under the WTO TRIPS Agreement and BTA, which require Vietnam to criminalize copyright piracy “on a commercial scale” (there are also detailed obligations on

<sup>11</sup> As previously reported, in 2019, the music industry petitioned the Authority of Broadcasting and Electronic Information (ABEI) to block two sites, *saigonocan.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 a principal source of unlicensed music in Vietnam, with both local and international repertoire easily accessible via the site.

<sup>12</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.

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>13</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 the amended IP Code 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>14</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. For example, Vietnam has yet to criminally prosecute a single commercial-scale copyright infringing site or piracy service, even though the current Criminal Code has been in effect since 2018.

**Intellectual Property (IP) Code Amendments Leave Some Issues Unresolved:** The IP Code amendments contain some improvements to the law, including clarifying that illegal uploading and streaming of a cinematic work is a violation of the communication right and copying part of a work is a violation of the reproduction right, that will help rights holders to address online piracy. Nevertheless, the amendments left some issues and questions unresolved, including regarding Vietnam's compliance with the WIPO Internet Treaties, the BTA, the WTO TRIPS Agreement, as well as other international obligations and evolving global norms. IIPA is hopeful that the following issues can be resolved in implementing regulations or additional amendments:

- **Term of Protection:** The amended 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.
- **Broadcasting and Communication Rights:** The IP Code now expressly and individually enumerates sound recording producers' exclusive rights in a manner that meets the minimum standards in WPPT. However, despite the inclusion of the broadcasting and communication rights in the list, their scope is dramatically limited by Article 33(1), which turns them into remuneration rights. Vietnam should provide sound recording producers with exclusive rights, or, at minimum, redraft the Article 33(1) of the IP Code in a manner consistent with Vietnam's international obligations, for example along the lines of Article 15 WPPT. This includes making sure that implementing regulation does not limit remuneration rights by exempting certain users of music from payment, nor make interactive uses subject to a mere remuneration right.
- **Definitions that Depart from WPPT:** Articles 44(1)(a) and 44(1)(b) include definitions of "performer" and "phonogram producer" that depart from the definitions of the WPPT. In addition, Articles 44(2) and 44(3) include a definition of "related rights holder" that is unnecessary and out of step with the framework provided in international treaties and in other jurisdictions. Finally, the definition of "communication to the public" does not include the second sentence of Article 2(g) of the WPPT on public performance. To avoid confusion and ensure consistency with the WPPT, these definitions should be revised.
- **Clarify Scope of the Making Available Right:** The inclusion in Decree No. 22/2018 of uses "*in the environment of telecommunication networks and the Internet*" subject to the limitation of Article 33(1)(b) of the IP Code raises questions regarding the types of exploitations covered by the exclusive making available right (which cannot be turned into a mere remuneration right). Implementing regulations should clarify that all forms of interactive on-demand transmissions, including acts such as stream ripping, are covered under the making available right.
- **Internet Service Provider (ISP) Liability:** Article 198b of the amended IP Code introduces an ISP liability regime, but IIPA is concerned that the scope of ISP liability limitations (i.e., safe harbors) may be too broad as currently provided. Implementing regulations should ensure that copyright safe harbors should apply to only passive and

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<sup>13</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. Such a resolution should 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>14</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.

neutral intermediaries that do not contribute to infringement, and that there are strong incentives provided for neutral ISPs to work with rights holders to address infringement on their services. In addition, eligibility requirements for ISP liability limitations should include appropriate conditions, including obligations for ISPs to remove infringing content expeditiously, and with a specific time-frame, upon obtaining knowledge or awareness of infringing activity, to implement effective repeat infringer policies, and to take other measures demonstrated effective in preventing or restraining infringement.

- **Denial of Protection for Certain Works:** Articles 7(2), 7(3), and 8 of the IP Code appear to give the state power to potentially restrict rights and may conflict with Vietnam's international commitments
- **Hierarchy of Rights:** Article 17(4) of the 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 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.
- **Overbreadth of Draft Private Copy Exception:** Ensure that the amended Article 25(1)(a) (private copy exception) 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 WTO 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.

The draft amendments to the Decree that have been made public seem to address the first issue regarding the exhaustive list of venues, but not the second one regarding "digital environment services." Additionally, the proposed amendments would impose (1) tariffs for the broadcasting and public performance remuneration when no agreement is reached between right holders and users, as well as (2) a default distribution key between rights holders, both of which would disincentivize agreements between the relevant stakeholders and would *de facto* regulate these matters by decree. The first issue is problematic because the list of uses and rates applicable if no agreement between users and rights holders is reached, which would be included in Appendixes to the Decree, may not adequately reflect the value of music in the market and may quickly be outdated. The second issue is problematic because the proposed distribution key between rights holders is skewed in favor of authors, thus not reflecting the economic contributions of the different categories of rights holders. Furthermore, the proposed amendments raise additional concerns, including that the proposed collective management framework appears inconsistent and, more importantly, may potentially result in: (a) mandatory collective management of exclusive rights, (b) the imposition of a one-stop-shop collective

management structure, (c) the determination of rates that are not reflective of the value of the music used in the market due to excessive intervention of the Ministry of Culture in the process, (d) the introduction of rules of distribution of royalties collected between rights holders that risk being unfair, discriminatory and not reflective of their respective economic contributions, and (e) the introduction of a decision-making process of CMOs in which non-discriminatory participation of right holders is not guaranteed.

**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.

## **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. The subsequent amendments to Decree 06 (as discussed below, promulgated as Decree 71/2022/ND-CP in October 2022) do not appear to have made any meaningful changes or improvements to these measures regarding pay-TV regulations in Vietnam.

**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. In October 2022, these amendments were promulgated as Decree 71 (Decree 71/2022/ND-CP). Of most concern with

the final Decree 71 is a licensing scheme that could potentially require a local presence or forced joint venture, and onerous censorship provisions for any VOD service that offered content that would not be considered “films” (which would be regulated under the Cinema Law). This licensing framework and continued uncertainty around censorship requirements fall short of industry expectations and are likely to limit consumer choice and access to content while indirectly contributing to online piracy.

**Amendments to Cinema Law and Related Decrees:** 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 passed Cinema Law amendments in June 2022, and they entered into force in January 2023. Implementing Decree No. 131 (Decree 131/2022/ND-CP) was passed in December 2022 and came into force in January 2023. IIPA commends Vietnam for consulting with the industry, removing the discriminatory film fund, and allowing flexibility in the Decree’s gradually phased screen quota. The one-year grace period for VOD content to comply with conditions in the Decree is welcome and should allow the industry to establish a business-friendly environment for collaboration, including regarding the welcomed provision for self-classification of films disseminated on cyberspace. IIPA encourages Vietnam to ensure that the implementation of the amended Cinema Law and related Decrees and Circulars is not more onerous than necessary. Relevant authorities should also be well-resourced to efficiently process compliance-related notifications and documentation required by the Cinema Law and related Decrees and Circulars, so as not to cause unnecessary delay. The delay in films being added to online catalogs in Vietnam would exacerbate the incidence of online piracy in Vietnam.

**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.

**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. Vietnam published draft amendments to Decree No. 72 in 2021 that could serve to remove the local presence requirement, but otherwise leave these concerns unresolved. 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 IPR 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. 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 (Vietnamese) companies. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for business 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 WTO TRIPS Agreement Article 61 and BTA Article 14;
- Several copyright exceptions may be overbroad and inconsistent with the three-step test of WTO TRIPS Agreement 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 WTO TRIPS Agreement 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 WTO 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; and
- Term of copyright protection falls short of the requirements of BTA Article 4.4.

# **WATCH LIST**

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** While IIPA members commend Brazil's excellent progress with a number of enforcement actions against online piracy, several long-standing normative and legislative concerns warrant keeping Brazil on the Watch List. For the creative industries, Brazil is a top priority market in Latin America. As such, the country's long overdue adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively known as the WIPO Internet Treaties) is a major concern for IIPA members. In 2019, then-President Bolsonaro signed the WPPT and forwarded the document to the National Congress for consideration. To be incorporated into Brazilian law, the WPPT needs to be ratified by the National Congress. In addition, the Government has indicated that the National Congress should do the same in relation to the WCT. It is essential that the Brazilian Congress approves and implements the WIPO Internet Treaties to ensure that the country's legal framework is consistent with global standards.

Brazil continued to provide positive anti-piracy enforcement developments in 2022. For instance, enforcement authorities initiated a fourth wave of Operation 404 that took down online piracy platforms in 11 different Brazilian states through criminal remedies, including site-blocking injunctions, in addition to leading search and seizure raids against major pirate targets. In August 2022, the Tribunal of Justice of the State of São Paulo granted a permanent and dynamic blocking injunction against 21 major stream-ripping services, and in September 2022, the same court granted a dynamic blocking injunction against 40 major stream-ripping services for an initial period of 180 days. Both orders were issued following applications filed by the Brazilian anti-piracy organization APDIF (Brazilian Association for the Protection of Intellectual and Phonographic Rights) and *CyberGaeco*, the cybercrime unit of the State of São Paulo's Prosecutor's Office.

On the legislative and policy fronts, the National Intellectual Property Strategy (ENPI) has been approved and serves as general guidance for all public initiatives concerning intellectual property (IP). Additionally, the National Plan Against Piracy (PNCP) has been in force since the beginning of 2022 and serves as general guidance for all the public initiatives concerning intellectual property infringement up to 2025. IIPA urges Brazil to provide more resources to the National Council Against Piracy to implement the PNCP, primarily focusing on Copyright Act Reform and fast-tracking discussions at both the Brazilian Regulatory Agency for Telecommunications (ANATEL) and the Brazilian Film Agency (ANCINE) to implement an effective system to tackle online piracy. Also, a new Copyright Act, if one is to be developed, should provide 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 Berne three-step copyright test.

Regarding market access barriers, 2022 showed signs that Brazil would at last implement significant reductions of the industrial product tax (IPI) for video game consoles and accessories. Unfortunately, the tax burden on these products remains significant, and IIPA encourages Brazil to further reduce or eliminate IPI and other taxes. What limited reductions the government made to the IPI in 2022 were ultimately revoked, and there are rumors that the new government could prolong or worsen burdensome taxes on the industry. IIPA continues to be deeply concerned over film, streaming, and television quotas. Additionally, discussions about over-the-top (OTT) regulation and taxation, as well as digital services taxes (DSTs), are also of great concern. 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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## **PRIORITY ACTIONS REQUESTED IN 2023**

### **Enforcement**

- Continue to establish a clear structure, with a high degree of political backing and adequate funding, to build on the success of Operation 404's multiple waves, *CyberGaeco's* actions, and similar operations, and ensure that law enforcement agents and prosecutors all over the country are properly trained and coordinated to conduct complex online investigations, including technical training on technological protection measures (TPMs) and anti-circumvention thereof.
- Ensure that ANCINE and ANATEL continue working to implement a system for administrative and judicial site-blocking for pirate sites.
- Encourage state courts to assign specialized courts or judges to handle IP cases (as is done with the business courts in Rio and São Paulo).
- Ensure that the *Conselho Nacional de Combate à Pirataria* (CNCP) continues to have the resources and political support to engage in cross-industry efforts against online piracy.
- Ensure that the National Plan Against Piracy speeds up discussions on a Copyright Act reform (see below), as well as on related site-blocking initiatives.
- Implement a long-term national program to train judges and prosecutors on IP law, the WIPO Internet Treaties, and enforcement measures, including procedures on site-blocking legal actions as well as technical training on TPMs and anti-circumvention; 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.
- Encourage regional Federal Revenue enforcement units (DIREPs) to maintain anti-counterfeiting raid actions in the so-called secondary zones (in the local market).
- Ensure that ANCINE continues to actively fulfill its duty in the fight against piracy of audiovisual content in Brazil.

### **Legislation and Regulation**

- Ratify and implement the WIPO Internet Treaties.
- Ensure the Copyright Law, currently under review, or any legislation on copyright:
  - (i) Fully 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 TPMs; and penalties for trafficking in circumvention devices and software;
  - (ii) Removes the default rule whereby authors', performers', and sound recording producers' communication to the public rights (broadcasting and public performance) are collectively managed by ECAD, or at the very least introduces adequate governance rules for ECAD, including fair and balanced representation of rights holders in ECAD's governing bodies and adequate distribution rules of the revenue collected.
  - (iii) Provides express legal basis and a streamlined process for civil and criminal courts to continue issuing orders to Internet service providers (ISPs) to block access to websites dedicated to copyright infringement;
  - (iv) Covers intermediary liability for inducing or encouraging infringement under certain circumstances, including advertisements placed on pirate sites;
  - (v) Criminalizes signal theft in the Pay-TV and OTT sectors;
  - (vi) Implements special cybercrime courts and prosecution units;
  - (vii) Penalizes repeat infringers, including those identified on online platforms and Internet applications and has ISPs define clear and effective policies to deal with such matters;
  - (viii) Ensures that any exceptions and limitations comply with the three-step test; and

- (ix) Ensures the availability of meaningful compensation for infringement commensurate with the harm suffered and at a level that will deter future infringements.
- Follow through with revision of the Customs Law to clarify that the retention of counterfeit or any other illegal product by customs authorities does not require a court's order to be confirmed.
- Approve draft bills intending to implement a judicial site-blocking system.

## Market Access

- Enable industry growth by reducing high tariffs and taxes placed on video game products.
- Mitigate imposition of the “video-on-demand (VOD) tax,” DST, or similar tax on movies and TV programming delivered on demand; and eliminate audiovisual quotas that discriminate against non-Brazilian content.
- Exempt OTT services from compliance with the existing Pay-TV Law, consequently, not increasing burdens towards either service, as a way to correct potential asymmetries.
- Reaffirm that collective management organizations (CMOs) can assert rights to collect royalties for acts of communication to the public only where authors and performers in audiovisual works have specifically mandated that these CMOs do so, and only where relevant rights have not already been assigned to producers of audiovisual works.
- To not renew Pay-TV Content Quotas, because their renewal artificially constrains access to Brazilian market of U.S. content exports and forces U.S. companies to make content spending decisions that would not be driven by the marketplace.

## THE COPYRIGHT MARKETPLACE IN BRAZIL

**Online marketplace:** Internet access and demand for online content continue to grow in Brazil. In 2022, at least 62 online platforms offered legal viewing options to Brazilian television and film audiences.<sup>2</sup> Most Pay-TV operators also provide TV everywhere services, allowing subscribers to access authenticated content across multiple platforms. Online access in Brazil to legitimate video game play is available through Xbox Live, Nintendo eShop, and PlayStation Network. Streaming accounted for 85.6% of revenues in Brazil for the music industry, representing a 34.6% revenue growth in 2021.<sup>3</sup> Combined ad-supported video and ad-supported audio streaming recorded growth of 46.3%.<sup>4</sup> Finally, in 2021, Brazil recorded revenues of more than US\$300 million for the first time ever.<sup>5</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. A study published in early 2022 showed that Brazil was the fifth country in the world ranking for online piracy consumption, with over 5 billion visits to websites that offer illicit content.<sup>6</sup> 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\$1.82 in 2021 in large part due to the rise of online piracy.<sup>7</sup> For 2021 and 2022, 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:** The four most popular types of online distribution channels for infringing materials in Brazil are: (i) websites targeted to the Brazilian market that link to infringing distribution hubs (including “cyberlocker” services and linking

<sup>2</sup> According to a BB Media report, for more details see <https://www.telesintese.com.br/ha-62-plataformas-de-streaming-em-operacao-no-brasil/>.

<sup>3</sup> International Federation of the Phonographic Industry (IFPI), 2022 *Global Music Report*, p. 138.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Study by Akamai and MUSO, for more details see <https://static.poder360.com.br/2022/03/soti-security-pirates-in-the-outfield.pdf>.

<sup>7</sup> Id.

sites); (ii) file sharing via illicit peer-to-peer (P2P)<sup>8</sup> networks and indexing sites for torrent files; (iii) stream-ripping sites that circumvent TPMs on licensed streaming sites, such as YouTube; and (iv) illicit 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 type of content, such as those sites solely dedicated to video games, tend to attract audiences faster and remain popular. This includes the highly popular Portuguese-language site, *yuzuroms.ml*, for infringing Nintendo Switch titles. These websites rely on magnet torrent links and “sister domains” (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 that allow 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. Online piracy likewise continues to plague the publishing industry. Several sites trafficking in infringing copies of books (*mercadolivre.com.br*), as well as journal articles (*sci-hub*),<sup>9</sup> remain problematic for publishers. There were, however, some positive developments for the industry in 2022, with raids carried out by law enforcement against operators of online sites trafficking in infringing copies of books in the States of Paraná, Espírito Santo, Maranhão, and Minas Gerais.<sup>10</sup>

The video game industry reports that Brazil ranks third globally in P2P piracy with a tremendous increase in volume of active illegal game websites being monitored in the country. For linking sites dedicated to unauthorized download of game titles, there was an overall increase of 21% in the number of illegal sites and potential targets for action, and there are more illegal sites dedicated to multiple types of content (including movies, TV series, and music). The volume of infringing game titles and product listings available on e-marketplaces has remained steady in general terms. Although some ESA members continued to see an increase in cyberlocker and BitTorrent network activity when it comes to certain popular game titles, in 2022 the video game industry overall saw a 5.2% decline in cyberlocker activity and a 21% decline for BitTorrent, in a year-on-year comparison, according to SimilarWeb and *IknowWhatYouDownload.com* data. Warnings of virus and malware risks within the online piracy communities could be one explanation for the shift from cyberlockers and BitTorrents to website-based piracy. Video game titles are the second most popular type of content among torrent downloads in Brazil, and the top 10 most popular titles are all from ESA member companies. While most cyberlockers and linking websites are 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. 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.

Online video game piracy has increased in volume of sources (unique targets) and its combined audience, resulting in a worsened overall scenario. This year both indicators (audience and number of unique targets) increased on a faster pace than in the previous year. Another problem the industry faces is unauthorized digital goods (UDGs)<sup>11</sup> (infringing versions of digital assets available within a video game environment, such as virtual currencies, digital

<sup>8</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.

<sup>9</sup> According to the site, Brazil ranks among the top five countries with the highest download activity.

<sup>10</sup> See [Download ilegal de livros é alvo de operação em quatro estados | Metrôpoles - Metrôpoles \(ampproject.org\)](#).

<sup>11</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 negatively impact video game companies and consumers in the following ways: (1) sellers of UDGs 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.

accounts, or “skins”). Dedicated commercial UDG pirates have professionalized and expanded their activities. Data gathered from SemRush and Google searches indicates that *MercadoLivre.com.br* is still the most popular platform for UDGs followed by *Americanas.com* in volume of listings with these characteristics. Both of these marketplaces are very responsive to publishers’ brand protection programs, with take down rates of over 90% for certain rights holders. However, rights holders carry a heavy burden to enforce against ads for infringing material posted by users. *MercadoLivre*, encouragingly, is beginning proactive enforcement efforts in 2023 and has reached out to video game publishers for rights information. Meanwhile, other online marketplace platforms such as *olx.com.br* and *shopee.com.br* have lower compliance rates in Brazil.

According to the International Federation of the Phonographic Industry’s (IFPI’s) Music Consumer Study for 2022 (MCS), the music piracy rate in Brazil stood at 52% of all internet users in 2021 – one of the highest in the world. Fifty-one percent of users engaged in stream ripping using websites or mobile apps (60% of 16- to 24-year-olds) while 30% used cyberlockers to download pirated music. Cyberlockers such as *4Shared* (3.5 million visits from Brazil in the third quarter of 2022) and *Zippyshare* (4.1 million visits in the same period) are also well-known destinations in Brazil for pirated music.

**Piracy Devices (PDs) and Signal Theft:** In 2022, Brazil continued to see significant levels of online piracy, piracy apps, and piracy devices harming the local audiovisual market. Signal theft remains an issue in Brazil, especially in poorer communities and is used as a source of premium live content for online piracy and ISDs’ businesses. In this regard, the use of devices known as “TV Boxes,” which can be preconfigured to steal protected content, is a growing and worrisome reality in the country. A significant amount of piracy devices is sold on the Internet, mainly in online marketplaces. Brazil’s economic crisis of recent years combined with the COVID-19 pandemic have set the stage for a likely spike in Internet protocol television (IPTV) rogue devices and pirate live-streaming of news and sports in coming years. Brazilian enforcement authorities have deployed strong efforts to properly tackle these issues in 2022, mainly through ANATEL, ANCINE, Customs, and the Ministry of Justice, although the remarkably high levels of audiovisual piracy in the region mean that, even with these actions resulting in a substantial impact in the number of infractions, the problem remains significant.

**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 piracy devices 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 (e.g., hard drives), discs, and memory cards that are locally burned and assembled with illegal copies of video games; (ii) circumvention devices as mentioned above; and (iii) modified consoles. 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. Apart from some noteworthy enforcement actions, described below, the lack of criminal investigations and effective action for seizures of modified consoles or circumvention devices or against repeat infringers enable these businesses to continue to thrive.

**Camcording:** Camcording piracy has been a persistent problem in Brazil but had been trending down pre-pandemic. Camcording halted between 2020 and 2021, due to COVID-19-related restrictions, but is expected to resume its previous levels with the reopening of movie theaters.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

**Enforcement Against Online Piracy:** The lower level of compliance by online platforms to tackle infringing uses and repeat infringers, as well as slow takedown processes, facilitate widespread commercial piracy in Brazil. While there are no copyright safe harbors in Brazil, there are existing voluntary notice and takedown efforts to combat

piracy online. However, the *Marco Civil da Internet* (Brazilian Internet Law) continues to create problems for rights holders as it is unclear whether the law applies to copyright enforcement online, consequently creating reluctance on the part of online intermediaries and law enforcement to act. The “Marco Civil” statute was passed in Brazil in 2014, and since copyright is excluded from the scope of application of this law, the government should ensure that its implementation does not interfere with existing voluntary notice and takedown efforts or other constructive cooperation to combat piracy online. Additionally, the lack of deterrent penalties applied to copyright infringement also contributes to the widespread piracy problem. However, the Brazilian campaign against online piracy performed well at both federal and state levels during 2022.

**Operation 404 and Operation Brick:** A positive note on enforcement efforts in Brazil includes the fourth wave of Operation 404 against online content piracy, which was executed by the Brazilian Ministry of Justice and Public Safety (with the support of the cybercrime team (CIBERLAB), enforcement authorities from ANCINE, stakeholders from the private sector (Brazilian Pay-TV Association (ABTA), Alianza, and the Motion Picture Association (MPA)), and international anti-piracy groups and law enforcement (U.S. Department of Justice, the UK Intellectual Property Office, and City of London Police)) in June 2022 and December 2022. Thirty search and seizure warrants were served in 11 Brazilian states, and 226 websites and 461 illegal apps were blocked pursuant to a criminal court order. All of the apps combined had been downloaded more than 10.2 million times. Social media accounts, pages, and search results related to the targets were also delisted. The latest operation is tackling online piracy in general, including criminal cases related to video games and targeting UDG commercial sites.

One of the new aspects of this year’s Operation was the suspension of abusive video game users for 30 days from the metaverse platform where they engaged in copyright infringement. These users are dedicated to building digital items called “maps” that use music without the requisite authorization from the right holders. The “maps” are virtual concert stages where unlicensed music is performed without authorization. These “maps” and the music files are distributed to users via downloadable links and are also used in “events” promoted by users.

In addition to these operations, the São Paulo Prosecutor’s Office special unit *CyberGaeco* led a series of criminal investigations against eight major infringing sites dedicated to video game piracy in Brazil also expanding its actions to UDG commercial Brazilian websites on a strategic improvement against online game piracy. These illegal game sites combined more than 840 thousand monthly visits.

**Shutdown of Various Stream Manipulation Services:** Following a coordinated approach involving Pro-Musica Brasil, Brazilian anti-piracy body APDIF, and the Brazilian police, the operator of *turbosocial.com.br* and six affiliated sites ceased offering streaming manipulation services. A further coordinated action by APDIF and Pro-Musica Brasil, by way of cease-and-desist letters, resulted in seven additional websites ceasing to offer music stream manipulation services. In addition, IFPI, Pro-Musica Brasil, and APDIF worked with *CyberGaeco* on an action that resulted in 18 websites and five users of a popular online marketplace ceasing to offer stream manipulation services. An additional 12 websites voluntarily stopped offering streaming manipulation services as a result of this action. In total, more than 65 streaming manipulation services have been affected by this coordinated action in Brazil and an additional 35 listings for music streaming manipulation services have been removed from a popular e-commerce platform.

**Domain Seizures:** In recent years, there have been significant positive developments in the area of domain seizures in Brazil. The domains for 10 infringing music sites were recently either suspended or seized, and the operators paid financial penalties that *CyberGaeco* donated to social work organizations.

**Seizure of Illicit Streaming Devices (ISDs):** The Federal Regulatory Agencies ANATEL (telco) and ANCINE (content) worked with the Brazilian Customs to seize more than 200,000 ISDs at Brazilian ports of entry from October 2021 to October 2022, which meant US\$35 million in losses for pirates. However, these agencies suffer from a lack of resources and staff. IIPA urges the Government of Brazil to make ANATEL a consenting body within the Brazilian

Foreign Trade System (SISCOMEX) so the Agency can enhance its role to prevent ISDs from even leaving their exportation ports.

Although anti-counterfeiting raid operations were affected by the general strike of the Federal Revenue in the first quarter of 2022 and the reduced political engagement due to the electoral year, many operations were conducted targeting the seizure of illegal devices in 2022. The video game industry supported numerous training sessions in Brazil in 2022, some that resulted in subsequent raids. For example, following a training for the State Police Department from Minas Gerais, the department was able to conduct a raid action of over 1,000 counterfeit video game products. In December, following training of the Customs Authorities from the Port of Santos (State of São Paulo), the authorities seized over 5,000 mini-consoles with pre-loaded infringing games. One video game company reported that actions by Brazilian customs and police raids in popular markets throughout Brazil resulted in the seizure of 50,600 preloaded consoles with unauthorized video games in 2022.

These enforcement actions speak to Brazil's improvement. However, too much of Brazil's judicial system continues to lack adequate understanding of IP matters, though some exceptions exist, such as the specialized commercial and criminal courts in São Paulo (see above) and Rio de Janeiro. IIPA urges 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, as well as technical training in complex online piracy, TPMs, and anti-circumvention technologies.

Even though there have been positive advancements in the last few years, especially with Operation 404, Brazil still suffers from a lack of specific norms and regulations regarding the enforcement of copyrighted works over the Internet and a lack of resources and staff to support enforcement actions considering the reach and amount of content piracy in the region. IIPA encourages CNCP to build on its 2022 work, develop a strategic plan to give top priority to combating 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 develop better standards and effective voluntary agreements to fight online piracy. To effectively undertake these actions, the Brazilian government should adequately fund the CNCP and increase the CNCP capability to operate with more human resources and infrastructure.

**Case Developments:** In *Intervozes v. Google Brasil*, the São Paulo State Court of Justice ruled that Google Brasil (YouTube) cannot take down audiovisual content infringing third parties' rights (and duly reported by the rights holder using YouTube's Content ID) without a previous court order pursuant to the Brazilian Internet Law and the freedom of speech provision in the Brazilian Constitution. This ruling may have negative effects on automated content protection tools used by Internet applications and risks deeply affecting enforcement of copyright on the Internet, as well as infringement numbers in Brazil if higher courts uphold the decision. However, it is important to remark that this case in particular was not about copyright specifically (and the video in question was about human rights issues) – therefore, it is not clear if the courts would have the same exact understanding when it comes to copyright issues.

On August 10, 2021, the Tribunal of Justice of the State of São Paulo, issued a permanent blocking order against 14 stream-ripping sites in a criminal case initiated by the industry's anti-piracy body, APDIF. The decision is the first of its kind in Brazil against music piracy services and affirms the legal powers of Brazilian courts to order permanent injunctions in cases against foreign sites with a significant audience in Brazil. The decision is part of the campaign developed by APDIF and *CyberGaeco*. More recently, in August 2022, the Tribunal of Justice of the State of São Paulo granted a permanent and dynamic blocking injunction against 21 major stream-ripping services, and in September 2022, the same court granted a dynamic blocking injunction against 40 major stream-ripping services for an initial period of 180 days. Both orders were issued following applications filed by APDIF and *CyberGaeco*.

**Enforcement Cooperation:** Audiovisual industry stakeholders play an active role in the Ministry of Justice's National Council Against Piracy, with regular participation by the MPA and the ABTA. MPA became a board member in December 2022, while the ABTA already serves on the Council. MPA was recently chosen to participate in the

Ministry of Economy's Intellectual Property Group (GIPI), which is responsible for discussing and updating Brazil's national strategy for IP. MPA and the ABTA are members of ANCINE's Technical Chamber to Combat Piracy, and both trade associations are part of a Technical Cooperation Agreement with the Public Prosecutor's Office from São Paulo State, aiming at tackling online piracy primarily through site-blocking judicial actions.

Additionally, there were multiple events to address online infringements, including three hybrid events dedicated to discussing with state prosecutors the application of disruptive actions against online piracy and cyber criminals. These events took place in the cities of Belo Horizonte, Porto Alegre, and Santa Catarina, and they also included an online training on open-source investigations with classes on different subjects and counting more than 33 hours of information.

In mid-August 2022, the National Secretary of Copyright and Intellectual Property (SDAPI) of the Ministry of Tourism, announced a series of public consultation meetings, starting in September and focused on different issues related to the use of creative content in the online environment. The first of these virtual meetings was focused on "streaming as a way of public performance." These "forums" will continue until the end of the year, and it is not clear if any conclusions or recommendations will be generated on every topic discussed. Additionally, there is no indication if these meetings will continue. Pro Musica Brasil attended the first session on behalf of the recording industry and ratified the position of the industry that ECAD has no jurisdiction nor legal powers in relation to interactive streaming.

**ANCINE's Anti-Piracy Program:** In December 2022, Ancine's board of directors has decided to completely redraft its Anti-Piracy Program, which will now be called Copyright Protection Program. In this context, the cooperation agreements that the Agency had with the MPA and with other players, such as the ABTA and e-commerce platforms, were terminated. Additionally, the Anti-Piracy Technical Chamber was dissolved, with the promise of setting up a Technical Chamber on Copyright Protection in the future. IIPA fears that these changes, under the pretext of reformulating anti-piracy programs, will undermine the various advancements that have been achieved in this area in recent years.

## **LEGISLATION AND REGULATION IN BRAZIL**

**Adopted Legislation:** On December 16, 2021, Brazil adopted Legislative Decree # 37/2021, which ratified the Budapest Convention. The ratification should facilitate cooperation between Brazil and other countries to fight cybercrime.

**National Intellectual Property Strategy:** In July 2020, Brazil's Economy Ministry launched a new consultation period to seek input on its proposal for a National Intellectual Property Strategy (ENPI), which was developed by the Inter-ministerial IP Group (GIPI) (overseen by the Economy Ministry). In late 2021, the ENPI was approved and made official by Presidential Decree, and Brazil's Ministry of Justice and Public Security launched the official PNCP in early 2022, as part of the aforementioned ENPI.

IIPA supports many of the strategy's goals, such as promoting the creation and strengthening of specialized IP public agency units and personnel, ranging from the judiciary to the police and customs; strengthening the structures of public policies against piracy that are already in place within the Ministry of Justice and Public Safety and other public agencies; re-affirmation of the authority of the administrative sphere to guarantee IP rights, including the opening of investigations and the suspension of websites and other services used primarily to violate IP rights; and in terms of the ENPI's general guidelines, increasing society's awareness not only of the benefits of IP rights, but also of the losses caused by the violation of IP rights, among others.

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. Several bills are working their way through the legislature related to notice and takedown, ISP safe harbors, and user-generated content platforms. Additionally, the bill enabling site

blocking has made no progress for the third year in a row. IIPA urges Brazil to focus on Copyright Act reform and the implementation of a site-blocking system. Moreover, discussions on site-blocking at both ANATEL and ANCINE should be fast-tracked to implement an effective system to tackle online piracy. The agencies are currently working on a cooperation agreement regarding the issue. In late 2022, ANATEL representatives traveled to Portugal and Spain to learn from local authorities about their successful site-blocking programs.

It is also essential for Brazil to ratify and implement the WCT and implement the WPPT to foster a vibrant legitimate market for Brazilian and foreign content. IIPA urges the Government of Brazil to consult with rights holders on the proposed copyright reform and ensures that it does not over-regulate or create broad exceptions and limitations to copyright. IIPA makes the following recommendations for the potential 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 dealing 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 and to include deterrent sanctions and penalties for the violations of TPMs.
- Clarify the provisions on damages to ensure that deterrent-level damages and a choice of method to calculate damages are available in respect of copyright infringement and circumvention of TPMs. Article 103 of the Copyright Law should be amended to expressly allow rights holders to choose the method of calculation of damages and include damage/losses suffered, an account of the infringer's profits, and a reasonable royalty as methods of the calculation of damages.
- 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 ECAD, a private umbrella CMO, and enjoy fair and balanced representation on its governing bodies. Brazilian authorities should also seize this opportunity to urge ECAD to amend its fixed split of the revenue collected from the single tariff, to the considerable disadvantage of producers. For example, music producers receive only 13.8% of total distributions despite their significant investments. Article 99(1) of the Copyright Law (introduced in law in 2013), which provides for a "one right holder one vote" rule within ECAD, should also be amended. This is not in line with international good practices and does not ensure that all rights holders whose rights are managed by ECAD are guaranteed fair and balanced representation in ECAD's governing bodies.
- 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 therefore, fell 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.
- Cover intermediary liability for inducing or encouraging infringement under certain circumstances, including advertisements placed on pirate sites.
- Criminalize signal theft in the Pay-TV and OTT sectors.
- Implement special cybercrime courts and prosecution units.
- Penalize repeat infringers, including those identified on online platforms and Internet applications, and have ISPs define clear and effective policies to deal with such matters.
- Ensure that any exceptions and limitations comply with the three-step test.

- With respect to copyright infringement, ensure the availability of meaningful rights holder compensation that is commensurate with the harm suffered by the rights holder and at a level that will deter future infringements.

In addition to amendments to strengthen protection and enforcement for rights holders, Brazil is currently considering several bills with worrisome provisions, including amendments to the Copyright Act.

**Derogation of Incentives:** At the same time that conversations on Pay-TV and screen quotas renewals are taking place (see below), the government has presented bills to revoke existing incentives that aid in the compliance with these quotas. These incentives create tax benefits for international programmers, which local players can access to co-produce works that are compliant with quotas. House Bill 4367/2020, currently awaiting the creation of a Special Committee, would do away with tax incentives contained in the Audiovisual Law. This bill follows similar efforts by the Ministry of Economy to revoke these incentives. These initiatives, if they pass, would generate significant losses for local producers and for their international coproduction partners.

**Voluntary Agreements and Best Practices Guides:** Several voluntary agreements and best practices guides have been signed between companies and public entities in Brazil, namely the “Memorandum of Understanding on Online Advertising and Intellectual Property Rights” (2019) and the “Best Practices Guide for Online Payment Processors” (2020) that aim to establish internal policies to reduce digital advertising and income from intellectual property infringement. Unfortunately, the lack of enforcement powers by CNCP is a strong impediment on establishing a cooperative environment among stakeholders. Government engagement to promote cooperation among private sector players and between public and private organizations through the CNCP could improve participation in voluntary measures.

## **MARKET ACCESS AND RELATED ISSUES IN BRAZIL**

**Pay-TV Content Quotas:** Effective in 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 3.5 hours per week of Brazilian programming during primetime. The Law 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 but could 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 were 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. While these quotas expired in September 2021, there is a draft bill (5092/2020) seeking to extinguish any deadline applied to the theatrical quotas. Local content quotas limit consumer choice and can push consumers toward illegitimate content sources.

**Video-on-Demand (VOD) Tax and Regulatory Framework:** Brazil currently applies a Condecine tax, on a per-title basis, to films, Pay-TV, and “other segments,” according to ANCINE’s Normative Ruling #105. If imposed on the VOD segment, such a tax would chill investment and curb consumer choice. Helpfully, in September 2021, Brazil’s legislature voted against the levy of Condecine tax over VOD content on a per-title basis, overriding an executive branch veto in the process. Although there is not currently a Condecine tax over VOD, discussions within the legislature persist. Notwithstanding recent positive developments in this area, industry stakeholders committed to the growth of Brazil’s OTT market remain concerned about the future.

**High Tariffs, Taxes, and Barriers on Entertainment Software:** Brazil's high tariffs and taxes on video game products and entertainment software are a long-standing concern and remain so going into 2023. In August 2022, then-President Bolsonaro reversed reductions of IPI that had been applied earlier in the year for over 100 products, including video game consoles, whose rate now have returned to the burdensome level of 20%. The August presidential decree sought to implement a decision of the Supreme Court, which questioned the constitutionality of IPI reductions that might adversely affect the free zone of Manaus (ZFM), where the IPI does not apply. In fact, it has not been shown that any ZFM manufacturers produce any video game related products that might be disadvantaged by a reduction in the IPI in the rest of the country.

On June 21, 2022, the Foreign Trade Chamber (CAMEX) of the Economy Ministry announced the reduction in import (II) taxes for console accessories and portable video game devices. Going into effect in July 2022, the move represented important progress to reduce the import tax burden on games with embedded screens to zero, and for other consoles and peripherals and accessories, it was reduced from 16% to 12%. These taxes 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.

Under a 2013 interpretation of the law that considered customized software a service, 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, which continued to be applied to off-the-shelf, physical software. However, the taxation of off-the-shelf software, such as video games, is widespread, including the federal IPI, import tariff (II), federal social contributions (PIS and COFINS), and the municipal services tax (ISS). The overall heavy tax burden on such software therefore marginalizes the legitimate market (since pirate copies, whether smuggled across the border or burned within the country, are not subject to these fees). IIPA urges the reconsideration of this problematic interpretation from 2013. The overall tax burden for video game products remains high, and IIPA encourages Brazil to continue efforts to further reduce or eliminate the federal-level IPI, import taxes, as well as the state-level (ICMS) and ISS taxes on video game consoles and accessories (the IPI on portables was fully eliminated in 2021).

**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 CMOs 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 entitled to collect royalties only 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. IIPA urges the Brazilian government to continuously and officially reaffirm that CMOs can assert rights only to collect royalties for acts of communication to the public where authors and performers in audiovisual works have specifically mandated that these CMOs do so, and only where relevant rights have not already been assigned to producers of audiovisual works. This continuous clarification is necessary to ensure that the CMOs assert only properly authorized claims and to protect rights of freedom of contract for all stakeholders.

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada remain on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** Canada's legitimate digital marketplace for copyright materials remains hampered by widespread infringement, including: stream-ripping services that undermine legitimate music streaming, video-on-demand (VOD), and download offerings; subscription piracy services (infringing paid Internet Protocol Television (IPTV) and 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 (PDs) 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. Canadian upstream piracy providers are also actively engaged in the theft of telecommunication signals that provide content to other 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 continues to allocate insufficient resources and strategic priority to enforcement of copyright laws, especially online, and significant market access barriers continue to impede U.S. film and TV producers and distributors.

The mandated parliamentary review of Canada's Copyright Act that was initiated in 2017 should have been a vehicle for addressing many of these problems, as many of the recommendations of the Parliament's Standing Committees on Canadian Heritage (Heritage Committee) and Industry, Science, and Technology (Industry Committee) would have improved copyright protection and enforcement in the country. However, the Government of Canada has not acted upon these recommendations, including the Heritage Committee's recommendation to amend the Copyright Act to clarify that the fair-dealing exception for education should not apply to educational institutions when the work is commercially available. Instead, the government initiated further consultations on copyright reform on a discrete set of issues in 2021. Meanwhile, 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 the fair-dealing exception for education, lack of effective remedies and legal incentives to combat growing online piracy, an unjustified radio royalty exemption, a wholly ineffective "notice-and-notice" system, a globally anomalous exception for user-generated content (UGC), and weak enforcement. Many of the parliamentary committee 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 specific legislation, Canadian courts have issued and upheld injunctive relief against intermediaries whose services are used to infringe copyright. IIPA is also encouraged that Canada has now implemented its obligation to extend the general term of protection for works as required by the U.S.-Mexico-Canada Agreement (USMCA) by issuing an Order in Council that fixes December 30, 2022, as the day on which the amendments to the Copyright Act that were included in Division 16 of the Budget Implementation Act, 2022, No. 1 came into force. These amendments to the Copyright Act extended the general term of copyright protection for all works measured by the life of the author plus 70 years (previously, life of the author plus 50 years) in accordance with Canada's obligations under the USMCA. However, in addition, Canada should remedy its deficient online copyright liability regime, which lags behind global norms. IIPA urges the U.S. government to remain extensively engaged with Canada on this and other important intellectual property (IP) issues in 2023.

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<sup>1</sup> For more details on Canada's Special 301 history, see previous years' reports, at <https://www.iipa.org/reports/reports-by-country/>. For the history of Canada's Special 301 placement, see <https://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## **PRIORITY ACTIONS REQUESTED IN 2023**

- Address the crisis in the educational publishing market, by clarifying that the fair-dealing exception for “education” does not apply to educational institutions when the work is commercially available.
- Harmonize remedies for collective management organizations (CMOs) under the Copyright Act.
- Counter 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 best practices, including by: expressly allowing rights holders to obtain no-fault injunctive relief against intermediaries whose services are used to infringe copyright (codifying the recent positive case law in this area (see below)); reforming the currently inadequate and globally anomalous “notice and notice” regime in favor of a more effective mechanism; clarifying and limiting the scope of the safe harbor provisions to ensure they apply only to passive and neutral intermediaries that do not contribute to infringing activities; and introducing measures that have been demonstrated effective in preventing or restraining infringement.
- Ensure 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.
- Eliminate or at least clarify the UGC exception, in accordance with parliamentary recommendations and Canada’s international obligations.
- Prioritize enforcement against online piracy (including stream ripping), the operation and sale of subscription piracy services, and the trafficking in PDs 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 the foregoing priority.
- Ease long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada’s USMCA commitments.

## **THE DIGITAL MARKETPLACE IN CANADA**

Canada remains one of the leading markets for online commerce of U.S. copyrighted works. The Canadian Internet Registration Authority (CIRA) reports that 71% of Canadians say they spend at least one hour per day watching TV or movies online.<sup>2</sup> About four in 10 Canadians spend more than three hours per day watching TV or movies online.<sup>3</sup> The legitimate online video market is growing in Canada, with studios and other producers continuing to work with multiple partners and platforms. In 2021, Canadians subscribed to a wide variety of services offering movies, TV programming, or both, online, with 61% of all Canadians reporting that they subscribe to Netflix, 40% subscribing to Amazon Prime Video, and 23% subscribing to Disney+.<sup>4</sup> The International Federation of the Phonographic Industry’s (IFPI) Music Consumer Study for 2022 (MCS) found that two-thirds of the time that Internet users in Canada listen to music is spent listening online through streaming services.<sup>5</sup> Canadian total recorded music revenues grew by 12.6% in 2021.<sup>6</sup> Streaming was the key to growth, with streaming total revenues up by 18.0% from US\$385.4 million in 2020 to US\$454.8 million in 2021.<sup>7</sup> Streaming’s share of total music industry revenues continues to grow, increasing to 77.9% in 2021, and digital consumption methods overall are now nearly 82% of all recorded industry revenues.<sup>8</sup> In 2021, 49% of Canadian adults and 70% of Canadian children played video games regularly with other people,<sup>9</sup> and 53% of Canadians engaged in gaming for about 7.9 hours per week.<sup>10</sup>

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<sup>2</sup> CIRA, *Trends in Internet Use and Attitudes: Findings from a Survey of Canadian Internet Users*, March 2022, p. 73, available at [https://static.cira.ca/2022-05/CIRA%20Internet%20Factbook%202022\\_Public.pdf?VersionId=B1k9RzbuIKIKo9tc4saNLokKfkzmsaTd](https://static.cira.ca/2022-05/CIRA%20Internet%20Factbook%202022_Public.pdf?VersionId=B1k9RzbuIKIKo9tc4saNLokKfkzmsaTd).

<sup>3</sup> Id.

<sup>4</sup> CIRA, *Trends in Internet Uses*, at p. 79.

<sup>5</sup> International Federation of the Phonographic Industry (IFPI), *2022 Music Consumer Study* (MCS).

<sup>6</sup> Id. at page 140.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Entertainment Software Association of Canada, *Essential Facts 2022*, p. 3, available at [https://thesa.ca/wp-content/uploads/2022/11/EF2022\\_EN.pdf](https://thesa.ca/wp-content/uploads/2022/11/EF2022_EN.pdf).

<sup>10</sup> Id. at p. 4.

Evidence persists, however, that the digital marketplace for copyrighted content in Canada continues to face challenges in realizing its full potential due to competition from illicit online sources. In 2022, 22.4% of Canadians accessed pirate services.<sup>11</sup> Stream-ripping services, now the leading form of music piracy in Canada, are a major contributor to this problem.<sup>12</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>13</sup> In a survey of Canadian Internet users, 19.4% of users aged 16 to 64 said they had downloaded music content through stream ripping in the last month.<sup>14</sup> Stream-ripping services undermine the legitimate markets both for streaming and for licensed music downloads. In the third quarter of 2022, the most popular stream-ripping sites in Canada were *YTMP3.cc* (5.1 million visits from Canada), *ssyoutube.com*, and *y2mate.is* (2.5 million and 1.9 million visits respectively in the same period). Dozens of websites, software programs, and apps offering stream-ripping services find an eager marketplace in Canada. Use of peer-to-peer (P2P) sites remains high, with BitTorrent indexing sites including *Rarbg*, *The Pirate Bay*, and *1337x* popular in Canada. Cyberlocker sites, such as *Mega*, *Uptobox*, *GoFile*, and *Rapidgator*, are also a common way to illicitly access recorded music.

As with music piracy, online movie and television piracy remains a formidable challenge in Canada, inflicting major financial harm. NERA Economic Consulting and the Global Innovation Policy Centre (GIPC) estimates the commercial value of pirated digital film content at US\$285.7 billion and the commercial value of pirated digital television content globally in 2017 at US\$280.5 billion.<sup>15</sup> The displacement of legitimate economic activity by piracy has a negative impact on economic growth. 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>16</sup> 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, 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>17</sup> Canadians made 2.6 billion visits to piracy sites in 2018, and the nature of this piracy continues to evolve.<sup>18</sup> In 2020, 76% of Canadians' visits to sites used for online piracy were to non-P2P sites, including streaming sites and cyberlocker (host) sites, up from 39% in 2015.<sup>19</sup> 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. Many of these illegal services in Canada have generated millions of dollars in revenue, oftentimes laundering the money through seemingly legitimate businesses set up solely for this purpose. The lucrative financial return of an infringing business model encourages a large ecosystem of players including the operator of the service itself, individuals supplying the infringing content, resellers of the service, payment processors, and advertisers. 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

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<sup>11</sup> IFPI, 2022 MCS.

<sup>12</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>13</sup> The music industry reports that some 93% of Canadians who visited YouTube used the site to access music in 2021.

<sup>14</sup> IFPI, 2022 MCS..

<sup>15</sup> NERA Economic Consulting and Global Innovation Policy Center (GIPC), *Impacts of Digital Video Piracy on the U.S. Economy*, June 2019, available at <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf>.

<sup>16</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>17</sup> Standing Committee on Canadian Heritage, *Shifting Paradigms: Report of the Standing Committee on Canadian Heritage (Heritage Report)*, May 2019, available at [https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc\\_cid=d88779154e&mc\\_eid=0183856a67](https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc_cid=d88779154e&mc_eid=0183856a67).

<sup>18</sup> Id.

<sup>19</sup> Sandvine, *Video Piracy in Canada*, April 2018, available at <https://www.sandvine.com/hubfs/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>.

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 United States (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>20</sup>

It is nearly impossible to overstate the magnitude of the piracy problem in Canada. 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.

Canada's digital marketplace also remains hampered by widespread infringement due to infringing paid subscription piracy services, including infringing IPTV and VOD services; the theft of telecommunication signals (thereby acting as the sources of content for these illegal services); illegal streaming sites and other online sources for unauthorized movies and TV shows; and PDs and apps. These sources remain readily available both online and in the legitimate retail market, suppressing the demand for legitimate digital streaming and VOD services. The film and television industry in Canada continues to battle an influx of operators, sellers, and resellers of infringing paid subscription IPTV and VOD services. Canadian individuals are also actively involved in the ripping and theft of on-demand streams and telecommunication signals for the purposes of: (1) making unauthorized streaming of live television and motion picture programming available to their own for-profit IPTV service or for sale as a "source" for other infringing IPTV services; and (2) for release on P2P sites affecting the Canadian and global markets.

Both online and offline, the legitimate market is challenged by trafficking in PDs 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 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 their legality. Canadian piracy operators 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.

Sites dedicated to distributing tools to circumvent access or copy controls used by copyright owners remain active in Canada, despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, as well as subsequent court decisions enforcing these statutes. The video game industry reports that in 2022, Canada ranked 10th in the world for console game piracy and 33rd for PC/Mac game piracy. Canada also ranked 31st in the world for all game-related P2P piracy.

## **COPYRIGHT ENFORCEMENT IN CANADA**

For Canada's main federal law enforcement agency, the RCMP, IP crimes 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 unable to effectively deal 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 in two separate

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<sup>20</sup> Id.

cases involving infringing subscription IPTV services, including a Nova Scotia case with multiple criminal charges. As both matters are ongoing, the ultimate outcome—and the resulting deterrent impact—remain to be determined. The non-statutory barriers to effective enforcement, as identified in parliamentary reports going back more than a decade, remain basically unchanged because Canadian law enforcement remains under-resourced, and too few agencies consider it a priority. Given the widespread availability of hundreds of subscription piracy services, more resources are needed to address this growing problem.<sup>21</sup>

Similar problems arise with Canadian prosecutors and courts. Historically, Crown Prosecutors have been reluctant to seek the breadth of remedies for IP crimes. This issue often arises due to a knowledge gap concerning the prosecution of IP crimes, a problem that is amplified when dealing with emerging piracy models, such as infringing IPTV or VOD services. While there have been some recent prosecutions, ongoing education of Crown Prosecutors is key to ensuring Canada stays ahead of emerging piracy business models.

While IIPA has seen positive engagement by law enforcement, a lack of law enforcement resources and Crown counsel awareness of the applicable laws remain significant challenges for rights holders. 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. 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 that this burden falls on the importer, as is the case in the United States.

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, PDs, 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 PDs 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 that is needed. IIPA members remain 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.

While the introduction of the “enablement” provision has been a helpful tool for addressing online piracy in terms of sites and services themselves, the lack of adequate tools in the Copyright Act concerning Canadian intermediaries continues to hamper enforcement against rogue sites or services in Canada. The Government of Canada must strengthen legal incentives for hosting providers, payment processors, advertising networks, domain registries and registrars along with other intermediaries, to stand by their terms of service, which often clearly outline an intolerance for copyright infringing activities, and to cooperate with rights holders, thereby deterring piracy from taking place via their services.

**Case Law:** Several Canadian court decisions reflect positive trends that legislation implementing the copyright review recommendations should affirm and build upon. Some directly involve provisions of the Copyright Modernization Act (CMA).

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<sup>21</sup> Standing Committee on Industry, Science and Technology, *Counterfeiting and Piracy Are Theft*, June 2007, available at [https://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391\\_INDU\\_Rpt08/391\\_INDU\\_Rpt08-e.pdf](https://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391_INDU_Rpt08/391_INDU_Rpt08-e.pdf) (called for a higher priority for enforcement at the retail level). See also, Standing Committee on Public Safety and National Security, *Counterfeit Goods in Canada – A Threat to Public Safety*, May 2007, available at <https://www.ourcommons.ca/Content/Committee/391/SECU/Reports/RP2985081/securp10/securp10-e.pdf> (raised similar concerns about law enforcement priorities and funding).

On March 24, 2022, the Supreme Court of Canada (“SCC”) dismissed the application for leave to appeal filed by TekSavvy Solutions Inc., the sole ISP to oppose the site-blocking order issued by the Federal Court and affirmed by the Federal Court of Appeal (FCA), in *Teksavvy Solutions Inc. v. Bell Media Inc.*<sup>22</sup> As a result, the decision of the FCA stands and underscores the ability of rights holders to obtain site-blocking orders in Canada on the basis of the courts’ equitable jurisdiction to grant injunctive relief.

On May 27, 2022, on the basis of the decision in *Teksavvy Solutions Inc. v. Bell Media Inc.*, the Federal Court in *Rogers Media, Inc. v. John Doe 1* granted the motion filed by the rights holders of live broadcasts of National Hockey League (NHL) games in Canada that the unknown defendants were unlawfully distributing and issued a dynamic site-blocking order for the “live” blocking of NHL games, the first of its kind in Canada.<sup>23</sup>

## **LEGISLATION AND REGULATION IN CANADA**

**Term Extension:** On November 17, 2022, the Government of Canada issued an Order in Council<sup>24</sup> that fixed December 30, 2022, as the day on which the amendments to the Copyright Act<sup>25</sup> that were included in Division 16 of Budget Implementation Act, 2022, No. 1 came into force. These amendments to the Copyright Act extended the general term of copyright protection for all works measured by the life of the author plus 70 years (previously, life of the author plus 50 years) in accordance with Canada’s obligations under the USMCA.

**Diagnosis, Maintenance, or Repair of a Product:** Bill C-244, an Act to amend the Copyright Act (diagnosis, maintenance, and repair), proposes to amend the Copyright Act to allow the circumvention of a TPM in a computer program if the circumvention is solely for the purpose of the diagnosis, maintenance, or repair of a product in which the program is embedded. Bill C-244 would also allow the manufacture, importation, distribution, sale, renting, and provision of technologies, devices, or components used for the diagnosis, maintenance, or repair of such products. On October 5, 2022, Bill C-244 completed the Second Reading before the House of Commons and was referred to the Standing Committee on Industry and Technology (INDU) for consideration.

**Copyright Board:** Amendments to the Copyright Board took effect in April 2019.<sup>26</sup> The amendments introduced statutory rate-setting criteria that require 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>27</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 amorphous and undefined criteria, such as the “public interest.” The “public interest” criterion – which the Industry Report notes could cause unpredictable results prompting costly, lengthy appeals and significant effects or other tariffs – 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 CMOs’ ability to collect royalties from active users. Unfortunately, the July 2021 SCC decision upheld the April 2020 decision by the FCA in *York*

<sup>22</sup> *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100, May 26, 2021, available at <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/497659/index.do>.

<sup>23</sup> *Rogers Media, Inc. v. John Doe 1*, November 17, 2021, available at [https://cippic.ca/uploads/T-955-21\\_FACTUM-PUBLIC.pdf](https://cippic.ca/uploads/T-955-21_FACTUM-PUBLIC.pdf).

<sup>24</sup> Order in Council, 2022-1219, November 17, 2022, available at <https://orders-in-council.canada.ca/attachment.php?attach=42930&lang=en>.

<sup>25</sup> Division 16, Amendments to the Copyright Act, available at [https://laws-lois.justice.gc.ca/eng/annualstatutes/2022\\_10/page-21.html#h-104](https://laws-lois.justice.gc.ca/eng/annualstatutes/2022_10/page-21.html#h-104).

<sup>26</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, 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 also implemented regulations requiring the Copyright Board to issue its decisions within 12 months following the close of hearings, which is a positive development.

<sup>27</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.

*University v. Access Copyright* that the Copyright Board approved tariff issued by Access Copyright is not mandatory and, therefore, not enforceable against York University or other non-licensees.<sup>28</sup> This presents a significant obstacle to a well-functioning market for the collective management of rights. To operate in that market, CMOs require the ability to enforce the rights they represent, in accordance with their mandates from rights holders.

**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. Further, in response to the United States' adoption of the Music Modernization Act (MMA) 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.

**Copyright Modernization Act:** In December 2017, Canada's Parliament launched the copyright law review mandated by the 2012 Copyright Modernization Act (CMA).<sup>29</sup> The review provided an invaluable opportunity for Canada to assess whether the Copyright Act has kept pace with rapid technological and market changes and to upgrade, improve, or correct the Copyright Act where it falls short in today's digital environment, including correcting deficiencies in the CMA. As IIPA previously reported, the review concluded with the May 2019 release of the Heritage Committee Report called "Shifting Paradigms" (Heritage Report)<sup>30</sup> and the June 2019 Industry Committee Report (Industry Report).<sup>31</sup>

The Heritage Report recognized the negative impact the 2012 amendments, which introduced an undefined "education" as fair-dealing exception, have had on the publishing industry, as well as 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 several positive recommendations intended to address these concerns, as well as other significant shortcomings of Canada's legal framework.<sup>32</sup> 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";
- 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, the WTO TRIPS Agreement, and WIPO Copyright Treaty (WCT)).

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<sup>28</sup> *York v. Access Copyright*, 2020 FCA 77.

<sup>29</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>30</sup> Standing Committee on Canadian Heritage, *Shifting Paradigms: Report of the Standing Committee on Canadian Heritage (Heritage Report)*, May 2019, available at [https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc\\_cid=d88779154e&mc\\_eid=0183856a67](https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc_cid=d88779154e&mc_eid=0183856a67).

<sup>31</sup> Standing Committee on Industry, Science, and Technology, *Statutory Review of the Copyright Act ("Industry Report")*, June 2019, available at <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/>.

<sup>32</sup> See IIPA, 2022 *Special 301 Report Submission*, pp. 144-45, available at <https://www.iipa.org/files/uploads/2022/01/2022-SPEC301-3.pdf>.

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; 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 IIPA has noted in several submissions and adopt needed reforms that have been delayed for too long, including: (1) expressly allow rights holders to obtain no-fault injunctive relief against intermediaries whose services are used to infringe copyright when the intermediary has actual or constructive knowledge of infringing content or links on their services or networks (codifying the recent positive case law in this area (see above)); (2) reform the currently inadequate and globally anomalous “notice and notice” regime in favor of a more effective mechanism; (3) clarify that safe harbors should apply only to passive and neutral intermediaries that do not contribute to infringing activities; and (4) avoid introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing (ECL).

## **OTHER DEFICIENCIES IN CANADA’S COPYRIGHT REGIME**

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.

**The Education Publishing Crisis Resulting from 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. 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 the development of new content and innovative means to deliver that content to consumers. Unfortunately, there has been little progress in rectifying the current situation, despite the CMA review.

The sense of impunity from copyright responsibility that Canada’s educational establishment displays not only has significantly reduced 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. In 2017, 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. 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 made 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. 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 remains unredressed. Because "education" is not defined in the statute and given the expansive interpretation of fair dealing articulated by Canadian courts, the exception continues to present a risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions). Unfortunately, with the 2021 SCC decision in the *York University v. Canadian Copyright Licensing Agency*, the problematic environment for education publishers can now be remedied only through action by parliament. The SCC ruled that certified tariffs are not mandatory, and as such, "not enforceable against York." Importantly, the SCC did not opine on the fair-dealing question, stating there was no "genuine dispute between the proper parties" about the (fair dealing) Guidelines.

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 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 corrective recommendations in the Heritage Report, including clarifying the scope of the fair-dealing exception for education. 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.

**Non-Commercial User-Generated Content (UGC) Exception:** The copyright exception for "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 WTO TRIPS Agreement, the Berne Convention, the 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. Although the exception has no precedent in global norms, it has spawned would-be imitators. This underscores the importance of removing, or at least clarifying, the UGC exception, in accordance with recommendations in the Heritage Report.

**Incentives are Lacking for Necessary Players to Cooperate Against Online Infringement:** Canada's Copyright Act fails to respond adequately to the broader challenge of online infringement. The statute lacks important standard tools that leading copyright regimes now routinely provide to incentivize intermediaries, including advertisers, payment processors, and domain name registrars and their affiliated privacy/proxy registration services, to address copyright infringement, and the tools it does provide fall demonstrably short. 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 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, in effect since January 2015. The 2021 consultation on a modern copyright framework for online intermediaries explored changes to the notice-and-notice system. However, nothing came of the consultation, which is a significant missed opportunity. No evidence exists that the notice-and-notice system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so. The system is merely an educational tool aimed at end-users, but no evidence exists that it contributes to mitigation of infringing activity by consumers. Simply notifying ISP subscribers that their infringing activity has been detected is ineffective in deterring illegal activity, because such notices do not lead to any meaningful consequences under the Canadian system. Furthermore, the system creates little meaningful incentive for service providers to attempt 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. ISPs have insufficient incentive to respect the legislated notice-and-notice system, because their failure to forward notices from rights holders is without significant consequence.

Moreover, the law lacks incentives necessary 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 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 by clarifying and limiting the scope of the safe harbor provisions to ensure they apply only to passive and neutral intermediaries that do not contribute to infringing activities. 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, and without the requirement for rights holders to first sue and obtain a successful judgement against the infringer; 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. Such amendments and avoiding broad exceptions that are inconsistent with these principles would help ensure that Canada's copyright framework for online intermediaries better achieves its underlying policy objectives in an evolving digital world. However, in updating Canada's safe harbor provisions, regard must be had to the lessons learned in other jurisdictions to avoid importing formulations that have led to “unbalanced” results.<sup>33</sup> Canada's 2020 USMCA implementation legislation did not address these deficiencies. 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 to make its current regime more effective and provide meaningful incentives to stimulate inter-industry cooperation against online piracy.

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<sup>33</sup> United States Copyright Office, *Section 512 of Title 17 – A Report of the Register of Copyrights*, May 2020, available at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

**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. 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.

**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. The Copyright Board concluded that there is no economic rationale for this provision, which it called a “thinly veiled subsidy” to “large, profitable broadcasters.” 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 CAD\$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. Unfortunately, the 2020 USMCA implementation legislation 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 CAD\$1.25 million commercial radio royalty exemption should be eliminated.

**Provide Full Rights for Communication to the Public of Sound Recordings:** 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.

**Provide Full Rights for Public Performance of Sound Recordings:** Although Article 15 of the WPPT is clear that the right to remuneration for public performances encompasses both direct and indirect uses of phonograms, the Canadian Copyright Act (s.72.1) prohibits rights holders from directly licensing “indirect” uses, where commercial businesses like shops or bars play music as part of their business operations or for ambiance, but the music comes from the radio rather than from a CD player or a background music provider service (for example). By prohibiting rights holders from licensing the users who actually use and benefit from their music, this provision fundamentally undervalues the right. Canada should amend the Copyright Act to ensure that the right allows the direct licensing of such uses in accordance with Article 15 of the WPPT.

## **TECHNICAL ASSISTANCE AND COOPERATION**

MPA-Canada provides technical assistance to and cooperation with Canadian authorities, including: (1) offers training to police officers, Crown counsel, government inspectors, and other entities involved in the Internet eco-system (such as e-commerce solutions, payment processors, and hosting providers) on all aspects of motion picture piracy via formal presentations throughout the year; and (2) participates in meetings with the Intellectual Property Rights (IPR) Enforcement Working Group, which is comprised of government, law enforcement, and rights holders, concerning the current and future state of affairs surrounding IP enforcement in Canada.

## **MARKET ACCESS IN CANADA**

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 certain long-standing 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>34</sup>

**Television Content Quotas:** The Canadian Radio-television and Telecommunications Commission (CRTC) imposes two types of 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. First, large English-language private broadcaster groups have a CPE obligation equal to 30% of the group's previous year's gross revenues from their conventional services and discretionary services (specialty and Pay-TV) combined, but there is some flexibility as to allocation among the services within the group. CPE obligations have also been assigned to independent signals and to independent discretionary services that have over 200,000 subscribers upon renewal of their licenses and are based on historical levels of actual expenditures on Canadian programming.

Second, per the Exhibition Quota, private conventional broadcasters must exhibit no less than 50% Canadian programming from 6 p.m. to midnight. Private English-language discretionary services (specialty and Pay-TV) must exhibit no less than 35% Canadian programming overall.

**Non-Canadian Signal and Service Restrictions:** Canadian broadcasting distribution undertakings (BDUs), such as cable, IPTV, 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 a "skinny basic" tier for not more than CAD\$25 per month that may include one set of "U.S. 4+1" (ABC, CBS, FOX, NBC, and PBS) from the same time zone as the BDU's headend, where available, if not, 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 offer a second set of U.S. 4+1 signals to its subscribers only 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 in a BDU's license from the CRTC, all other non-Canadian signals and services may be carried on only 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. Further, 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.

**Proposed Obligations on Non-Canadian Digital Services:** Non-Canadian digital services delivered over the Internet are currently exempt from most requirements under the Broadcasting Act. However, Parliament is in the final stages of considering proposed legislation (Bill C-11) that will provide the CRTC with the explicit power to regulate non-Canadian digital media services, including the power to make regulations that would impose financial, discoverability, and reporting obligations to support the Canadian broadcasting system. On June 21, 2022, the House of Commons completed the Third Reading of Bill C-11 and the Senate subsequently adopted the report of the Standing Senate Committee on Transport and Communications (TRCM) on December 14, 2022.

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<sup>34</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.

**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 and IPTV operators and satellite television distributors), must meet certain tests of Canadian ownership and control: (1) a licensee’s CEO must be Canadian; (2) at least 80% of a 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 parent must be beneficially owned and controlled by Canadians. The parent corporation or its directors cannot exercise control or influence over the 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” be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on such 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 non-Québec-based film distributors to do business directly in Québec. Film distributors that were members of the Motion Picture Association (MPA) as of January 1, 1987 are permitted to 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 and Communications. The Agreement was revisited in 2022 and was extended for seven years.

**Proposed Online Streaming Act:** In February 2022, the government introduced Bill C-11, the Online Streaming Act, which proposes to update the Canadian Broadcasting Act to provide for the regulation of streaming services by bringing these services under the regulatory authority of Canada’s broadcasting and telecommunications regulator the CRTC. The Online Streaming Act would provide the CRTC with the explicit power to regulate non-Canadian digital services delivered over the Internet, including granting the CRTC the power to make regulations that would impose financial, discoverability, and reporting obligations to support the Canadian broadcasting system. CRTC regulations issued under the Online Streaming Act will be guided by a government-issued Policy Direction, expected to be released following passage of the Bill C-11. It remains to be seen how the Online Streaming Act will affect the creative industries, and it contains some ambiguities, for example, the scope of authority to prescribe measures to foster the discoverability and promotion of Canadian content. The Minister has made numerous statements about how the legislation is intended to operate (e.g., that the CRTC would not have authority to issue orders impacting the algorithms of streaming platforms), but those intentions are not always expressly reflected in the text of the Bill. IIPA continues to monitor Bill C-11 and any effects it may have on IIPA members.

**Online Harmful Content:** On March 30, 2022, the government appointed an expert advisory group on online safety to advise on developing a legislative and regulatory framework to address harmful online content<sup>35</sup> and how to best incorporate the feedback received during the consultation that took place between July and September 2021. Bill C-36, which was tabled on June 23, 2021, but did not pass due to the 2021 election, targeted five categories of harmful content: terrorist content; content that incites violence; hate speech; nonconsensual sharing of intimate images; and child sexual exploitation content.<sup>36</sup> A summary of the panel conclusions and recommendations was published online on June 15, 2022.<sup>37</sup> IIPA continues to monitor the government’s work and any effects it may have on the broader online ecosystem.

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<sup>35</sup> Canadian Heritage, *Backgrounder – Government of Canada announces expert advisory group on online safety*, March 30, 2022, available at <https://www.canada.ca/en/canadian-heritage/news/2022/03/government-of-canada-announces-expert-advisory-group-on-online-safety.html>.

<sup>36</sup> Bill C-36, *An Act to amend the Criminal Code and the Canadian Human Rights Act and to make related amendments to another Act (hate propaganda, hate crimes and hate speech)*, First Reading, June 23, 2021, available at <https://www.parl.ca/DocumentViewer/en/43-2/bill/C-36/first-reading>.

<sup>37</sup> Government of Canada, *Minister Rodriguez announces conclusion of expert advisory group on online safety*, June 15, 2022, available at <https://www.canada.ca/en/canadian-heritage/news/2022/06/minister-rodriguez-announces-conclusion-of-expert-advisory-group-on-online-safety.html>.

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

Canada's international agreements with the United States most relevant to copyright obligations include the WTO TRIPS Agreement and the USMCA.<sup>38</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>39</sup> and Canada's market access restrictions raise issues regarding its commitments under the USMCA.

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<sup>38</sup> United States-Mexico-Canada Free Trade Agreement, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

<sup>39</sup> See TRIPS Article 13 and USMCA Article 20.64.

# COLOMBIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** With recent growth of Colombia’s economy, there is a critical need for the Colombian government to direct resources towards the enforcement of intellectual property rights (IPR). Colombia’s newly elected President, Gustavo Petro, has stated that intellectual property (IP) will continue to be protected. However, no major national anti-piracy efforts have been conducted by the National Police or the Attorney General’s Office in the last year. While the Copyright Office (DNDA) took action in 2021 against an online platform providing illegally broadcasted pay-tv signals, Colombia’s enforcement framework is not up to the challenge of its online piracy problems. This enforcement component was the missing piece of past President Duque’s plan to support the “Orange Economy,” or creative economy, and thus should be a priority of the new administration.

The approval (in late 2021) of the National Council for Economic and Social Policy’s (CONPES’s) National Intellectual Property Policy, which will guide the development of public policies on the subject up to 2031, was a significant advancement for copyright protection in the country. The implementation of this policy should help increase enforcement and improve the legal framework to foster the growth of a vibrant creative economy.

Legal reforms of the past several years in Colombia failed to introduce adequate protection and enforcement mechanisms to counter the country’s significant online piracy problem. Moreover, while a new National Development Plan will be developed for the 2023-2026 period, it remains to be seen how much emphasis will be placed on protecting IP. The lack of coordination and expertise among the country’s judicial and law enforcement personnel is a major obstacle for the protection of copyrighted works in Colombia. To address these enforcement challenges, IIPA urges Colombia to empower the DNDA to coordinate and train all relevant actors on copyright and enforcement best practices, with the work of INDECOPI in Peru serving as a good example of an administrative authority in the Andean Community that is playing an active role in copyright enforcement. IIPA also urges Colombia to bring its regime for the protection of technological protection measures (TPMs) into compliance with the provisions of the U.S.-Colombia TPA and to reconsider amendments to its copyright law that curtail the freedom of contract of foreign rights holders and local parties.

## **PRIORITY ACTIONS REQUESTED IN 2023**

### **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 against online piracy, based on MOUs and industry best practices.
- Encourage the DNDA to take action against notorious stream-ripping sites.

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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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## Legislation and Regulation

- Clarify, via regulation from the Ministry of Information Technologies and Communications and through DNDA's implementation of Law 1915 of 2018, that TPM circumvention is not permissible for any exception or limitation under the copyright law because that would be inconsistent with the U.S.-Colombia 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 of 2019, Colombia's National Development Plan, to preserve contractual freedom for future forms of commercialization.
- Amend paragraph (d) of Article 3 of Law 23 of 1982 (Copyright Law) to eliminate the so-called 60/40 rule, which is a legal barrier to the growth and development of the rights of performers and producers in Colombia and is inconsistent with Columbia's obligations under the U.S.-Colombia TPA.
- Urge the Colombian government to implement the new tax reform in a manner that provides clear rules for foreign companies and aligns with ongoing multilateral tax discussions at the OECD.
- Urge the Colombian government to pause consideration of its "Ley de la Música" bill and launch a broad consultation with impacted stakeholders, including local and multinational companies doing business in Colombia.

## THE COPYRIGHT MARKETPLACE IN COLOMBIA

While Colombia recently amended its Copyright Law, implemented a National Development Plan (2019-2022) that involves IPR protection, and attempted to tackle online piracy through administrative site-blocking orders, online piracy continues to be a significant and largely unaddressed problem in Colombia, showing no improvement in the past year. As of January 2022, Colombia had 35.5 million Internet users, and Internet penetration increased to 69.1% of the population (from 68% in the previous year).<sup>2</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.<sup>3</sup>

Online piracy in Colombia greatly increased due to the COVID-19 pandemic, as consumers gravitated to the online environment for movie and video game content, including illegal video game products offered on e-commerce platforms. The video game industry notes that the term "juegos" (games in Spanish) was the 14th most searched word on Google Colombia, a strong indicator of popularity for online gaming content. The audience for Spanish language infringing video game download and link sites in Colombia increased by 13% during the last year. An important piracy channel for digital video games remains the online marketplaces in Colombia, which are responsible for providing powerful commercial platforms to infringers.<sup>4</sup> Activity on these platforms increased during the pandemic, with some platforms reporting a 26% increase in the volume of listings (products announced by users) and an increase of more than 60% in local revenue in Colombia. Online markets have become the most concerning environment for infringing video game activity given their replacement of physical markets and their broader coverage in the country, popularizing the purchase of illegal products in the video game community. At the same time, the proportion of the total video game content traffic on the BitTorrent network in Colombia increased over the year, from 11% to 14%, despite a decrease in the number of users of the major torrent sites dedicated to infringing video games. Additionally, the illegal video game cyberlocker landscape is much more fragmented, with major platforms and services losing audience numbers to multiple smaller services, which have gained traction due to their agility in evading enforcement. Colombian National Police report that online crime overall has increased by 89% since January 2021. Concurrently, in the past year, online video game piracy increased in Colombia, spurred by increasingly more diversified methods for accessing and commercializing illegal game products and titles and a persistent lack of coordinated law enforcement. Bearing this in

<sup>2</sup> See Simon Kemp, Datareportal, *Digital 2022: Colombia*, February 15, 2022, available at <https://datareportal.com/reports/digital-2022-colombia>.

<sup>3</sup> The lack of awareness of the impacts of piracy is a problem in Colombia. The IP authorities organize effective public educational sessions on IP and infringement, but these programs do not start at the high school or university levels to explain what infringement is and how it affects rights holders.

<sup>4</sup> On a positive note, the video game industry reports that by working with *Mercado Libre*'s headquarters in Buenos Aires, Argentina, it is able to remove some infringing or illegal content from *Mercado Libre Colombia*, the most relevant e-commerce platform in the country.

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There are more than one million illegal pay-tv connections, which amount to operator industry losses of more than US\$247 million per year and government losses due to tax evasion of US\$197 million per year. According to studies from Ether City, Colombia represented 4% of Latin America's searches for pirate websites, and almost one in every four online offerings for movie and television titles directed the user to infringing content and services in 2020.<sup>5</sup>

For music, the predominant forms of piracy in Colombia are stream-ripping sites and cyberlockers. SimilarWeb data shows the most popular stream-ripping sites in the third quarter of 2022 were *y2mate.com* (with 24 million visits), *ssyoutube.net* (with 5.2 million visits), and *mp3y.download* (with 570,000 visits). The most popular cyberlockers in the third quarter of 2022 were *Mega.nz* (with 6.9 million visits), *1fichier.com* (with 2.4 million visits), and *Zippyshare.com* (with 940,000 visits). The recording industry also reports that locally run infringing download sites such as *simp3s.net* (with 100,000 visits from Colombian users in 2022) and *mp3cielo.co* (with 36,500 visits from Colombian users in 2022) are very popular among Internet users in Colombia. Further, mobile app piracy has become a growing concern for the recording industry considering the high volume of infringing music apps that are available and used in Colombia.

## **COPYRIGHT LAW IN COLOMBIA**

Recent changes in Colombia's legal regime fall short of providing the necessary tools to adequately protect and enforce IPR in the face of the country's significant online piracy problem, although there has been some positive movement to improve overall enforcement coordination. Additional copyright law revisions are needed to bring Colombia into compliance with its TPA obligations. Proposed legislation in 2022 raises serious concerns for the effective collection and distribution of performance rights, compounded by limitations under the Copyright Law that discriminate against holders of related rights. IIPA encourages USTR to closely monitor proposed amendments to the Consumer Protection Act (CPA) for development of useful online enforcement tools, as well as Colombia's implementation of the newly approved National Policy on Intellectual Property Policy, which shows some promise as a possible vehicle to coordinate needed law enforcement resources.

**Compliance With U.S.-Colombia TPA Obligations:** To fully comply with the U.S.-Colombia TPA, some of the copyright amendments to Colombia's Law 1915 of 2018 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;<sup>6</sup> and (2) a TPM may not be circumvented to exercise any exception or limitation.<sup>7</sup>

In addition, IIPA continues to urge 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.<sup>8</sup> Colombia also still must adopt statutory damages for copyright infringement as a key TPA obligation. Statutory damages were the subject of a 2019 draft Bill from the DNDA, but it shows no signs of progress.

**Regulation of Performance Rights and Collective Management Organizations (CMOs):** On September 7, 2022, Bill # PL-189-2022C, "*La Ley de la Musica*" (The Music Law) was submitted to the House of Representatives.

<sup>5</sup> Ether City, *Dimensión e impacto de la Piratería online de contenidos audiovisuales en América Latina*, December 10, 2023. available at: <https://cet.la/estudios/cet-la/dimension-e-impacto-de-la-pirateria-online-de-contenidos-audiovisuales-en-america-latina/>.

<sup>6</sup> See U.S.-Colombia Trade Promotion Agreement (TPA)(2012), Article 16.7(4)(f) available at <https://ustr.gov/sites/default/files/col-ipt.pdf>.

<sup>7</sup> See U.S. Colombia TPA, Article 16.7(4)(d) which 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."

<sup>8</sup> DNDA is again this year considering holding a public hearing to determine whether more exceptions and limitations should be added to the law.

The Bill would create a national fund for the promotion of national talent and music-related activities that includes several new fiscal contributions such as: (i) a 2% contribution on advertisement income of all digital service providers (DSPs), (ii) a 1% contribution on subscription payments to all DSPs, and (iii) funds pending at all CMOs for non-identified works and unclaimed distributions. The Colombian government should reject this Bill because it contains provisions that are highly damaging for digital platforms and CMOs in Colombia and that could create significant obstacles for the development of a healthy music market in the country.

In August 2021, the Constitutional Court agreed to hear the case filed by *ProMúsica Colombia* (on behalf of the recording industry) against Article 3(d) of the Copyright Law.<sup>9</sup> This provision imposes that authors receive at least 60% of remunerations collected from performance rights, *de facto* limiting remunerations to 40% for owners of neighboring rights in the communication to the public of works and phonograms, while 60% of remunerations go to copyright holders for the same use. The lawsuit received many supportive submissions, including from the International Federation of the Phonographic Industry (IFPI), performers organizations, and the Attorney General, all of whom generally agree that the provision is not found in any other copyright law in the region and is clearly discriminatory against artists, performers, and phonogram producers without justification.

On March 16, 2022, the Supreme Court dismissed *ProMúsica Colombia*'s Article 3(d) challenge on the basis that the 60-40 rule was justified by the “essential” nature of the creative works. While the Court clarified that Article 3(d) applies only by default when parties do not already have an agreement in place, the 60-40 rule remains 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>10</sup> Thus, Colombia should amend Article 3(d) of the Copyright Law to eliminate the 60% remuneration floor for authors.

**National Intellectual Property Policy Consultation:** In October 2020, CONPES, a division of the National Planning Department, launched a public consultation on a proposed National Policy on Intellectual Property (*Política Nacional de Propiedad Intelectual*). The proposal acknowledges the insufficiency of Colombia's institutional capacity to effectively manage, protect, and exploit IP rights. For example, 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. The CONPES' proposal 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. The National Planning Department approved the final document in November 2021, and it is now in force. Rights holders expect the Colombian government to implement the recommendations beginning in 2023 through 2031. Rights holders expect implementation will have a positive impact on enforcement against online piracy in Colombia, ranging from improved enforcement against circumvention of TPMs to specialized IPR training programs for judges and legal operators.

**Proposed Amendments to the Consumer Protection Act (CPA):** Colombian lawmakers are considering a draft legal reform, number 284 of 2020,<sup>11</sup> intended to update the CPA from 2011 (law number 1480) to extend the existing consumer protections and regulations for e-commerce. The draft CPA amendment does not mention any specific market. Instead, it would provide general rules for consumer protections that already exist to be applied to the online environment, such as the right to accurate publicity and clear product and service information; the right to consumer privacy protection established by article 5 of the bill; and the “right to be forgotten” established by article 3 and 4 of the bill, which allows for the withdrawal from a contract within seven days and receipt of a full refund of any payments made. These reforms could provide authorities with additional legal enforcement resources to help level the

<sup>9</sup> See Article 3(d) of Law 23 of 1982, available at [https://propiedadintelectual.unal.edu.co/fileadmin/recursos/innovacion/docs/normatividad\\_pi/ley23\\_1982.pdf](https://propiedadintelectual.unal.edu.co/fileadmin/recursos/innovacion/docs/normatividad_pi/ley23_1982.pdf) (in Spanish).

<sup>10</sup> U.S.-Colombia TPA, Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-ipr.pdf>.

<sup>11</sup> See Senate Bill 284 of 2020, available at <http://leyes.senado.gov.co/proyectos/index.php/textos- radicados-senado/p-ley-2020-2021/2065-proyecto-de-ley-284-de-2020> (in Spanish).

playing field for legitimate content providers against certain illegal services. The draft legal reform is now being discussed by the House of the Representatives under number 291/2021, but it has not yet been approved.<sup>12</sup>

**Constitutional Challenge to National Development Plan Article 181:** In May 2019, Colombia adopted law No. 1955-2019, which created the National Development Plan and is updated every four years (National Development Plan for 2023-2026 is still in development).<sup>13</sup> Article 181 created a set of regulations for copyright and related 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. The Colombian Supreme Court dismissed the 2020 lawsuit filed by *ProMúsica Colombia* challenging this obstacle to the free assignment of copyright rights and neighboring rights. A similar challenge by the audiovisual industry is still pending.

## **COPYRIGHT ENFORCEMENT IN COLOMBIA**

**Lack of Coordination and Expertise:** To date, Colombia's law enforcement authorities have not developed methods to stop the widespread availability of infringing content to Colombian Internet users and ensure compliance with copyright laws and regulations. Despite the available rights and remedies in the law, enforcement levels remain low, demonstrating a tolerance for the continued operation of an illegal online market. 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. The National Police and prosecutors need increased dedicated resources, considering that IP cases have not been a priority when it comes to investing time and resources in their investigation. The special cybercrime unit, *Dirección de Investigación Criminal e Interpol* (Department of Criminal Investigations and Interpol or DIJIN), focuses its enforcement actions mostly on areas such as online fraud (ransomware and phishing) without pursuing further coordination to promote greater protections for the digital economy or IPR. The police and its dedicated cybercrime department, *Centro Cibernético Virtual* (CAI Virtual),<sup>14</sup> should have a specific channel to provide assistance to businesses affected by cybercrimes and to coordinate efforts. The DIJIN and CAI Virtual have an appropriate structure and skill set to handle such cases and achieve a deterrent impact in the illegal online ecosystem.

The DNDA is the department that is most competent in copyright-related issues, but it 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 to expand DNDA's jurisdictional capabilities to enforce up to 200 civil copyright-related cases yearly. However, it is still unclear how this authority will be applied in practice, and the jurisdictional panel inside DNDA has very limited resources, causing serious delays. IIPA urges the Colombian government to increase DNDA's capacity through its implementation of the National IP Policy, which recommends a better organization of government authorities to combat digital piracy and enforce Colombia's IP laws.

In 2022, *ProMúsica Colombia* filed a pilot case asking for a blocking order against popular stream-ripping site *Y2Mate.com*. DNDA dismissed the case based on legal technicalities – and failed to take any additional actions or initiatives to combat Colombia's digital piracy problem. Despite DNDA's legal authority to order injunctions against

<sup>12</sup> House of Representatives Bill 291 of 2021, available at <https://www.camara.gov.co/proteccion-al-consumidor> (in Spanish).

<sup>13</sup> *Documento de seguimiento, Plan Nacional de Desarrollo 2018-2022*, October 31, 2020, available at <https://www.cnp.gov.co/Documents/Informe-PND.pdf> (in Spanish).

<sup>14</sup> See *Centro Cibernético Policial*, available at <https://caivirtual.policia.gov.co> (in Spanish).

relevant cases of digital piracy, such powers have rarely been exercised. As a result, Colombia currently has some of the highest traffic to stream-ripping sites throughout the entire Latin American region.

In March 2021, DNDA ordered ISPs to block the Internet signal from IPTV Colombia Premium,<sup>15</sup> which illegally broadcasted pay-tv signals. It was the first precautionary measure imposed against online piracy in DNDA's history. The new administration needs to ensure that the National Development Plan includes a powerful component to engage authorities to more actively protect IP in the digital environment, including a leadership role for the DNDA to coordinate the protection of the creative sector ecosystem.

The proposed National Intellectual Property Policy identified the lack of knowledge and training in IPR among its judicial and law enforcement personnel as one of the obstacles for effective copyright enforcement.<sup>16</sup> It is essential for Colombia to implement comprehensive copyright training for all relevant judicial and law enforcement at the local and regional levels, as well as training of customs officials at the border to identify and seize illegal streaming devices (ISDs).

**Internet Service Provider (ISP) Cooperation:** Since the COVID-19 pandemic, online piracy has significantly grown. Unfortunately, Colombia lacks sufficient ISP liability provisions to ensure ISPs are incentivized to cooperate with rights holders to address online piracy. Colombia also lacks specific regulations requiring ISPs to disable access to infringing content. Furthermore, remedies for copyright infringement are inadequate and unclear, which is why many rights holders do not pursue cases or actions against infringing sites.

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.<sup>17</sup> One reason ISPs may be hesitant to move forward with an MOU is because the government is currently considering (i) implementing a notice and take down procedure and (ii) creating safe harbor provisions. IIPA would, in the first instance, recommend that – rather than introducing safe harbors – ensure there is a clear legal basis for the liability of active online services and greater responsibilities on intermediaries to take action against infringing content. If, however, proposals are put forward to introduce safe harbor provisions, these measures should not interfere with an ISP's capacity to deploy their own site-blocking measures. Furthermore, any proposals for notice and takedown and safe harbors should provide for adequate incentives for ISPs to cooperate with rights holders to combat piracy. They should also be available only to ISPs that remove infringing content expeditiously and implement effective repeat infringer policies. Moreover, Colombia should provide measures demonstrated effective in preventing or restraining infringement and encourage ISPs to implement "know your business customer" (KYBC) policies to ensure they keep up to date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers. IIPA also urges 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.

## **MARKET ACCESS**

**New Tax on Digital Services and Platforms:** In November 2022, Colombia's legislature finalized a Tax Reform that will change the status quo of Colombian taxable nexus from having a corporate residence or physical presence in Colombia to one based on "significant economic presence." The result is that the new law will require virtually all U.S. companies to choose either (1) to pay Colombian income tax through a 10% withholding tax at source; or (2) pay a 3% tax on all gross income from the sale of goods and the provision of digital services from abroad to

<sup>15</sup> Juan Francisco Campuzano Velez, *Asuntos: Legales, Se impuso primera medida cautelar contra piratería online en la historia de Colombia*, March 9, 2021, available at: <https://www.asuntoslegales.com.co/actualidad/se-impuso-primer-medida-cautelar-contra-pirateria-online-en-la-historia-de-colombia-3136271> (in Spanish).

<sup>16</sup> The entertainment software industry, in connection with the Interamerican Association of Intellectual Property (ASIFI), has reported that in the past year it has held different educational sessions on devoting law enforcement and specialized prosecutorial resources to combatting online and physical piracy.

<sup>17</sup> In 2022, the Motion Picture Association (MPA) began conversations with the main Colombian ISPs in hopes of implementing site-blocking measures.

users located in Colombia. Helpfully, the law preserves successful programs that have, in recent years, incentivized historic levels of investment in local audiovisual production. The new tax rules, set to take effect in January 2024, will require regulations to implement the withholding and declaration obligations and the tax collection mechanisms. IIPA encourages the Colombian government to implement the tax reform in a manner that provides clear rules for foreign companies and aligns with ongoing multilateral discussions at the OECD.

**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. 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 to generate appropriate and proportional relief for local market stakeholders.

# ECUADOR

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR retain Ecuador on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** Six 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. For example, unlike the majority of music markets in the region, which have experienced significant growth in recent years, Ecuador’s music market has languished, primarily because COESCI has proven to be extremely burdensome and full of overly broad exceptions and limitations to copyright that inhibit new investments into the production of Ecuadorian talent as well as market development. 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 license 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 in which courts do not follow judicial precedent, and Ecuadorian judges have no experience or training on the doctrine of fair use, all of which undermine the proper application of the fair use doctrine and create unacceptable legal uncertainty for both rights holders and users.

Unfortunately, the regulatory provisions announced by the *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) in 2020 do not adequately correct COESCI’s egregious 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 some of COESCI’s exceptions. IIPA commends SENADI and SENESCYT for undertaking these initiatives and urges 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, IIPA also recommends that Ecuador direct considerable attention and resources to its enforcement efforts. While in 2021 Ecuador undertook several important enforcement reforms, including adding criminal penalties for intellectual property (IP) violations, and SENADI issued several administrative site-blocking orders, Ecuador’s piracy problems remain and require prompt action. For example, the country’s pay-TV penetration has declined in recent years mainly due to the proliferation of illegal streaming websites and illegal Internet protocol TV (IPTV) services piracy, and camcording legislation remains necessary because as theaters reopen Ecuador will likely continue to rank as a top regional provider of camcorded films.

#### **PRIORITY ACTIONS REQUESTED IN 2023**

- 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 and to do so in a transparent process that provides relevant stakeholders the opportunity to intervene.

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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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

- SENADI should consider issuing administrative *ex officio* blocking orders against online piracy platforms, notorious stream-ripping sites, and other online infringing services as warranted, by providing more resources and funds.
- Create and train enforcement units dedicated to investigate and raid physical targets of online piracy.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording, without requiring proof of commercial intent.
- Ensure that broadcasters and cable operators, including the state-owned cable TV company, pay royalties for the music and sound recordings that they use.

## **THE COPYRIGHT MARKETPLACE IN ECUADOR**

Official government statistics indicate that, for 2022, more than 60% of the population used the Internet and over 50% had a smartphone.<sup>2</sup> According to the International Federation of the Phonographic Industry's (IFPI's) 2022 Global Music Report, digital revenues in Ecuador amount to 91.2% of total music revenues, with streaming revenues alone making up 91% of total music revenues. There are seven legitimate online music services.<sup>3</sup>

Stream ripping is the predominant form of music piracy in Ecuador. While the most popular stream-ripping sites were *y2mate.com*, *mp3-youtube.download* (now *mp3y.download*), *flvto.biz*, and *notube.net*, website blocking actions ordered by SENADI against these sites have hurt their popularity, with traffic shifting to other stream-ripping sites, including *ssyoutube.com*, *savefrom.net*, and *mp3y.download*, all of which had a combined number of 10.1 million visits during Q3 of 2022. In addition, online piracy of film and television content, including through illicit streaming devices (ISDs) and infringing IPTV services, has been on the rise due to the current legal framework that prevents proper enforcement of copyrights. While SENADI's site-blocking actions against audiovisual piracy are important, they are insufficient considering the amount of infringement.

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 2020-2021 were exceptional years due to the COVID-19 pandemic, Ecuador is likely to remain a regional provider of camcorded films as movie theaters regain popularity. Legislation is needed to provide for deterrent criminal penalties for unauthorized camcording, without requiring proof of commercial intent.

## **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 in Article 9(2) of the Berne Convention, Article 13 of the WTO TRIPS Agreement, and the corresponding provisions of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), each in force in Ecuador since 2002.

Unfortunately, SENADI's November 2020 regulations implementing some of COESCI's provisions did not address the creative industries' most serious concerns regarding the overbroad exceptions. Instead, the regulations imposed numerous new obligations on 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. SENESCYT is reportedly working on a legislative proposal to amend some of COESCI's exceptions. IIPA urges SENADI and SENESCYT to reverse the most damaging provisions in COESCI, as laid out below, and to bring the law into compliance with the country's international obligations.

<sup>2</sup> See Information and Communication Technologies 2020 Summary, NEC (last visited Nov. 8, 2022), available at <https://www.ecuadorencifras.gob.ec/tecnologias-de-la-informacion-y-comunicacion-tic/>.

<sup>3</sup> See Legal Music Services Ecuador, PRO MUSIC (last visited Nov. 23, 2021), available at <https://www.pro-music.org/legal-music-services-latin-america.php>.

**Fair Use:** Ecuador’s attempt to transplant the U.S. fair use provision in the COESCI law creates an unacceptable level of uncertainty and risk in the country’s copyright ecosystem. COESCI’s Article 211 is broader than the U.S. provision on which it is purportedly based, because it adds a fifth factor, described as “use and enjoyment of other fundamental rights.” This factor is essentially a catchall and creates great uncertainty as to what constitutes “other fundamental rights” and how this factor will relate to the other four. Furthermore, while decades of case law and the principle of *stare decisis* enable U.S. courts to appropriately interpret and confine Section 107 of the U.S. Copyright Act, a similar environment does not exist in Ecuador. As a civil law country, its courts are not bound by judicial precedent. Furthermore, no body of case law exists within the legal system in Ecuador to which a judge may refer in evaluating whether the contested use is indeed fair. Also, although Article 211 indicates it is to be applied in accordance with international treaties to which Ecuador is a party, the provision is not in accord with international law due to the broad, unclear fifth factor and the lack of any case law to appropriately confine the exception. Finally, Article 211 may further negatively impact online enforcement in Ecuador because Internet platforms may be less willing to take down infringing content if they construe the fifth factor broadly and decide that unauthorized access to protected works is a fair use pursuant to “enjoyment of other fundamental rights” recognized in Ecuador (e.g., right to practice sports, right to education, right to communication, etc.). Thus, as written, the provision is outside the bounds of the three-step test, the international standard that confines exceptions and limitations to copyright, because it conflicts with the normal exploitation of works, unreasonably prejudices rights holders’ legitimate interests, and is not limited to “certain special cases.”<sup>4</sup>

Making matters worse, Article 211 includes language akin to a fair use savings clause that 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 fair use savings clause applies to each enumerated exception in the law, effectively broadening each exception beyond the scope of the three-step test. In other words, if the use does not meet one of these exceptions, then the fair use savings clause allows the exploiter to try and qualify under the overly broad fair use provision, with all of the problems identified above. Therefore, for all of the reasons discussed above, Article 211 should be removed.

**Other Exceptions:** COESCI’s list of other exceptions and limitations is extensive. As discussed below, the following exceptions allow widespread uses that clearly fall outside the confines of the three-step test.

Exception 9 for libraries and archives 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 and data 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. Again, this exception is overly broad in violation of the three-step test, especially in that libraries and archives may use the copies created under the exception for lending to users. 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 and go beyond certain special cases.

Exception 11 allows broadcasters to make ephemeral copies for their own transmissions and keep them for a period of five years. This lengthy period of retention makes this exception a *de facto* statutory license to make permanent copies, instead of an exception for ephemeral copy use. This exception prevents music rights holders in

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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 WTO TRIPS Agreement, Art. 13 (1994); WIPO Copyright Treaty (WCT), Art. 10 (1996); and, WIPO Performances and Phonograms Treaty (WPPT) Art. 16 (1996).

Ecuador from licensing the reproduction rights and unreasonably interferes with rights holders' normal business. The exception should be revised to limit the retention period to a standard term of 30 days.

Exception 24 allows websites, without the permission of rights holders, to reference or link to online sites, as well as to reproduce and store content when necessary for the operation of a search site provided 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 most businesses in Ecuador qualify as "small businesses," the exception is not limited to certain special cases. This exception is one of the most damaging in COESCI because it results in unreasonable harm to the economic interests of copyright and related rights holders. 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, especially coaches and "busetas," which are popular forms of transportation in the region and a non-negligible market for music rights holders. This overbroad, unfair, and unjustified exception is another example of protecting a particular interest of a group of companies against the legitimate interest of copyright and related rights holders.

Exception 30 allows "community radios" to communicate works to the public without permission from rights holders or remuneration. 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 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 problematic COESCI provisions include compulsory licenses and various rights and "default" clauses to govern contracts within the creative sectors, unless those contractual provisions are 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 a conflict exists regarding related rights. Such provisions are discriminatory and do not fulfill their intended purpose of increasing protection for authors and composers. In today's world, copyright owners and related rights holders, including singers and musicians, need equal protection to secure the normal exercise of their rights according to their contributions in the production and distribution chain of music and other protected content.

## **COPYRIGHT ENFORCEMENT IN ECUADOR**

More active and efficient copyright enforcement in Ecuador depends on the urgent modification of its legal framework and appropriate funding. In addition, Ecuador's government should create and train enforcement units dedicated to investigate and raid physical targets of online piracy. In a positive development, in 2021 Ecuador instituted several important enforcement reforms, including introducing IP crimes into the Ecuadorian legal system to punish, with imprisonment, those who violate IP rights. IIPA hopes this reform will address problems with a lack of deterrent sentencing and *ex officio* authority that historically have hampered effective enforcement against infringing acts in

Ecuador.<sup>5</sup> In addition, important amendments helped alleviate gaps and obstacles to customs regulations and border measures.<sup>6</sup>

In another positive development, in the past three years, SENADI has issued administrative site-blocking orders against pirate sites. In particular, in September 2021, SENADI ordered Ecuadorian Internet service providers (ISPs) to block around 40 infringing online platforms, three of which were responsible for enabling the non-authorized access of more than 50,000 visitors to over 1,000 pay-TV channels. On July 23, 2021, following applications filed by *Sociedad de Productores de Fonogramas* (SOPROFON), a sound recording industry CMO, SENADI issued four precautionary measures ordering all ISPs in the country to implement blocking against the most popular stream-ripping sites in Ecuador: *y2mate.com*, *mp3-youtube.download*, *flvto.biz*, and *notube.net*. Following the blocking, visits to these four sites from Ecuador dropped from 3.79 million in June 2021, the month prior to the blocks, to just 0.85 million in September 2021, a fall of 77.7%. This decline has been maintained during 2022. These orders are the first of their kind in Ecuador against sites dedicated to the infringement of IP rights in sound recordings and music videos of national and international artists and set a positive precedent for copyright enforcement in the online environment.

Despite the impact of this first action, stream ripping remains a key music piracy threat in Ecuador. Blocking four major stream-ripping destinations was successful in stopping the vast majority of visits to the targeted sites, but a wide variety of alternatives remained for users in Ecuador eager to download music illegally through stream ripping. For instance, following the blocking of the four sites mentioned, visits from Ecuador to stream-ripping site *Snappea.com* alone rose from 0.82 million in June 2021 to 5.83 million in September 2021. We urge SENADI to issue blocking orders against other sites that facilitate piracy to foster the growth of Ecuador's creative industries.

Administrative proceedings before SENADI, known as “tutelas,” were 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 related rights.

For example, in 2020, the Judiciary Panel, *Órgano Colegiado de Derechos Intelectuales*, decided 11 administrative appeals against DIRECTV for non-compliance with phonogram producers' and performers' rights. These cases were initiated in 2014 by SOPROFON 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 impinges on 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 to make the process expeditious and effective.

In addition, CNT, the state-owned cable TV company that signed an agreement with SOPROFON in 2019 to settle claims for uses of phonograms from 2011 to 2019, is now at fault again after failing to comply with the licensing agreement that covers the use of sound recordings from 2020 to 2023. This lack of compliance sets a bad precedent

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<sup>5</sup> Pursuant to this reform, intellectual property (IP) crimes will be punished with six months to one year imprisonment, confiscation, and a fine of eight to three hundred unified basic salaries (currently US\$ 3,200 – US\$ 120,000). For companies that commit criminal IP crimes, punishments include the confiscation of the offending assets, and a fine, regardless of the criminal responsibility of the persons involved in the commission of the crime. The judge may order the offending goods to be destroyed or, in cases in which the government determines the seized merchandise may satisfy a social need, the offending IP will be removed and the goods will be distributed, as long as this action does not affect the nature or functionality of the merchandise.

<sup>6</sup> The amendments require mandatory communication between the IP authority (SENADI) and the customs authority (SENAE) because both institutions will interconnect their systems and records. SENA E must inform the owner of the registered IP right that it discovered merchandise that would allegedly violate their rights. If SENADI determines an IP infringement occurs, the offender will be punished with a fine of between 1.5 to 142 unified basic salaries (currently between US\$ 600 – US\$56,800), in addition to other precautionary measures.

for the rest of the pay-TV market in Ecuador, and thus, the Ecuadorian government should instruct CNT to honor its licensing agreement with SOPROFON and make the corresponding payments. Further, SENADI should call the attention of CNT's board of directors to this situation, noting that the unauthorized communication to the public of sound recordings is a crime penalized in the Ecuadorian Criminal Code with prison time and fines.

# NIGERIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Nigeria be placed on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** As sub-Saharan Africa's largest economy, Nigeria is a critical market for the copyright industries, which have made significant investments in the creation and distribution of creative content in the country. The substantial increase in the accessibility of high-speed Internet and mobile devices in Nigeria has created opportunities; unfortunately, in the absence of an effective copyright legal and enforcement regime, Nigeria has experienced a growing online piracy problem. The increasing number of websites that make movies and music available for illegal digital downloads continues to ravage the country's creative sector, undermining revenues from legitimate channels, including streaming platforms (e.g., Netflix, Showmax, and Prime Video) and movie theaters, for disseminating licensed content. To address its online piracy problem, Nigeria needs to upgrade its legal and enforcement frameworks to provide adequate and effective protection and enforcement online. Nigeria ratified the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) in 2017, but it has not yet fully implemented the treaties. A copyright bill (CB) that passed the National Assembly in 2022 includes several positive aspects, including improvements to Nigeria's enforcement framework, but these are undercut by certain problematic provisions that should be revised for Nigeria to fully implement the WIPO Internet Treaties and meet global minimum standards and evolving global norms for copyright protection and enforcement in the digital environment. In addition, Nigeria's government should increase resources for enforcement against online piracy and take more enforcement actions. The Government of Nigeria should also reinstate the operating license of the Copyright Society of Nigeria (COSON), the collective management organization (CMO) mandated by international music rights holders to administer broadcasting and public performance rights, and ensure CMOs are owned or controlled by their member rights holders and are non-profit organizations.

#### **PRIORITY ACTIONS REQUESTED IN 2023**

- Make revisions to the few, but important, remaining elements of the CB that require updating to ensure Nigeria fully implements the WIPO Internet Treaties and meets its international obligations and evolving global norms, in particular by: extending Nigeria's term of protection for works and sound recordings in line with the international standard of 70 years from fixation or publication (and the same for juridical entities), and, for works, to the life of the author(s) plus 70 years; withdrawing the overbroad extended collective licensing provision; withdrawing the overbroad compulsory license for uses in the public interest; and amending the unclear open-ended fair dealing exception to maintain the closed list of specific fair dealing exceptions.
- Provide more resources, including critical resources such as electricity and Internet access, for the Nigeria Copyright Commission (NCC) online enforcement unit to adequately engage in and sustain efforts to combat piracy in the country.
- Increase investigations and take action against online piracy services that are harming the creative industries.
- Raise awareness among Internet service providers (ISPs) around effective policies to prevent piracy, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.
- Reinstate the operating license of COSON (subject to a satisfactory audit to ensure appropriate good governance and operational practice) and ensure that CMOs are owned or controlled by their member rights holders and are non-profit organizations.

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<sup>1</sup> For more details on Nigeria'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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## **THE COPYRIGHT MARKETPLACE AND ENFORCEMENT IN NIGERIA**

Nigeria's vibrant film and music industries are critical to its economy.<sup>2</sup> Nigeria's Minister of Information and Culture, Lai Mohammed, recently summarized the conclusion of an Afreximbank report that the creative industry "is a resource which is limitless, renewable, and can easily create wealth and jobs."<sup>3</sup> He further stated, "When you look at the development of the creative industry in Africa today you will realize that we are sitting on a goldmine."<sup>4</sup>

Unfortunately, pervasive piracy remains a significant obstacle for Nigerian authors and artists, who, as a result, struggle to receive any compensation for their works.<sup>5</sup> In 2019, the NCC disclosed that the country loses approximately \$3 million yearly to digital piracy.<sup>6</sup> According to the World Bank, nine out of every ten films sold in Nigeria are pirated copies.<sup>7</sup> Nigeria is a hub for music copyright piracy (and other forms of cybercrime) with its international reach undermining legitimate music markets across Africa, Latin America, and even in Europe. Illustrating the problem, a Nigerian actor commenting on the decline of that country's Hausa language film industry (known as "Kannywood") pointed to piracy, stating that "[w]e are all not happy and surely, piracy was what destroyed us."<sup>8</sup> In its report on Africa, the U.S. International Trade Commission (ITC) found that piracy "remains the largest threat" to the film industry in Nigeria, citing to a 2014 NCC report that estimated that Nigeria lost over \$1 billion annually to film piracy.<sup>9</sup> Particularly as Nigeria looks to recover from economic damage caused by the pandemic, stronger copyright protection and enforcement are needed to support the country's burgeoning creative sector.<sup>10</sup>

A large number of Nigeria-based individuals operate advertising-funded piracy websites. These individuals use mainly foreign based, but also some regional, web hosting services to distribute links to infringing content, including pre-release and other high value content. Social media is used to further drive traffic to these sites, thereby increasing revenue derived from advertising. Site operators use a mix of pop-under and in-situ advertisements to generate revenue based on site traffic and advertisement clicks. Unlike in most other countries, site operators do little to hide their identities and contact information. Many of these sites fail to remove infringing content upon notification by rights holders. For music and audiovisual piracy, the unauthorized content includes a mix of domestic and international content. Such sites are very popular within Nigeria but also, in many cases, regionally and beyond, hampering not only the development of the local music, film, and television industries but also polluting other markets.

The growing number of these websites undermine legitimate channels for licensed content, including streaming video-on-demand (SVOD) (e.g., Netflix, Showmax and Prime Video) and movie theaters. The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2022 (MCS) found that the music piracy rate in Nigeria was the highest in any of the 22 countries included in the study. Across a nationally representative sample of 16-44-year-olds, 88% of respondents said that they had used unlicensed means to obtain music in the previous month, nearly three times the global average of 30%. Nearly all of these music pirates used illegal stream-ripping sites and apps to download music content, mainly on mobile devices (the most common way of accessing the

<sup>2</sup> Universal Music has launched a division in Nigeria, and Netflix has increased its investment in Nigeria as well as other key markets in Sub-Saharan Africa. See Richard Smirke, "Universal Music Grows African Presence With Launch Of Nigeria Division," July 17, 2018, Billboard, <https://www.billboard.com/articles/business/8465836/universal-music-nigeria-western-africa-ezegozie-eze>; and Christopher Vourlias, "Netflix's Head of African Originals Lays Out Streamer's Plans for the Continent (EXCLUSIVE)," Feb. 28, 2020, Variety, <https://variety.com/2020/digital/news/netflix-head-african-originals-lays-out-plans-for-continent-1203518648/>.

<sup>3</sup> See James Ojo "Lai: Creative industry is Africa's only hope from economic woes," June 21, 2022 TheCable Lifestyle, <https://lifestyle.thecable.ng/lai-creative-industry-is-africas-only-hope-from-economic-woes/>.

<sup>4</sup> See id.

<sup>5</sup> See, e.g., "Nigeria: Piracy Is Endangering Kannywood Industry – Uzee," March 7, 2021, Leadership (Abuja), <https://allafrica.com/stories/202103100305.html> and Dionne Searcey, "Nigeria's Afrobeats Music Scene is Booming, but Profits Go to Pirates," June 3, 2017, NY Times, <https://www.nytimes.com/2017/06/03/world/africa/nigeria-lagos-afrobeats-music-piracy-seyi-shay.html>.

<sup>6</sup> NCC: Nigeria Loses \$3bn Annually to Piracy <https://www.thisdaylive.com/index.php/2019/04/26/ncc-nigeria-loses-3bn-annually-to-piracy/>.

<sup>7</sup> Nigeria's film industry: A potential gold mine <https://www.un.org/africarenewal/magazine/may-2013/nigeria%E2%80%99s-film-industry-potential-gold-mine>.

<sup>8</sup> See, Mohammed Lere, "Nigeria: Kannywood is on the Brink of Collapse – Actor," June 24, 2019, Premium Times, <https://allafrica.com/stories/201906240774.html>.

<sup>9</sup> U.S. International Trade Commission, U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments, Investigation Number 332-571, 186, available at <https://www.usitc.gov/publications/332/pub5043.pdf>.

<sup>10</sup> See Samuel Andrews, "Netflix Naija: creative freedom in Nigeria's emerging digital space?," March 19, 2020, The Conversation, <https://theconversation.com/netflix-naija-creative-freedom-in-nigerias-emerging-digital-space-133252>. See also Joseph Onyekwere, "Nigeria: Outdated Laws, Bane of Nigeria's Creative Industry, Says Idigbe," May 15, 2018, The Guardian, <https://allafrica.com/stories/201805150315.html>.

Internet in Nigeria). In addition, 27% of respondents downloaded pirated music from cyberlockers and 25% from BitTorrent sites. The most popular stream-ripping site was *Y2mate.com*, visited by 19% of all Internet users. SimilarWeb reported that the site was the 109th most visited web site of any kind in Nigeria in Q2 2022 with over 1.3m visits.

MP3 download sites focused on pirating local music are a major issue in Nigeria. IFPI's MCS found that more than half (54%) of all Internet users visited *TheNetNaija.net* to download music. The audiovisual industry also reports significant concerns with downloads of film and television content from the site and, according to SimilarWeb, *TheNetNaija.net* attracted 30.87 million global visits in December 2022 and is the 11<sup>th</sup> most popular site in Nigeria. According to the MCS, 43% of Internet users downloaded pirated music from *trendybeatz.com* (the 38<sup>th</sup> most popular site in the country) and 39% from *justnaija.com* (the 93<sup>rd</sup> most popular site). By providing free pirated downloads of MP3s, these sites harm primarily domestic and African artists and restrict the growth of the local music industry.

There is no formal framework for cooperation between ISPs and rights holders in Nigeria. The NCC issued a guideline for the Provision of Internet Services, which mandates ISPs to ensure that users are informed of any statements of cybercrime prevention or acceptable Internet use published by the Commission or any other authority, and that failure to comply with these acceptable use requirements may lead to criminal prosecution, including for violations of intellectual property rights (IPR).<sup>11</sup> The Government of Nigeria should raise awareness among ISPs around effective policies to prevent piracy, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.

**Enforcement:** Nigeria has taken some positive steps recently to address its piracy problems, including several administrative enforcement actions undertaken by the NCC.<sup>12</sup> In August 2022, the NCC signed a memorandum of understanding (MOU) with the Federal Airport Authority of Nigeria to curb hard goods piracy.<sup>13</sup> In addition, the government recently developed a National Intellectual Property Policy that aims to, *inter alia*, drive training, education, and awareness and strengthen institutional frameworks for administration, management, and enforcement of IPR.<sup>14</sup>

Nevertheless, more must be done by law enforcement, local registry and registrars, and ISPs to shut down pirate online services.<sup>15</sup> Several enforcement deficiencies and limitations negatively impact intellectual property (IP) protection and enforcement in Nigeria, including:

- high levels of corruption;
- bureaucracy within government agencies—including Nigerian police, IP registries, and other related agencies—that impedes access to justice and undermines protection of IPR by obstructing rights holders' ability to make criminal complaints against piracy and other forms of infringement or to seek to protect their IPRs;
- protracted litigation and case backlog in courts that impede speedy access to justice and non-deterrent outcomes, all of which create little disincentive against piracy, enabling locally operated pirate sites to thrive and proliferate;
- insufficient technical capacity of IPR officials;
- lack of funding for IPR Registries in the country, resulting in an ineffective IPR protection system; and
- poor utilization of technology by the IPR Registries leading to inefficient administrative systems.

<sup>11</sup> See <https://www.ncc.gov.ng/docman-main/legal-regulatory/guidelines/62-guidelines-for-the-provision-of-internet-service/file>.

<sup>12</sup> For example, in October 2022 the NCC seized 1,600 copies of pirated books worth over N2 million from four bookshops in the Federal Capital Territory, FCT, Abuja. In September 2022, the NCC conducted an anti-piracy action against a digital television station, Real Summit Television, for allegedly intercepting and stealing the program contents of other digital Satellite transmitting stations like DSTV and StarTimes, impounding illegal digital cable networks worth N250 million. See "NCC impounds illegal digital cable network worth N250m in Enugu," <https://www.vanguardngr.com/2022/09/ncc-impounds-illegal-digital-cable-network-worth-n250m-in-enugu/>. Furthermore, a recent Court of Appeals decision, *Ugochukwu v. Nigerian Copyright Commission (2022) LPELR-57970(CA)*, interpreted the Copyright Act to permit Copyright Inspectors to enter premises and recover evidence without a court order.

<sup>13</sup> See <https://www.worldstagenews.com/2022/08/10/nigeria-faan-ncc-sign-mou-to-curb-piracy-at-nations-airports/>.

<sup>14</sup> See World Intellectual Property Organization (WIPO), "Nigeria Validates National IP Policy and Strategy," [https://www.wipo.int/about-wipo/en/offices/nigeria/news/2022/news\\_0002.html](https://www.wipo.int/about-wipo/en/offices/nigeria/news/2022/news_0002.html).

<sup>15</sup> Many piracy sites, both operated from within Nigeria and overseas, make use of the .NG country code Top level Domain (ccTLD). Accordingly, Nigeria should take action against piracy sites that use the .NG and .COM.NG ccTLDs. Unfortunately, the music industry did not receive a substantive response from the domain registrar *WEB4AFRICA.NG* in response to a complaint filed in 2018.

Nigeria needs to more effectively enforce against the numerous unlicensed online music and audiovisual services that operate in Nigeria, which are harming many markets inside and outside of Nigeria. If passed, new criminal provisions in the CB, discussed below, should be used by the NCC as the basis for enforcement actions against piracy services. Moreover, more resources are needed for the NCC online enforcement unit to adequately engage in sustained efforts to combat piracy in the country, including to ensure authorities have critical resources such as electricity and Internet access. In addition, the Government of Nigeria should take the following steps to improve enforcement:

- The judiciary should fully maximize the current IP legislation (discussed below) to protect rights holders, and take the following actions:
  - build up case precedents that promote the rights of creators and reinforce confidence and trust in the law and the judiciary by borrowing from case law interpretation in foreign jurisdictions that provide adequate and effective protection and enforcement of copyrights;
  - form specialized cybercrime courts and prosecution units;
  - designate specialist courts and specialist IP judges within states that have large creative ecosystems;
  - increase reliance on expert witnesses in the requisite IP fields; and
  - partner with reputable academic institutions for regular updates on IP laws, consultations, and training on IP to improve IP expertise among judges.
- Provide for adequate statutory and punitive damages in cases of copyright infringement and online piracy.
- Ensure that rights holders' enforcement of their rights is not impeded due to protracted litigation.
- Provide sufficient resources and enhance engagement by enforcement authorities to ensure IP cases can be investigated and prosecuted efficiently and at scale.
- Ensure the NCC, in collaboration with other relevant IP agencies in the country, develops an awareness policy to educate rights holders on available IP protection mechanisms.
- Increase judicial and prosecutorial training in IPR cases, with a focus on anti-piracy enforcement matters.

**Collective Management:** An additional concern in Nigeria is the absence of an accredited CMO for music rights holders to manage their public performance and broadcast rights. This absence is the result of a dispute between the NCC and COSON, 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. As a result, IIPA recommends COSON should be reinstated, subject to a satisfactory audit to ensure appropriate good governance and operational practice. Additionally, legislation is needed to define CMOs and their proper governance to ensure 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, as well as improved enforcement as noted above, CMOs would be able to license effectively in Nigeria.

## **COPYRIGHT LAW AND RELATED ISSUES**

Nigeria ratified the WIPO Internet Treaties in 2017 but has not fully implemented the treaties. As a result, Nigeria's legal regime has fallen short of international copyright norms in several key respects. A draft copyright bill, first circulated in 2017, was re-circulated as an Executive Bill, alongside a Private Member Bill in 2021. Following a public consultation, including positive engagement by the U.S. Government, the two bills were ultimately merged – resulting in the CB. Although the CB has not been officially released to the public, IIPA understands that the legislation addresses some of stakeholders' concerns with the Executive Bill, including providing definitions for technological protection measures (TPMs) and broadcasting that are consistent with the WIPO Internet Treaties, removing the registration requirement to exercise exclusive rights, and providing for expeditious takedowns and provisions to address repeat infringers. The CB was passed by the National Assembly in 2022 and was sent to the President for assent. However, because the President did not give his assent by the required deadline, the CB was subsequently returned to the National Assembly. It remains unclear whether Parliament will adopt an amended bill before elections take place in February 2023.

The CB would introduce several reforms, including: an exclusive right of making available; improvements to the enforcement framework, including procedures for blocking websites and criminal penalties for online infringements; improved protections for TPMs; and obligations for ISPs to ensure their networks do not facilitate piracy, including to “expeditiously” take down infringing content, institute a repeat infringer policy, and ensure infringing content that has been taken down remains off their networks. Unfortunately, there remain several significant deficiencies in the CB that should be corrected for Nigeria to properly implement the WIPO Internet Treaties and meet its international obligations and evolving global norms, including the following:

- Section 35 of the CB introduces a compulsory license scheme that is arguably incompatible with Nigeria's international obligations, including under the Berne Convention and the WCT. Under this provision, the NCC could bypass the copyright owner and authorize the use of a copyrighted work "by any person for the purpose of rectifying the abuse of a dominant market position or to promote public interest." The provision would undermine rights holders' ability to assert their rights in or license their works because any user could request that the NCC bypass the copyright owner and authorize or prohibit certain uses of a work based on the mere allegation that the user "made a reasonable effort to obtain permission from the owner of copyright on reasonable commercial terms and conditions and that the effort was not successful." Hence, Section 35 undermines contractual freedom and legal certainty and is inconsistent with Nigeria's international obligations, including under the Berne Convention and the WCT. The section is outside the scope of the compulsory licenses set out in the Berne Convention and its Appendix, which cannot be applied to the right of making available or beyond the narrow uses set out therein. Moreover, the Section reduces the scope of the exclusive right of making available, thereby running afoul of the bill's objective to implement the WCT by compromising its milestone right.
- The CB includes a proposal to add extended collective licensing (ECL) in Nigeria. An ECL system is appropriate only in well-developed collective rights management systems, where organizations represent a substantial number of rights holders for each segment of the collective marketplace, and only in well-defined areas of use where obtaining authorization from rights holders on an individual basis is typically onerous and impractical to a degree that makes a license unlikely. As noted above, Nigeria's collective management system is inadequate. In addition, the provision is overly broad. For these reasons, such a system is not appropriate in Nigeria.
- The CB appears to provide for a hybrid fair use-fair dealing provision that is substantially broader than the U.S. fair use doctrine for several reasons. First, the provision includes additional broad purposes that are not present in the U.S. statute, including "private use" and "private study." Second, U.S. fair use is determined on a fact-intensive, case-by-case basis. Without the foundation of a well-developed body of case law, Nigeria's untested, broader fair use provision would result in uncertainty for both rights holders and users on the parameters of permissible uses. The additional broad purposes listed in the text adds to the uncertainty and risk that Nigerian judges, none of whom have ever adjudicated a fair use case and would be doing so without any binding precedent to guide them, will find an unacceptably wide range of uses to be non-infringing. Third, the expansive new "fair use" exception is included as part of a "fair dealing" system that includes several overly broad new exceptions, as discussed below. This unprecedented hybrid approach further adds to the uncertainty and risk that the fair use provision will deny copyright owners fundamental protections on which they rely to license their works and sound recordings. Therefore, the proposed broad hybrid fair use-fair dealing provision is inconsistent with the three-step test because it is not limited to certain special cases and there is a substantial risk that it would be applied in a manner that conflicts with the normal exploitation of a work or unreasonably prejudices the legitimate interests of the rights holder.
- An exception for archives, libraries, and galleries, is broader than the exception in U.S. law and inconsistent with the three-step test, because it would permit these institutions to make and distribute "copies of works protected under this Bill as part of their ordinary activities" without limitation, and it would also permit lending such copies to users.

- The CB also would provide for compulsory licenses for translation and for reproduction of published works. This provision should be revised to ensure it is calibrated according to the terms of the Berne Convention Appendix, which currently it is not.
- While the CB includes an exclusive right of distribution, extraneous language has been added that appears to limit the right of distribution "for commercial purposes" and for works that have "not been subject to distribution authorized by the owner." IIPA is concerned that this language could be interpreted to extend the concept of exhaustion of rights to distributions of digital content.
- While the broadcast right is granted as an exclusive right in Section 12, it is then downgraded to a mere remuneration right in Section 15. Sound recording producers' broadcast right should be maintained as an exclusive right without being downgraded to provide the fair market conditions in which right holders can negotiate commercial terms that reflect the economic value of uses of recorded music to broadcasters.
- The CB would propose 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 bill.
- The overbroad quotation exception should be revised to limit the use of a quotation to purposes of criticism or review.
- 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 license to legalize piracy—and ensure that rights holders receive adequate shares of collections made, deductions are kept to a minimum, and compensation is payable directly to rights holders.
- The term of protection for sound recordings should be extended to 70 years from fixation or publication (and the same for juridical entities), and, for works, to the life of the author(s) plus 70 years.
- Eligibility for safe harbors from liability should be limited to only passive and neutral intermediaries that do not contribute to infringing activities.

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

Nigeria's enforcement framework is deficient, lacking effective remedies to combat pervasive online piracy, which is inconsistent with Nigeria's obligations under the WTO TRIPS Agreement enforcement provisions, including Articles 41 and 61. As noted above, certain provisions of the CB, notably the compulsory licensing provision of Section 35, would put Nigeria out of compliance with its obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Internet Treaties.

# PERU

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Peru remain on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** Peruvian authorities, especially the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOP) and the courts, have made highly commendable efforts to improve enforcement against several major infringers by issuing injunctions for Internet service providers (ISPs) to block copyright infringing websites. However, the proposed *Proyecto de Ley 878/2021-CR* (the General Internet Bill) currently being discussed in the Peruvian Congress, as well as the proposed amendments presented by the Supervisory Body of Telecommunications Private Investment (OSIPTEL) to the Net Neutrality Regulation, risk depriving INDECOP of this power. Additionally, the General Internet Bill introduces a safe harbor mechanism that is not in line with international standards nor in keeping with Peru's international obligations under the U.S.-Peru Trade Promotion Agreement (U.S.-Peru TPA). IIPA urges the Peruvian government to withdraw or, at the very least, clarify the General Internet Bill to ensure that these problems are addressed. Online and physical piracy continue to be serious problems in Peru that undermine the market for legitimate content in the country and across the region.

In fact, Peru should make more use of its existing judicial and administrative powers to address its evolving piracy problem and to properly protect the legal digital market. For instance, INDECOP, the agency charged with promoting and defending intellectual property rights (IPR), has proven to be a very efficient entity in the fight against piracy, and IIPA encourages the Government of Peru to give it greater powers and the necessary human and economic resources to continue with this work so that it conducts even more effective administrative enforcement operations against online infringing sites. Moreover, it is essential that the Peruvian Congress reject the provisions from the General Internet Bill, and any other legislation or regulation, that will hinder the administrative site-blocking efforts developed by INDECOP. Additionally, the Peruvian government should create a task force among the multiple prosecutors' offices with jurisdiction over intellectual property (IP). Finally, the Government of Peru should not rely on expansive interpretations of exceptions in the Copyright Act to avoid paying for licenses for music. Instead, it should serve as an example of the importance of respecting copyright.

## PRIORITY ACTIONS REQUESTED IN 2023

### Enforcement

- Devote significantly more resources and political support to combat digital piracy.
- Increase INDECOP's funding and powers so that it can build upon the recent positive examples of IP enforcement against piracy website operators in the country.
- Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.

### Legislation

- Retain the current legal basis for no-fault administrative injunctions, including website blocking relief (a currently effective tool to reduce online piracy).

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<sup>1</sup> For more details on Peru's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Peru's Special 301 placement, see <https://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

- Reject any provisions in the General Internet Bill (*Proyecto de Ley 878/2021-CR*), such as Article 51, that would interfere with administrative site blocking or undermine copyright enforcement in the country.
- Eliminate Articles 48, 49, 50, and 51 of the General Internet Bill, which address online service providers (OSP) liability.
- Ensure Article 57 does not invalidate the vital copyright licenses upon which digital content providers rely to distribute products in Peru.
- Reject the proposed amendments presented by the Supervisory Body of Telecommunications Private Investment (OSIPTEL) to the Net Neutrality Regulation, which would undermine INDECOPI's enforcement efforts.
- Repeal *Decreto Legislativo No. 1391* of September 4, 2018, or, at a minimum, amend the law to remove the "one member, one vote" governance system from collective management organizations (CMOs) that prevents more equitable voting systems based on the amount of distributions to members.
- Pass legislation to introduce clear secondary liability principles for online copyright infringement and establish measures demonstrated effective in preventing or restraining infringement.
- Improve the efficiency and effectiveness of the judicial system, including through raising greater awareness among judges about international best practices on copyright protection and online enforcement.
- Create a task force among the multiple prosecutors' offices with jurisdiction over IP.

## **THE DIGITAL MARKETPLACE IN PERU**

Internet connectivity is growing in Peru. Fixed broadband subscriptions in Peru was reported at 3,044,000 in 2020.<sup>2</sup> Peru's music market grew by 23.6% in 2021 to US\$31 million, driven mainly from an 86.6% growth in streaming.<sup>3</sup> Revenue in the video-on-demand (VOD) market is expected to show an annual growth rate of 6.15%, resulting in a projected market volume of US\$189.90 million by 2027.<sup>4</sup> The number of VOD users is expected to amount to 7 million users by 2027, and user penetration will be 18.1% in 2022 and is expected to hit 19.9% by 2027.<sup>5</sup> The video game market will rise with an annual average of 20%, generating US\$147 million by 2023.<sup>6</sup> While legal means of accessing copyrighted content online are growing, legitimate content is still competing with illegal sources.

**Online Piracy:** Online and physical piracy continue to be serious problems in Peru that undermine the market for legitimate content in the country and across the region. Individuals based in Peru operate many websites that profit from selling advertising and user data and offer vast movie and music catalogs to stream and/or download. These sites are highly popular in places such as Argentina, Mexico, and Chile, where they attract hundreds of thousands, and for some countries millions, of visitors. The most relevant form of piracy in Peru is via illegal downloading from licensed online streaming platforms, such as YouTube. Seven of the top ten piracy sites in Peru during the second quarter of 2022 were stream-ripping sites and three others were cyberlockers. The most popular stream-ripping sites recorded millions of individual visits, such as *NoTube.site* (13.6 million visits from Peru in Q3 2022), *OnlineVideoConverter.pro* (3.3 million visits), *SaveFrom.net* (2.6 million visits), and *Y2Meta.com* (1.2 million visits). The most popular individual site for piracy was the cyberlocker *Mega.nz* with 11.8 million visits during the third quarter of 2022, but *1fichier.com* (2.0 million visits) and *Zippyshare* (1.1 million visits) were also widely used. Data from *CET.LA* shows that, from 2019 to 2020, the 100 most popular illegal domains in Peru received over 280 million visits, 82% of which were directed to illicit streaming websites.<sup>7</sup> The illegal websites received 88% more visits than the legal ones.<sup>8</sup> Illegal Internet protocol

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<sup>2</sup> Trading Economics, *Peru - Fixed Broadband Internet Subscribers*, available at <https://tradingeconomics.com/peru/fixed-broadband-internet-subscribers-wb-data.html>.

<sup>3</sup> International Federation of the Phonographic Industry (IFPI), *2022 Global Music Report*, p. 170.

<sup>4</sup> Statista, *Video Streaming (SVoD) - Peru*, available at <https://www.statista.com/outlook/dmo/digital-media/video-on-demand/video-streaming-svod/peru>.

<sup>5</sup> *Id.*

<sup>6</sup> Gaming and Media, *Peru: A promising market for Video Games and Esports*, August 12, 2020, available at <https://g-mnews.com/en/peru-a-promising-market-for-video-games-and-esports/>.

<sup>7</sup> CET.LA, *Dimension and impact of online piracy of audiovisual content in Latin America*, October 12, 2020, p. 63, available at <https://cet.la/estudios/cet-la/dimension-e-impacto-de-la-pirateria-online-de-contenidos-audiovisuales-en-america-latinal>.

<sup>8</sup> *Id.*

television (IPTV) offers are also present in Peru, but on a smaller scale: 10% of the e-commerce offers regarded illicit devices, while 90% were licit.<sup>9</sup>

**Unauthorized Camcording:** Unauthorized camcording is a persistent challenge for rights holders in Latin America. Peru remains one of the leading sources of unauthorized camcords in the region. Fifteen illicit audio and/or video recordings of MPA member films were sourced from Peruvian theaters in 2019, up from ten in 2018. Professional cammers feel safe to conduct this activity in Peru because criminal convictions require proof that the recording was made with an economic intent, which makes it virtually impossible to obtain a conviction. Peru needs to enact legislation that would effectively criminalize unauthorized camcording of films without the need to prove an intent to profit.

## **COPYRIGHT ENFORCEMENT IN PERU**

INDECOPI and the courts have made evident efforts to improve enforcement against several major local sites infringing music and film copyrights. For example, in July 2022, INDECOPI ordered ISPs to block 147 illicit websites that illegally provided copyrighted content.<sup>10</sup> Since 2019, INDECOPI has also developed an agreement with *La Liga* to identify infringing websites and to prevent the illegal transmission of sport events.<sup>11</sup> It is also clear that website blocking works in Peru. In November 2020, the most popular stream-ripping site in the country was *Y2Mate*, which received an average of 138,000 visits from Peru each day. The site was then blocked by ISPs in the country starting in December 2020; by March 2021, daily visits from Peru were down to just 22,000, a reduction of 84.1% compared to prior to the blocking. The action also had an impact on overall stream-ripping levels, which were 20.4% lower in February 2021 than in November 2020.

However, the General Internet Bill currently being discussed by the Peruvian Congress could, if approved, halt these successful initiatives as it creates several new requirements and deterrents to online enforcement of copyrights. Moreover, Peru has yet to implement the necessary high standards of copyright protection to meet its international trade obligations and to further develop the country's digital and creative economy. For example, Peru's law lacks a provision that provides statutory damages for civil copyright infringement. In addition to necessary legal reforms, IIPA urges Peru to make more use of its existing judicial and administrative powers to address its evolving piracy problem and to properly protect the legal digital market. For instance, the Government of Peru should increase the funding for INDECOPI, the agency charged with promoting and defending IPR, so that it can expand on its success in administrative enforcement operations against online infringing sites. More personnel are needed in the copyright enforcement area, along with additional support and structure for technical training and inspections.

## **COPYRIGHT AND RELATED LEGISLATION AND REGULATION IN PERU**

**General Internet Bill (*Proyecto de Ley 878/2021-CR*):** The General Internet Bill proposes to introduce damaging changes to the current framework. These changes would roll back the progress the government has made against piracy, negatively impact the legitimate market for copyrighted content, and severely hamper the ability of rights holders and INDECOPI to enforce copyright in Peru. Specifically, Article 51 is particularly troubling because it appears to require a judicial order to intervene against an Internet access service and services provided on the Internet. As a result, IIPA is concerned that under Article 51, OSPs would not be required to address infringing content unless a court issues a judicial order. Therefore, if approved, this article could put an end to the current administrative site-blocking regime as well as to procedures that allow rights holders and OSPs to remove infringing content in an efficient and timely manner. Currently, the administrative procedure implemented by INDECOPI has full transparency and provides any involved party the ability to appeal to its internal commission and to a civil court.

<sup>9</sup> Id. at p. 23.

<sup>10</sup> More information available at: <https://www.gob.pe/institucion/indecopi/noticias/630376-golpe-a-la-pirateria-digital-indecopi-bloquea-147-webs-ilegales-que-explotaban-obras-y-producciones-protégidas-por-el-derecho-de-autor>.

<sup>11</sup> More information available at: <https://newsletter.laliga.es/global-futbol/laliga-collaborations-bring-down-pirates-in-brazil-and-peru> and <https://newsletter.laliga.es/global-futbol/laliga-reducing-access-to-pirated-content>. See also, <https://www.gob.pe/institucion/indecopi/noticias/627440-el-indecopi-y-laliga-group-internacional-renuevan-convenio-para-luchar-contra-la-pirateria-digital>.

Article 51 also seems to conflict with other provisions contained in the General Internet Bill. Articles 49.2 and 50.2 both mention the possibility that administrative authorities could order the removal of infringing content. This is apparently inconsistent with Article 51's requirement that any intervention is only by judicial order. Additionally, Articles 40 and 71 state that OSPs (including those that provide access, search, and caching in Article 40 and domain rental in Article 71) cannot be held responsible for user-generated content, if, among other things, they did not refuse to comply with a judicial or administrative order requiring removal. Therefore, the General Internet Bill is inconsistent on its face and, if approved in its current form, it will introduce significant uncertainty into Peru's copyright enforcement legal framework.

The General Internet Bill would introduce an inadequate and highly damaging OSP liability framework that appears to require a judicial or administrative order before OSPs can be held liable for and required to remove or disable access to infringing content on their services. According to Articles 49.1 and 50.1, OSPs cannot be held liable for user-generated content if they do not have "effective knowledge" that the content is illegal, or if they have effective knowledge and they act diligently to take it down or block access. Under Articles 49.2 and 50.2, such "effective knowledge" appears to require receiving an order from an administrative or judicial authority to remove or disable access to the illegal content. Conditioning "effective knowledge" on a declaration from a judicial or administrative authority would provide unacceptably inadequate legal incentives for OSPs to cooperate with rights holders to take down infringing content, in violation of Article 29 of the U.S.-Peru TPA, as discussed further below.

IIPA acknowledges that both Articles 49.2 and 50.2 state that the requirements for "effective knowledge" are "without prejudice to the procedures for detecting and removing content that providers apply under voluntary agreements and other means of actual knowledge that could be established." While this indicates that other methods of proving effective knowledge may be possible, that is far from clear. It is also concerning that the General Internet Bill does not include remedies against the abuse of safe harbor provisions. Although Article 42 of the General Internet Bill states that restrictions to OSP services can be made for the purpose of protecting IPR, the article requires either a judicial or a legislative measure to do so. Moreover, Article 42 does not mention administrative measures, which again raises questions regarding the sustainability of the current administrative site-blocking regime.

Because the General Internet Bill appears to require a judicial or administrative order for OSPs to remove or disable access to infringing content on their services, enactment would likely place Peru in violation of the U.S.-Peru TPA. Article 29(b) of the U.S.-Peru TPA requires Peru to implement an effective notice and takedown mechanism that requires OSPs to "expeditiously" takedown infringing content "on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective notifications of claimed infringement." The General Internet Bill's requirement that rights holders must wait for a judicial or administrative order is clearly inconsistent with this obligation.

In addition, Article 16.29(a) of the U.S.-Peru TPA requires Peru to provide "legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials."<sup>12</sup> To ensure adequate legal incentives for cooperation between service providers and rights holders, Peru should implement secondary liability principles to hold OSPs responsible for infringements carried out by third parties using their services. In U.S. law, secondary civil liability doctrines (under vicarious, contributory, and inducement theories of law) provide the legal incentives for cooperation and are a deterrent to the unauthorized storage and transmission of copyrighted materials.<sup>13</sup> The General Internet Bill appears to hold OSPs liable for third-party infringements only upon a judicial or administrative order, which provides inadequate legal incentives for cooperation between OSPs and rights holders to combat online piracy. In fact, instead of weakening incentives for OSPs, Peru

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<sup>12</sup> U.S.-Peru Trade Promotion Agreement (U.S.-Peru TPA), available at <https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/FTAs/peru/16%20IPR%20Legal.June%2007.pdf>.

<sup>13</sup> In addition to secondary civil liability, an effective online liability regime should also provide criminal liability for aiding and abetting criminal copyright piracy.

should pass legislation to introduce clear secondary liability principles for online copyright infringement and establish obligations for service providers to apply measures demonstrated effective in preventing or restraining infringement.

Finally, Article 57 creates additional uncertainty for digital content, proposing an inalienable right for consumers to seek a refund for electronic transactions. While the type of transactions covered by the provision is unclear, the provision risks invalidating the vital copyright licenses upon which digital content providers rely to distribute products in Peru.

The General Internet Bill would dramatically weaken protection for creative works and impact the ability of rights holders and INDECOPI to continue their efforts to enforce copyright online, thus effectively depriving rights holders of the fundamental right to copyright protection included in Article 2.8 of the Political Constitution of Peru. The Explanatory Memorandum of the General Internet Bill makes several references to fundamental rights, implying that access to the Internet should be one of them. However, while access to the Internet is currently not recognized as a fundamental right in the Political Constitution of Peru, copyright protection is. The General Internet Bill does not seem to take this into account. These provisions should be withdrawn and reconsidered. Peru should not create a legal framework that would make copyright enforcement on the Internet onerous, as would be the case if these provisions are included in this General Internet Bill.

Ignoring the inconsistencies, the General Internet Bill appears to propose an approach that relies on judicial orders for copyright enforcement. Such an approach would completely congest the judicial system of Peru due to the sheer number of infringing sites that rights holders and enforcement authorities regularly face and would render the copyright enforcement framework completely ineffective. As we have seen in countries that have introduced similar mechanisms, an approach like the one proposed by the General Internet Bill congests the judicial system of a country, rendering the fight against infringing content on the Internet virtually ineffective. It would also prevent rights holders and OSPs from pursuing out of court agreements to monitor and tackle copyright infringement. In the very isolated examples of countries that followed the same approach as proposed in Peru—Spain until the implementation of the Sinde Law in 2014 and, more recently, Chile in 2010—anti-piracy efforts have been dramatically reduced, leading to the proliferation of unlawful activity in the region.

IIPA requests the current legal basis for no-fault administrative injunctions, including website blocking relief (a currently effective tool to reduce online piracy), should be retained and any provisions in the General Internet Bill, such as Article 51, that would interfere with this tool, should be eliminated from the General Internet Bill. Moreover, Articles 48, 49, 50, and 51, which address OSP liability, should be eliminated.

**Net Neutrality Regulation:** OSIPTEL has also presented amendments to the Net Neutrality Regulation with the same goal: preventing the blocking of copyright infringing websites unless there is a court order. However, the judicial system in Peru is not designed to deal with the ever-changing landscape of online copyright infringements and lacks the efficiency required to mitigate the damages from this type of piracy.

**Copyright Act:** The scope of substantive copyright protection has remained unchanged over the last two years, but there is one provision in the Peruvian Copyright Act that has been proven to be particularly problematic. IIPA is concerned about the reliance of state-owned or state-funded operators on certain exceptions of the Copyright Act to avoid obtaining licenses for the use of music, which sets a particularly negative example in the market in terms of respect of copyright. For example, Article 41(b) of the Copyright Act allows for the use of “small fragments” of works during official events, without a license or payment, provided that none of the participants receive remuneration for their participation. Yet, local rights holders have seen how state-owned entities, notably state-funded broadcasters and public events organizers, consistently rely on this exception to avoid obtaining a license for the use of music. Among those unlicensed companies, there is one TV nation-wide broadcasting company (Channel 7), a national radio chain (*Radio Nacional*), and many governmental offices and official entities that regularly sponsor music events without any copyright or related rights licenses. These uses clearly exceed the exception of Article 41(b) of the Copyright Act.

# POLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Poland be placed on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** Internet piracy is a significant problem in Poland, severely hampering Poland's market for legitimate sales of film and television content, music, books, and entertainment software. In the experience of the copyright industries, all indications are that the situation has worsened in recent years. In June 2017, Deloitte published a report that found that in 2016 Internet piracy cost Poland over 3 billion PLN (US\$757 million) of lost GDP, 836 million PLN (US\$211 million) of lost tax revenues, and 27,500 lost jobs.<sup>2</sup> According to the report, in 2016, 51% of Internet users in Poland (more than 12 million Poles) used websites offering illegal access to content, and illegal websites in Poland received revenues of 745 million PLN (US\$188 million). Recent data, including from the International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2022 (MCS) and APP Global's Piracy Landscape Report from December 2019, demonstrates that the rate of Internet piracy has continued to grow.

The Government of Poland has so far failed to provide adequate and effective enforcement mechanisms to combat online piracy, raising questions regarding compliance with the enforcement provisions of the WTO TRIPS Agreement. Poland should make clear that its national legislation is in line with European Union (EU) law by implementing Article 8(3) of the EU 2001 Copyright Directive (2001/29/EC), which ensures that no-fault injunctive relief is available against intermediaries whose services are used for piracy. The Polish Government chose not to implement this provision, despite an obligation to do so, under the assumption that the prescribed injunctive relief is already available in Polish civil law. However, Polish courts have held that Polish civil law does not provide no-fault injunctive relief as required by Article 8(3). The Polish legislature should clarify the issue by finally implementing into national law Article 8(3), which dates back to 2001.

Although Poland has failed to institute best global practices for Internet service provider (ISP) liability, including failing to properly implement Articles 14 and 15 of the EU E-Commerce Directive (2000/31/EC), the situation could be remedied through proper application of the EU Digital Services Act. Regarding the 2019 EU Digital Single Market (DSM) Copyright Directive (2019/790) and SatCab Directive (2019/789), the Polish transposition is still ongoing. Unfortunately, the most recent draft legislation includes several concerning provisions that deviate to some extent from the Directives.

Finally, Poland's enforcement officials do not take sufficient effective actions against online piracy under the existing law, and Poland maintains several market access barriers that limit consumers' access to legitimate content. Poland should address the deficiencies in its enforcement framework, including the lack of adequate and effective mechanisms to combat online piracy.

### **PRIORITY ACTIONS REQUESTED IN 2023**

- Ensure adequate and effective enforcement against online piracy, including by correctly implementing Article 8(3) of the EU Copyright Directive.
- Ensure Poland's ISP liability regime is consistent with global best practices.
- Fully implement the DSM Copyright Directive.
- Take effective enforcement actions against unlicensed services, including sites that link to pirated content, in

<sup>1</sup> For more details on Poland's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Poland's Special 301 placement, see <https://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

<sup>2</sup> A summary of the 2017 Deloitte report on Internet Piracy is available in English at [http://zpav.pl/pliki/aktualnosci/Deloitte/Broszura\\_piractwo\\_EN\\_Final.pdf](http://zpav.pl/pliki/aktualnosci/Deloitte/Broszura_piractwo_EN_Final.pdf).

- accordance with EU case law.
- Improve criminal enforcement by following through on more criminal investigations and issuing deterrent sentences against infringers.

## **THE COPYRIGHT MARKETPLACE AND ENFORCEMENT IN POLAND**

Online piracy is a serious problem in Poland. A 2019 APP Global report found that operators of known infringing sites, such as *Filman.cc*, operate in the open and enjoy a positive perception by the public.<sup>3</sup> Many piracy sites even are permitted to maintain the appearance that they are legal businesses. For example, *cda.pl* is listed on the Warsaw Stock Exchange and *Chomikuj* has filed defamation claims for being referred to as pirates, even though the site has been structurally infringing for many years and was declared directly responsible for copyright infringement by the Polish Supreme Court in May 2022.<sup>4</sup> The piracy landscape is dominated by piracy streaming services that hinder the growth of legitimate streaming services in the country. According to the APP Global report, a selection of 156 websites that provide access to infringing content generated 193 million visits from Poland in December 2019. The majority (90%) of the visits to these sites were to local Polish sites.<sup>5</sup> Poland also has seen recent growth of pirate Internet protocol television (IPTV) services, which provide bundles of illegal retransmissions of linear channels, often via a dedicated set top box or simply via an app. These services are typically subscription-based and examples include *weeb.tv*, and *polbox.tv*. In addition, according to the video game industry, in 2022 Poland ranked eighth globally in the number of connections by peers participating in unauthorized file sharing of video games of all kinds on peer-to-peer (P2P) networks (up from ninth globally the prior year), as well as of incidents of P2P infringement of games on personal computers.

According to IFPI's 2022 MCS, Poland had the highest music piracy rate out of eight EU countries included in the study, with 38.5% of Internet users from Poland (and 50.5% of 16-24-year-olds) having pirated music at least once in the previous month. According to the Study, the most popular piracy destinations in Poland were domestic-run cyberlockers that targeted a Polish audience. For example, *Chomikuj* had been used by 12.5% of users age 16-64 to download music in the previous month and had 19.4 million visits from Poland in Q3 2022. The Study highlights that stream ripping is the key music piracy threat in Poland. 30.9% of Internet users said they had used stream ripping to illegally download music, while 24% had obtained pirated music from cyberlockers like *Chomikuj* and *Ulub*, and 13% had downloaded from BitTorrent sites like *ThePirateBay* and *1337x*. The most popular stream-ripping websites received millions of visits according to data from SimilarWeb, including *2convert.net* (2.2 million visits from Poland in Q3 2022), *mp3y.download* (2.0 million visits from Poland in Q3 2022), *savefrom.net* (1.3 million visits from Poland in Q3 2022), and Polish language site *Pobieracz.net* (1 million visits from Poland in Q3 2022).

Poland also suffers from other forms of piracy, including instances of illegal camcording (with two new cases reported in 2022) and hard goods piracy. Poland is flooded with imports of toys and other goods, illegally bearing trademarks owned by producers of audiovisual content, hindering their ability to exploit these marks in Poland. Despite efforts of the customs administration, illegal goods manufactured in Asia are easily accessible in Poland.

Enforcement against online piracy is inconsistent and inadequate. The operators of websites that post infringing hyperlinks, whether text links or embedded streaming links, try to avoid responsibility by arguing they are merely linking to external content that has already been made available to the public. The creation of specialized intellectual property (IP) courts in 2020 has not brought about needed improvements. Moreover, the Polish press recently reported that the IP courts have refused to allow plaintiffs to demand names of physical persons (private

<sup>3</sup> See APP Global piracy landscape report, December 2019.

<sup>4</sup> In 2015, Polish film makers obtained a court order against the *Chomikuj.pl* content hosting platform related to the availability of infringing copies of Polish movies, requiring that *Chomikuj* implement various measures to prevent the availability of infringing content. After a lengthy appeals process, in May 2022 the Supreme Court finally ruled that platforms sharing illegal content from their users are indirect infringers and thus should be held liable for abetting. According to the decision, the illegal content must disappear from *Chomikuj.pl* and the portal must pay compensation to the creators in the amount of 540,000 PLN. However, it is important that *Chomikuj.pl* has an active role in content sharing activities. While this is a positive development, the length of time for these proceedings illustrates how these delays can undermine effective civil enforcement.

<sup>5</sup> See id.

individuals) engaged in infringing activities, unless they are engaged in a registered business activity. The practice has been that the names of such individuals could be obtained through a court order. Recently, however, the Circuit Court in Warsaw issued a refusal and the Court of Appeals hearing the case in the second instance directed an official judicial question to the Supreme Court, which decided not to respond to the question, so justification of this decision has yet to be obtained. Civil actions against pirate services are generally ineffective due to the slowness of the legal process in Poland. Finally, as discussed below, the Government of Poland has not implemented Article 8(3) of the EU 2001 Copyright Directive, which would provide for a key enforcement tool against online piracy, and instead leaves piracy services free to continue operating and growing unencumbered in Poland.

## **COPYRIGHT LAW AND RELATED ISSUES**

Poland's legal framework is inadequate, leaving copyright owners unable to effectively protect and enforce their rights online in the face of piracy. Poland lacks adequate enforcement mechanisms against online piracy because it has not implemented Article 8(3) of the EU Copyright Directive, which requires Poland to provide for no-fault injunctive relief against intermediaries whose services are used for infringement.<sup>6</sup> In addition, Poland's ISP liability framework falls short of global best practices and EU law. Amending Poland's copyright enforcement laws to provide a legal basis for injunctive relief and to improve its ISP liability framework were among the recommended conclusions of the 2017 Deloitte report on Internet piracy.<sup>7</sup> To address its escalating Internet piracy problem, Poland should enact enforcement mechanisms that are adequate and effective to combat online piracy, including by implementing Article 8(3) of the EU Copyright Directive. In addition, Poland should ensure that its implementation of Article 17 of the DSM Copyright Directive is done faithfully.

**Lack of Injunctive Relief:** Article 8(3) of the EU Copyright Directive requires Member States to ensure that injunctive relief is available "against intermediaries whose services are used by a third party to infringe a copyright or related right." Unfortunately, Poland has not implemented this provision. Since accession to the EU, the Government of Poland has claimed that its existing legal tools are sufficient to achieve the goals set by the Directive and, therefore, implementation of this Article is unnecessary. Yet, as discussed above, piracy remains a significant problem in Poland and existing tools are inadequate for rights holders to effectively enforce their rights online. The lack of injunctive relief remedies is particularly problematic given the popularity of local, Polish language pirate sites.

Due to the refusal of the Government of Poland to enact effective online enforcement mechanisms, domestic and international rights holders lodged complaints against Poland with the European Commission (EC) for failure to implement Article 8(3) of the Copyright Directive (complaint reference CHAP(2015)02644). In response, the Government of Poland asserted that there is no evidence that its legal system is not in line with Article 8(3) and that its current legal regime has achieved the Article's objective, pointing to Articles 422 and 439 of the Civil Code and Article 11 of the Enforcement Directive. Among other things, rights holders responded that while the Civil Code provisions regulate aspects of civil enforcement, the provisions do not provide a legal basis for no-fault injunctive relief against third parties. A 2017 Warsaw Court of Appeals decision held that Article 8(3) was not implemented into Poland's legal system, although the court dismissed the application to disable access to an infringing service (*Chomikuj.pl*) on other grounds—that the application did not properly name the parties against whom injunctive relief was sought—and the part of the decision relating to the implementation of Article 8(3) was not central to the holding. In May 2022, the Polish Supreme Court finally rendered a long-awaited decision in the *Chomikuj.pl* case. Although the Supreme Court finalized the judgement of the Court of Appeals, affirmatively declaring *Chomikuj.pl* directly responsible for copyright infringement, the case did not clarify whether no-fault injunctive relief is available under Polish law

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<sup>6</sup> No-fault injunctive relief refers to injunctive relief consistent with Article 8(3) of the EU Copyright Directive 2001/29, (Copyright Directive), which requires that injunctive relief is available "against intermediaries whose services are used by a third party to infringe a copyright or related right." As discussed in Recital 59 of the Copyright Directive, "In many cases such intermediaries are best placed to bring such infringing activities to an end." Accordingly, injunctive relief should be available "against an intermediary who carries a third party's infringement of a protected work...even where the acts carried out by the intermediary are exempted under Article 5."

<sup>7</sup> See supra fn. 2.

In sum, there is confusion because the Polish government and the Courts disagree on the state of the law. The Government of Poland can easily clarify the situation by taking the necessary steps to implement Article 8(3) to provide rights holders with a mechanism for adequate and effective enforcement against online piracy, which continues to grow unabated.

**Internet Service Provider (ISP) Liability Framework Fails to Meet Global Best Practices:** Poland's ISP liability framework is inadequate because it does not meet global best practices for notice and takedown and does not provide for other measures demonstrated to be effective in preventing or restraining infringement. Poland has incorrectly implemented Articles 14 and 15 of the EU E-Commerce Directive, which provide the minimum requirements for the ISP liability framework in the EU. Poland's Act on Providing Services by Electronic Means (E-Services Act), which implements Articles 14 and 15 of the EU E-Commerce Directive, has various shortcomings that have made it extremely difficult for rights holders to effectively enforce their rights. In a complaint to the EC (case EU-Pilot 8165/15/CNCT), rights holders raised these shortcomings, including the following: (i) a service provider is required to take action only if it has actual knowledge of the infringement, not if there is "awareness of facts or circumstances from which the illegal activity or information is apparent," as required by the E-Commerce Directive; (ii) the law only requires "disabling access to infringing content" as opposed to "to remove or to disable" it, as required under the Directive; and (iii) there is no legal basis to seek injunctions against service providers, as required by Article 14(3) of the Directive, Article 8(3) of the 2001 EU Copyright Directive, and the 2004 EU Intellectual Property Rights (IPR) Enforcement Directive (2004/48/EC). The Polish government responded to the allegations by, in effect, arguing that these shortcomings were to some extent already addressed and remedied by case law. The situation remains unclear and, to avoid commercial and legal uncertainty, the law should be changed to comply with international and EU standards. However, the Digital Services Act entered into force in November 2022, and the incorrect implementation of Articles 14 and 15 of the EU E-Commerce Directive will no longer be relevant once the Digital Services Act becomes applicable in February 2024.

Draft legislation to amend Poland's e-commerce legislation to address these deficiencies has been pending since April 2012, but no progress has been made since then. In June 2016, the Council for Digitalization, an advisory body to the Minister of Administration and Digitization, proposed a resolution to resume work on the amendments to the e-commerce legislation under the current government. However, the advisory body is no longer active, and the matter currently rests with the Ministry of Digitization, with no discussions currently pending regarding the amendment of Poland's e-commerce legislation, despite continued encouragement by rights holders.

**Implementation of the 2019 EU Digital Single Market (DSM) Copyright Directive (2019/790) and SatCab Directive (2019/789):** The Ministry of Culture published a bill in June 2022 to amend the Copyright Act to implement both the DSM Copyright Directive and the SatCab Directive.<sup>8</sup> Subsequent versions of the bill, after public consultations and inter-governmental consultations, were published in November 2022 and January 2023. The governmental phase is close to completion and the draft should be submitted to Parliament during the first quarter of 2023.

The draft legislation includes several concerning provisions. For example, regarding the transposition of Article 17 (concerning the use of protected content by online content sharing service providers) of the DSM Copyright Directive, the Polish draft notably limits automated blocking to obvious and indisputable infringements. Poland had been critical of Article 17 for several years and filed a complaint against Article 17(4)(b) and (c) following the adoption of the Directive.

In addition, the revised draft bill proposes a non-waivable remuneration right, subject to mandatory collective rights management, for music performers, authors, and performers in respect of on-demand use of audiovisual works, including video-on-demand (VOD) use. The remuneration must be paid in addition to the contractual remuneration received by co-authors and performers in both sectors. This remuneration would make licensing more complicated as

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<sup>8</sup> SatCab Directive is Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programs, and amending Council Directive 93/83 [2019] OJL130/82.

digital services and streaming platforms would need to negotiate separately with the various collective management organizations (CMOs) representing performers and authors. This remuneration right, coupled with the requirement of the intervention of CMOs adds additional unnecessary burdens, both financial and administrative, on digital music services, complicating their launch in Europe and chilling the launch of streaming services in Poland in particular. This scheme impedes proper functioning of the digital single market, the primary objective of the DSM Directive. CMOs mandated by law to exercise remuneration rights interfere with individual licensing and negotiation of compensation arrangements with authors and performers, ultimately undermining their ability to negotiate primary compensation, including up front lump-sum compensation and additional compensation tied to the success of musical or audiovisual works. Such compensation may be reduced in anticipation of remuneration demands on their behalf by CMOs throughout the exploitation chain. In addition, the rules for CMOs are not clear regarding on-demand use of audiovisual works, adding market uncertainty and potential financial burdens on digital services and authors and performers.

There is no evidence justifying this remuneration right in Poland. Such a right would conflict with the normal exploitations of the content and undermine the free exercise of exclusive rights and contractual freedom, thus running afoul of international copyright norms. Moreover, the provision conflicts with a key objective of the U.S.-EU Trade and Technology Council that, as provided in the Inaugural Joint Statement, “the European Union and the United States intend to work to identify and avoid potential new unnecessary barriers to trade in products or services derived from new and emerging tech, while ensuring that legitimate regulatory objectives are achieved.”<sup>9</sup> For the reasons described, the additional right would in fact contravene this objective, creating a barrier to the cross-border provision of online content services and constituting a disproportionate limitation on the freedom of the online distributors of content to conduct their business, which is particularly egregious considering digital service providers have already negotiated licenses for the rights.

The bill also proposes that the right to a work or performance may be revoked if a contract includes an obligation for the distribution of the work or performance and the work or performance is not distributed within the timeframe as set forth in the contract. If the contract does not provide for a timeframe for the distribution of the work or performance, the right may be revoked after 10 years, provided that an additional six-month term for the distribution of the work or performance is granted.

Finally, the bill would implement “direct injection” as a part of the definition for broadcasting. On the notion of the direct injection, IIPA proposes that in line with Recital (20) of the SatCab Directive, the Polish legislation makes it clear that participation of a broadcasting organization and a signal distributor in the single act of communication to the public should not give rise to joint liability on the part of the broadcasting organization and the signal distributor for that act of communication to the public.

**Private Copying Levy:** The Polish government introduced a bill in 2022 amending the private copying levy regulations. In particular, the bill would increase the scope of devices subject to the copying levy and the entities obliged to make the payment and increase the levy from three percent to up to four percent of an amount due from the sale or market value. The specific percentage relating to the specific types of the devices and carriers will be determined by the Minister of Culture, by an ordinance, guided by the findings of a report prepared by the Polish Chamber of Artists on the of fair use of rights in Poland. Unfortunately, these changes will increase prices without accomplishing its main purposes, which is to compensate rights holders for losses suffered due to private copying. That is because a large portion of the proceeds from the levy is directed to a social fund for artists.

## **MARKET ACCESS**

**Broadcast quotas:** Effective January 1, 2022, non-Polish EU broadcasters over a certain size are required to contribute 1.5% of revenues from the Polish market to the Polish Film Fund of Polish Film Institute (PISF). Also effective

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<sup>9</sup> See *U.S.-EU Trade and Technology Council Inaugural Joint Statement*, September 29, 2001, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/29/u-s-eu-trade-and-technology-council-inaugural-joint-statement/>.

in January 2022, broadcasters established in Poland are required to devote at least five percent of their quarterly transmission time to European programming produced by independent producers in the period of five years prior to broadcasting, excluding news services, advertising, teleshopping, sports broadcasts, text broadcasts, and game shows. However, the broadcasters of specialized television channels indicated in an ordinance of the National Broadcasting Council (the Polish broadcasting authority) are required to provide a lower proportion of European programming produced by independent producers over a period of five years prior to broadcasting. There are additionally programming quota requirements for broadcasters that require domestic broadcasters to dedicate at least 33% of their quarterly broadcasting time to programming produced originally in Polish and at least 50% of their quarterly broadcasting time to European programming.

**Video-on-demand (VOD) quotas:** Effective in January 2022, VOD service providers established in Poland are required to devote at least 30% of the catalogue to European programming, including those originally produced in Polish, and ensure the appropriate programming prominence of such programming in the catalogue. The basis for calculating the percentage is the amount of programming made available in the catalogue in a given calendar quarter. One season of a series is considered as one piece of programming. Per the July 2020 Act of Cinematography, VOD service providers over a certain size are also required to contribute 1.5% of revenues from the Polish market to the Polish Film Fund of the PISF.

**Foreign ownership restrictions:** Pursuant to Article 35 of the 1992 Radio and Television Law, Poland limits ownership in broadcasting companies to 49%. IIPA appreciates President Duda's veto of an earlier effort to undermine foreign investment and encourages vigilance against any future such efforts.

**Regulatory uncertainty:** In October 2022, Poland appointed new Commissioners to the National Broadcasting Council. Some of these Commissioners appear to want to limit the reach of commercial broadcasters to favor public television, including by delaying license renewals.

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

The deficiencies in Poland's enforcement framework, including the lack of effective remedies to combat pervasive online piracy, are inconsistent with Poland's obligations under the WTO TRIPS Agreement enforcement provisions, including Articles 41 and 61.

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendations:** IIPA recommends that Switzerland be placed on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** For more than a 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 enactment of an amended Copyright Act that largely maintains the troubling 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 amended 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 additional amendments to the Copyright Act to bring it in line with its international treaty obligations, current best practices in Europe, and international norms.

#### **PRIORITY ACTIONS REQUESTED IN 2023**

- 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 Internet Protocol (IP) address evidence in connection with civil claims, and effective remedies regarding intermediaries or Internet service providers (ISPs), including no-fault injunctions against ISPs whose services are used by third parties for copyright infringement.
- 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, or do away with the remuneration caps for catch-up TV.
- Stop the extended collective licensing (ECL) regime from moving forward. However, should the ECL regime move forward, ensure that it is clearly delineated, applies only to acts of exploitation that are onerous to license on an individual basis, and provides for clear and practically effective opt-out mechanisms that can be exercised by rights holders at any time.
- Strongly encourage data centers and ISPs to implement and enforce better "know-your-business-customer" (KYBC) protocols.
- Permit effective enforcement against ISPs based in Switzerland and hosting infringing services and introduce a legal framework for combating copyright infringements, both via civil and criminal means.
- Clarify those areas of the Swiss Film Act that currently negatively affect the distribution of audiovisual works in Switzerland to apply only to distributors or platforms located 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).

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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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.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 the ordinances of the Telecommunications Act (TCA) to facilitate rights holders' access to 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 is becoming 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. As discussed below, the uncertainties of the recent Copyright Act amendments are further worsening the situation.

Piracy continues to undermine and disrupt the growth of the legitimate digital content market and leads to less 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.

The use of cyberlocker services for storage and sharing of illegal files continues to be a concern. The notorious cyberlockers *rapidgator.net* and *uptobox.com* attract a significant number of visits from Switzerland, with *rapidgator.net* receiving 730,770 visits and *uptobox.com* receiving over 806,751 visits during the last quarter of 2022, according to SimilarWeb. A newer site, *Ddownload.com*, also received over 378,000 visits during that same period, according to SimilarWeb. In a positive development, however, the popular cyberlocker *Uploaded.net* was found liable for copyright infringement by Germany's Federal Court of Justice (BGH) in 2021 and was subsequently shut down in December 2022.<sup>2</sup>

The music and motion picture industries report several 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. 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.<sup>3</sup> Following the removal action by RIPE, the company dissolved. Some ISPs that purport to be based elsewhere, for example 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 virtual private networks (VPNs) to mask their identities. Despite being apparently based in Panama with no known operation in Switzerland, Private Layer offers dedicated servers in Switzerland and 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 to shield their facilitation of illegal activity. Swiss authorities should act to ensure that these ISPs and data centers operate meaningful KYBC policies and take action to have these policies 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. According to SimilarWeb's data, there were 3.32 million visits to stream-ripping sites from Switzerland during Q3 of 2022 that were explicitly for the purposes of downloading copyright protected music. *Mp3y.download* was the most popular stream-ripping service in Switzerland with 2.6 million visits from Switzerland during the twelve months prior to the end of Q3 2022, based on

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<sup>2</sup> See <https://torrentfreak.com/cyando-kills-uploaded-net-before-copyright-quagmire-drowns-it-221129/>.

<sup>3</sup> Some hosting providers are referred to as "bulletproof" because their terms of service allow their customers to upload and distribute infringing content without consequence.

SimilarWeb data. Four other sites received more than 1m visits from Switzerland over this same period: *ytmp3.cc*, *y2mate.com*, *yt1s.com*, and *savefrom.net*.

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. According to SimilarWeb data gathered in the last quarter of 2022, *bs.to* is the most popular pirate site in Switzerland receiving over 10.5 million visits. Several BitTorrent indexing sites, including *thepiratebay.org* and *1337x.to*, are also very popular in Switzerland. *Thepiratebay.org* received over 802,884 visits from Switzerland and *1337x.to* received over 1.309 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 had 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 amendments confirmed that IP address data is 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 legislature 10 years to remedy this enforcement gap and yet it only provided 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 engender 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 ISP, could not be required to block access to copyright infringing websites because of the absence of any provision of law specifically dealing with access providers' responsibilities. According to the court, the pirate site operators were the only parties that could be held liable under the law because users who downloaded infringing content using these services could rely on the broad private use exception.

Unfortunately, rights holders in Switzerland often have very little recourse against piracy sites, particularly those operated or hosted outside Switzerland. Therefore, better cooperation from intermediaries is crucial to effectively tackle the problem of illegal content in Switzerland. Such cooperation should include providing for no-fault injunctions against ISPs whose services are used by third parties for copyright infringement, as required under the European Union (EU) Copyright Directive, and the law should be changed to reflect that. Further, while the amended Copyright Act permits collection of IP address data for criminal copyright cases, as noted above the amendments did not change the status of IP address collection for civil cases. Barring any further 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.

The practice of mandatory collective licensing of rights implicated in catch-up TV recording and making available services, in place for nearly a decade, has been reconfirmed again by approval of a new tariff for remuneration regarding these services. These catch-up services offer 24-hours per day, 365 days per year full recordings of TV programs from several hundred channels, making several tens of thousands of hours of televised content available to the public. The new tariff provided for improved conditions in favor of broadcasters, and litigation proceedings previously brought by them have been settled. The mandatory tariff effectively eliminates exclusive rights implicated by these services, offering only *de minimus* remuneration for these audiovisual exploitation rights and precluding direct licensing by rights holders. This undermines the opportunity for rights holders to secure fair market value for works, including in licenses to broadcasters and platforms. In addition, the extension of the private copy exceptions to these catch-up TV and other making available services (such as a network Personal Video Recorder (nPVR)) compromises the exclusive making available right, and thus, is inconsistent with Switzerland's international obligations, including under the WIPO Copyright Treaty (WCT). Unfortunately, the Copyright Act contains no provisions limiting time-shifting and catch-up TV services (see discussion below on the private copy exception), and the parliament expressed strong support for this practice during its debates.

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,” (also known as cyberlockers) have practiced takedown, but have not prevented (and have even supported) the re-upload of the infringing content. 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. KYBC policies for ISP hosting services are needed 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 (TPMs) for purposes of uses permitted by law, including the over-broad 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 Agreement, the WCT and WIPO Performances and Phonograms Treaty (WPPT) (collectively, the 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 Amendments**

The 2020 Copyright Act amendments unfortunately fell short of implementing the full Working Group on Copyright (AGUR12) compromise recommendations agreed to by rights holders.<sup>4</sup> As discussed below, further amendments or other legislation are needed to adequately address rights holders' concerns and to ensure adequate

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<sup>4</sup> The copyright amendment legislation was prepared by the Working Group on Copyright (AGUR12) in 2013. For a full description of the AGUR12 process, see prior years' IIPA Special 301 reports, at <https://iipa.org/reports/reports-by-country/>.

and effective copyright protection and enforcement. 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 impairs 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 amended law did not solve the problem *Logistep* created and in many ways puts rights holders in a worse position than they were in following the *Logistep* decision. While the Copyright Act may allow rights holders to use personal information (including IP addresses) to file criminal complaints, it does not allow for collection or processing of this information solely to bring civil claims. This needlessly limits rights holders' ability to enforce their rights and essentially forces rights holders to rely exclusively on criminal enforcement. However, criminal enforcement alone is grossly inadequate because prosecutors rarely bring criminal cases against piracy due to resource constraints and a general reluctance. To properly address the privacy concerns raised in the *Logistep* case, the provision should be amended or modified in implementing legislation or regulation to only 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), as well as the recommendation of the AGUR12).<sup>5</sup>

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). Unfortunately, the legal requirements remain unclear, particularly the required evidence for showing that a hosting provider created a “particular danger” for copyright infringement through its technical features or its business model. This provision will require potentially intricate and lengthy pilot proceedings to become enforceable.

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 applies only if a film is of Swiss origin or produced in a country that provides a similar collectively enforced right of remuneration.<sup>6</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 and exercise of exclusive and individual licensing. The opt-out provision does not render an ECL voluntary, and the language of the provision suggests that opting out must be declared for each individual license. There is, therefore, substantial risk that ECLs 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 opt out and exercise their exclusive rights. An initial tariff was agreed upon and became effective in 2022. In addition, requiring a rights holder to opt out to exercise exclusive rights

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<sup>5</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>6</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.

could constitute a formality prohibited by international law, including the Berne Convention and the WTO TRIPS Agreement. In short, ECLs, 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,” as 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 the WTO TRIPS Agreement.

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 requires only that the copy is created, copied, or made available in Switzerland, including, potentially, copies made available from foreign sources. As a result, the provision could be applied 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, it is possible this provision could be combined with other exceptions such as the existing, unusually broad private use exception, which can apply 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 protected for just 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.

On December 17, 2021, the Federal Council issued a report (requested in 2019 by the Council of States) on the effectiveness of the 2020 amendments to the copyright law. The report holds, *inter alia*, that the new stay-down provision (Art. 39d) had not been tested in courts so far. Rights holders understand that this will likely require a long and expensive test case litigation. Also, the report confirms that few criminal proceedings have been reported and, thus, the effects of the new data processing permission (Art. 77i) cannot yet be fully assessed.

### **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 to narrow the private copying exception, which is overbroad and exceeds the limits of the three-step test. The exception 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 the inadequate protection accorded to TPMs (see below), constitute significant hurdles for 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 relies on the private copy exception to permit cable and over-the-top (OTT) providers, including major telecom corporations, to offer seven-day “catch-up” services on integral recordings of hundreds of TV programs, imposing a government-approved collective remuneration tariff in these

services. 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 use by the initial broadcaster, on a platform-by-platform basis. This extension of the private copy exception to these catch-up TV services undermines the exclusive making available right, and thus, is inconsistent with Switzerland's international obligations, including under the WCT.

**Circumvention of Technological Protection Measures (TPMs):** 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 and inconsistent with Switzerland's obligations under the WIPO Internet Treaties, which require “adequate legal protection and effective legal remedies” against circumvention of TPMs.<sup>7</sup> Moreover, given the inappropriately wide scope of the private copy exception (discussed above), this exception to the circumvention of TPMs could be interpreted to permit individuals to circumvent access or copy controls that protect copyrighted content and disseminate that content widely. As a result, 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>8</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>9</sup> This consultation is particularly troubling in light of the broader “Digital Switzerland” Strategy, currently underway.<sup>10</sup>

**Provide Neighboring Rights More Fair Treatment:** Article 60(2) of 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 the Federal Supreme Court upheld the cap. The Court acknowledged that the remunerations for performing rights are, in fact, higher in other European countries, but decided not to intervene on the merits. Instead, the Court ruled that it is up to the Swiss legislature to set these caps based on a political assessment. Unfortunately, the legislature declined to address this issue in the recent Copyright Act amendments. This unusual and unjustified discrimination against neighboring rights owners should be ended and replaced with a fair and equitable remuneration for both performing artists and producers.<sup>11</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 (TCA):** The Federal Council enacted amendments to the ordinances of the TCA that entered into force in January 2021. The ordinances may create a further obstacle for anti-piracy activities because the ordinances 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.e., registrants), (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-

<sup>7</sup> See Article 11 of the WCT and Article 18 of the WPPT.

<sup>8</sup> See <https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office-otm.html>.

<sup>9</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>10</sup> See <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-80379.html>.

<sup>11</sup> Moreover, as discussed above, it is inappropriate and detrimental that the government has created additional collectively managed rights in the Copyright Act without first addressing the fundamental unfairness in Switzerland's collective management system—namely, the discrimination against neighboring rights holders. This discrimination is fundamentally contrary to the important U.S. policy of not establishing a hierarchy of rights and should be ended by modifying the cap.

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, WTO TRIPS Agreement, WCT, and WPPT. Switzerland is thereby obligated under these international agreements to provide “effective” remedies to prevent and deter infringement. For example, under Article 41(1) of the WTO TRIPS Agreement (and similarly 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 infringements.” Switzerland is not currently doing so, and as explained in this report, the amended Copyright Act does not bring Switzerland in line with its existing obligations. In addition, as noted above, Switzerland is not presently providing “adequate legal protection and effective legal remedies” against the circumvention of TPMs, as it is required to do under Article 11 of the WCT and Article 18 of the WPPT.

## **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 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.

**Investment Obligations and Streaming Services Quotas:** Another amendment to the Swiss Film Act, adopted in May 2022, introduced an investment obligation for streaming services in Swiss film productions and quotas for streaming services. All audiovisual services providing film content (commercial broadcasters, foreign broadcasters with publicity windows to Switzerland, transactional video-on-demand (TVOD) and subscription video-on-demand (SVOD) platforms as well as telecom services) must invest in Swiss film production or its promotion. The investment obligation amounts to four percent of their annual gross income generated in Switzerland. If they fail to do so, they must pay a subsidiary levy after a period of four years. The revised Film Act also sets a new 30% quota of European films on streaming services and regulates public access to films that have received federal funds. The provisions implementing the amendments are scheduled to enter into force on January 1, 2024. These amendments interfere with contractual freedom and were adopted without a proper impact assessment to determine if the market is capable of absorbing any such investment. The Swiss Federal Council has opened a consultation on these regulations that will close in mid-February. If implemented, the obligations should be assessed against the benchmarks of flexibility, proportionality, predictability, and non-discrimination. The obligations should be re-evaluated every two years from entry into force and provide a maximum of flexibility. Switzerland is not required to implement these amendments by international agreements.

**Broadcasting Quotas:** The Federal Act on Radio and Television obligates broadcasters to reserve half of their transmission time for European works, where practicable. This obligation should be removed to ensure a level playing field for U.S. audiovisual works.

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Taiwan be placed on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** The Government of Taiwan has recently taken some positive steps to improve its digital marketplace for legitimate audiovisual content, including outlawing piracy devices (PDs) and apps in 2019 and then taking enforcement actions over the past few years. This includes against certain notorious piracy sites, such as *8maple.ru* (and related domains), as well as advancing legacy cases against *ChuangYi TV box* and *QBox* (or *Chien Hsun TV Box*), although, unfortunately, in both cases prison sentences were commuted to non-deterrent fines. However, continuing online piracy; concerning recent enactments that maintain, and proposed amendments that would further establish, some 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 United States, Taiwan's government should address the copyright protection, enforcement, and market access concerns discussed in this report. At minimum, Taiwan should ensure its enforcement framework and its copyright legislation comply with its obligations under the WTO TRIPS Agreement, including ensuring its civil procedures effectively result in deterrence, and that the scope of any exceptions and limitations under its Copyright Act are narrowly tailored and specific.

PDs, websites, and apps, especially those operated or based outside of Taiwan, continue to be problematic for rights holders by facilitating unauthorized streaming, including live broadcasts, and stream ripping. Illegal theatrical camcording remains a concern. E-book piracy and the making available of copyrighted teaching materials without authorization on university digital platforms likewise remain problematic.

A positive development was enactment of the 2019 amendments to the Copyright Act that provide a clear legal basis to combat the proliferation of piracy apps and devices, but sentences against pirate operators in legacy cases are too low to deter piracy; it is hoped that ongoing investigations and cases will lead to more deterrent outcomes. 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 available through the specialized Intellectual Property (IP) court, against piracy sites, preferably through a Copyright Act amendment. Unfortunately, the amendments to the Copyright Act passed in May 2022 fail to address deficiencies in Taiwan's legal framework and continue to raise questions regarding Taiwan's 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 those in the proposed regulations of over-the-top (OTT) services and in the proposed intermediary platform regulations. 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.

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<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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## **PRIORITY ACTIONS REQUESTED IN 2023**

### **Enforcement:**

- Ensure that the Criminal Investigation Bureau (CIB), Telecommunication Police Brigade (TPB), and Criminal Investigation Brigade (CIBr) continue to investigate and prosecute more online piracy cases (including those involving PDs and apps under the amended Copyright Act), with the goal of seeking deterrent-level punishment against commercial piracy operations.
- Take effective action to deter unauthorized theatrical camcording incidents, including issuing deterrent penalties.

### **Legislative:**

- Enact legislation to:
  - Provide a clear legal basis for rights holders to obtain no-fault injunctions to order Internet service providers (ISPs) to disable access to infringing content on websites, including foreign websites (and including, as necessary, amendments to 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 the ISP liability framework to ensure that all intermediaries are properly incentivized to act against online piracy and that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities; that such intermediaries fulfill certain conditions, including adoption and implementation of a repeat infringer policy, with encouragement to institute a “know your business customer” (KYBC) policy; and that, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances from which 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;
  - 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 term of 95 years, but in any case, no less than 70 years);
  - Make unauthorized camcording of motion pictures in theaters a criminal offense;
  - Enhance Article 88 of the Copyright Act by removing restrictive language on calculating damages and the NTD1 million limit; and
  - Correct Taiwan Intellectual Property Office (TIPO) collective management practices to allow a royalty rate based on a fair market rate and eliminate delays in fixing the rate in dispute settlement cases.
  - Ensure sound recordings are treated the same as literary, musical, and dramatic or choreographic works, including but not limited to providing exclusive rights for public performance and retransmissions of sound recordings.
- Issue implementing regulations ensuring that recent amendments to the Copyright Act can be read in a way that is consistent with Taiwan’s WTO TRIPS Agreement and Berne Convention obligations, namely, to ensure new educational exceptions meet the three-step test.
- Recognize a commitment to comply with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively the WIPO Internet Treaties) irrespective of formal accession, which might not be politically possible.

## Market Access:

- 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, and local discriminatory content quotas on television content; and ensure that any new OTT regulations (e.g., the Internet Audiovisual Services Act (IAVSA)) or any regulations on intermediary platforms (e.g., the Digital Communications Act) do not disincentivize foreign investment by, for example, requiring foreign OTT service providers to register, set up local permanent establishments, disclose sensitive commercial information, and comply with a rating system that is potentially inconsistent with international standards, or mandating local content obligations.

## TAIWAN'S ONLINE MARKETPLACE

The creative industries make significant contributions to Taiwan's economy. Taiwan is the 28th largest music market in the world in 2021 by revenue, down three places from last year.<sup>2</sup> However, Taiwan is still a hub of music production for the Chinese-speaking world and a major exporter of "C-pop." Recorded music revenues for streaming increased by 6.8% to US\$67.6 million in 2021.<sup>3</sup> The total market size for music in 2021 was US\$88 million.<sup>4</sup> Additionally, nearly 9 million Taiwanese subscribed to video-on-demand (VOD) services in 2020, and 56% of Internet users in Taiwan use VOD at least once a week.<sup>5</sup> In 2021, Taiwan's cinema industry was estimated to generate a revenue of US\$177 million, showing a decrease compared to US\$184 million in 2020.<sup>6</sup> The revenue of both 2020 and 2021 was affected heavily by the COVID-19 outbreak, and the figure was projected to be US\$439 million in 2026.<sup>7</sup> In 2022, the annual revenue of the video games and eSports market in Taiwan was projected to reach US\$3.87 billion, showing an increase for six consecutive years.<sup>8</sup> 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 should not be considered an exhaustive review of all concerns.<sup>9</sup>

**Online Piracy:** Online and mobile device piracy in Taiwan continued in 2022. Foreign websites that provide illegal content remain a significant problem and undermine the ability of rights holders and legitimate services to distribute copyrighted content and prevent rights holders from seeing their investments reach their full potential in Taiwan. Streaming and linking sites that aggregate and index links to pirated content stored on other sites continue to make up a large amount of piracy consumption in Taiwan. For example, the highly popular Chinese language *Gimy* pirate website family now redirects to *Gimy.app* (the main domain), *Gimytv.com*, *Gimy.cc*, and *Gimy.one*. *Gimy*'s global SimilarWeb ranking is 2,149 but has a local rank of 42 in Taiwan. The *Gimy* website/domains had an aggregate of 35 million monthly visits in August 2022, a 52% increase in traffic year-on-year, according to SimilarWeb. A criminal referral was made in Taiwan in December 2020, and there was a raid in early 2021. Despite this enforcement action, which resulted in several key *Gimy* pirate domains going offline, *Gimy* has re-emerged with the domains noted above, and the case remains in the evidence-gathering phase with Taiwan prosecutors.

Another popular infringing website is *gimyvod.cc*, unrelated to *Gimy* discussed above. *Gimyvod.cc* is believed to be operated by an individual in China, but this website is not accessible in China. This site was previously at

<sup>2</sup> International Federation of the Phonographic Industry (IFPI), 2022 *Global Music Report*, p. 183.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Frontier Economics, *The Economic Impact of Video-on-Demand Services in Taiwan*, 2021, p. 2, available at <https://www.mpa-apac.org/wp-content/uploads/2021/11/TW-Frontier-The-Economic-Impact-of-VOD-in-Taiwan.pdf>.

<sup>6</sup> Statista, *Annual revenue of the cinema industry in Taiwan from 2017 to 2021, with forecasts until 2026*, available at <https://www.statista.com/statistics/1194461/taiwan-total-revenue-of-cinema-industry/#:~:text=In%202021%2C%20Taiwan's%20cinema%20industry,million%20U.S.%20dollars%20in%202020.>

<sup>7</sup> Id.

<sup>8</sup> Statista, *Annual revenue of video game and eSports market in Taiwan from 2017 to 2021, with forecasts until 2026*, available at <https://www.statista.com/statistics/1194527/taiwan-annual-revenue-of-video-games-and-esports-market/>.

<sup>9</sup> See, e.g., IIPA, Taiwan, 2022 Special 301 Report (January 31, 2022), available at <https://www.iipa.org/files/uploads/2022/01/2022-SPEC301-3.pdf> and IIPA, Taiwan, 2021 Special 301 Report (January 28, 2021), available at <https://www.iipa.org/files/uploads/2021/01/2021SPEC301TAIWAN.pdf>.

*gimyvod.com* and is one of the most popular streaming Chinese language websites in the Asia region. It offers a vast library of motion picture, television, anime content, and Asian dramas. *Gimyvod.cc* uses Cloudflare to mask its IP location, which hinders rights holders' ability to identify the site's precise host and location of the website's server. Notorious piracy sites *Dytt8.net*, *Dy2018.com*, *Dygod.net*, and *Ygdy8.com* allegedly have their servers located in Taiwan.<sup>10</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.

The long-standing forum site *Eyny.com* also remains a primary piracy concern in Taiwan. There are more than 17 million visits per month to *Eyny* from Taiwan from users seeking to download music, film, television episodes, and software and video games. Cyberlockers such as *Katfile.com* and *Mega.nz* receive more than 4 million visits between them from Taiwan each month while stream-ripping destinations such as *Y2Mate* (1.0 million visits per month) and BitTorrent portals like *Rarbg* (1.1 million visits) are also widely used to obtain pirated content.

Stream ripping, where users of legitimate online platforms use tools, such as an app or a website, to illegally “rip” the streamed audio or video content, is a growing problem that first impacted the music industry but is now beginning to impact other creative industries as well. 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 or making available rights, and to unlawfully circumvent technological protection measures (TPMs), but in Taiwan no such cases have been brought, in part because operators are located outside Taiwan. As discussed below, Article 87 of the Copyright Act should be further amended to expressly confirm that it can be used against foreign-based services.

A newer form of piracy involves 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. A recent case in Taiwan concerned a karaoke audiovisual content cloud database that is believed to be legally licensed for only the China territory. However, the database was accessed and used by Taiwanese consumers who were able to download the karaoke content via an app provided by the owner of the cloud database. Rights holders of those karaoke audiovisual content in Taiwan suffered a significant loss from this issue but are unable to pursue either the machine manufacturer or the Taiwanese distributor under Article 87-1-8 of the new OTT legislation because those audiovisual content are believed to be 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>11</sup> have become a significant platform for disseminating illegal content. Prior to the pandemic, Taiwan had also seen an increasing amount of unauthorized camcording. Illicit camcord data for 2020-2022 remains anomalous because of the widespread closure of theaters in 2020, 2021, and into 2022 amid the COVID-19 pandemic. In addition to improving the legal framework (discussed below), the government should take actions under current law, including issuing deterrent-level penalties, and work with industry to persuade exhibitors to provide staff with more training and to take proactive security measures.<sup>12</sup> The resumption of normalcy in movie-going attendance provides an important opportunity to “reset” on this key issue.

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<sup>10</sup> USTR identified *Dytt8.net* in its 2021 Review of Notorious Markets for Counterfeiting and Piracy (February 2022), 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”). The related sites *Dytt8.net*, *Dy2018.com*, *Dygod.net*, and *Ygdy8.com* are consistently high ranking with recording more than 23 million monthly visits in mainland China in August 2022, according to SimilarWeb. 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. These sites are under investigation.

<sup>11</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>12</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.

**Book Piracy:** 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* and *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>13</sup> The *shopee.com* platform, in particular, continues to be problematic, with reports of infringing content, i.e., counterfeit versions of textbooks and unauthorized ebooks, on the site remaining high. Unfortunately exacerbating the problem, the process for reporting infringing content is cumbersome and responses to takedown notifications have been inconsistent.

**Piracy Devices (PDs):** Notwithstanding specific legislative reforms, the proliferation of PDs remains a problem in Taiwan, and enforcement against PD operators has been insufficient.<sup>14</sup> Streaming devices that run with proprietary infringing apps enable access to live channels and VOD content and are readily available online and in physical marketplaces. Popular illicit streaming devices (ISDs) include *UnblockTech*, *EVPAD*, and *SVI Cloud* (which specifically target users in Taiwan and are all manufactured in China). Sellers of streaming devices try to distance themselves from the installing of infringing apps by claiming that the manufacture or sale of the boxes themselves is not illegal and that resellers instead provide a code for their customers to install infringing apps.

The 2019 amendments to Articles 87 and 93 of the Copyright Act provide a clear legal basis for enforcement against the dissemination of certain piracy apps and the manufacture and trafficking of PDs and piracy apps. To ensure the law accomplishes its goal of deterring the sale of PDs in the marketplace, IIPA is hopeful that recent enforcement actions will result in increased deterrence against the manufacturers and distributors of PDs and piracy apps, as well as against resellers of devices that do not have piracy software or apps pre-loaded (but who are well equipped by the manufacturer or by middleware providers to install illicit software or apps). In light of the amended law, local associations, including the Taiwan OTT Media Services Association, continue to ask 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.

## **ENFORCEMENT UPDATES IN TAIWAN**

Taiwan's Internet users often obtain unauthorized content primarily from websites located overseas. Unfortunately, Taiwan's legal framework to address overseas infringements remains inadequate. No-fault injunctive relief directing ISPs to stop providing access to infringing content on piracy websites does not appear available under current law (or any procedure for that matter, whether civil, criminal, administrative, or voluntary), although an unpublished Taipei District Court case, as well as the *Gimy* criminal action (see below), may pave the way for an approach by Taiwan Network Information Center (TWNIC) to disable access to sites engaged in illegal activity. However, since that is a criminal process and applies only to the defendant domains identified, there is no dynamic impact, and pirate operators can easily evade orders that are not permanent. 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.

The government has been more proactive in combating piracy websites when the operations have a clearer nexus to Taiwan. A criminal referral was made in Taiwan related to *Gimy* in December 2020, and there was a raid in

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<sup>13</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>14</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*.

early 2021. Despite this enforcement action, *Gimy* has redirected to new domains, including *Gimy.app* (the main domain), *Gimytv.com*, and *Gimy.cc* and continues to be very popular. The case remains under investigation by Taiwanese prosecutors. More actions should be taken against the new domains to cease infringement by *Gimy*. A Taiwan court also delivered a verdict in a February 2021 criminal case involving the Chuang Yi TV box, in which the defendant was found guilty of breaching Article 92 of the Copyright Act for public transmission of a copyright work without authorization. Unfortunately, while the defendant initially received a sentence of 6 months imprisonment, it was commuted to a fine, so the result is less than deterrent.

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 rampant online and mobile piracy.

Furthermore, civil remedies are inadequate. Article 88 of the Copyright Act includes restrictive language on calculating damages and limits damages to NTD1 million in cases where actual damages cannot be clearly determined. Due to the nature of much copyright piracy, and the lack of available data to rights holders, in most cases, actual damages cannot be clearly determined, which is why the United States has deterrent-level statutory damages. Article 88 should be enhanced by removing these impediments. 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.

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 generally do not result in deterrence (although the “Response Policy Zone” process has led to some temporary disabling of access of domains associated with criminal online copyright infringement on a couple of occasions). 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**

The Government of Taiwan has failed to provide for legal remedies and procedures that would enable effective copyright enforcement online, and the legislative proposals in previous years have been going in the direction of diluting the level of copyright protection and weakening the enforcement framework even further.

**Amendments to the Copyright Act:** Taiwan has in recent years introduced only minor amendments to its Copyright Act. As previously reported, in 2019 Taiwan enacted amendments to Articles 87 and 93 of the Copyright Act. This legislation followed 2018 guidance from the TIPO that streaming devices are prohibited under the Copyright Act and an August 2018 IP Court decision confirming this interpretation. Revised Article 87 maintains the condition that violators must “receive benefit” from their actions. This requirement should be removed, since in some cases the “benefit” may be indirect and difficult to prove. 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. Also, the requirement to prove the offender’s knowledge that the broadcast or transmitted content was copyright infringing may make this new provision unenforceable when the content is licensed to broadcast or transmit in a specific territory but then broadcasted or transmitted beyond the licensed territory. Moreover, this amendment is of limited

practical relevance to rights holders given that the majority of services potentially caught by its scope are based in and operated from outside of the Taiwanese jurisdiction and no mechanism exists for rights holders to bring action in Taiwan against such services.

Other longstanding draft copyright amendments unfortunately propose many changes that would weaken rather than strengthen the scope of substantive copyright protection. In April 2021, TIPO proposed a draft bill amending the Copyright Act (Draft Bill), which was passed from the Executive Yuan to the Legislative Yuan for review in May 2021. The Draft Bill is largely based on earlier proposals. Unfortunately, the Draft Bill contains problematic provisions for rights holders, including a broadly drafted exception that allows public presentation of works using home-style equipment for non-recurring and non-profit purposes that risks including audiovisual works released through VOD services and does not address many of the criticisms IIPA raised in comments on the previous drafts that TIPO had released for public comment. As of December 2022, the majority of the Draft Bill remains under consideration by the Legislative Yuan. Of note, in May 2022 the Legislative Yuan passed a small portion of the Draft Bill focused on broader education exceptions in the Copyright Act that may result in weakened protection for copyright.

Prior IIPA submissions have detailed the flaws in the draft amendments.<sup>15</sup> As noted, while many of the online services built on infringing activities or facilitating infringement are located outside of Taiwan, a significant amount of infringing activity occurs within Taiwan and should create a nexus for action. In prior communications with industry, ISPs in Taiwan have indicated a willingness to address the problem of flagrantly infringing websites but insist they would do so only upon being ordered by a court or the government. It remains unclear whether the current legal framework could be interpreted to enable ISPs to do more or whether it inhibits them from doing so. Several dozen jurisdictions around the world have remedies in place to halt copyright infringing websites from being accessed by users. 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, or encourage infringement. It is unfortunate that no such proposals have been included as part of the copyright reform process. Governments in the region, including Australia, South Korea, Singapore, India, Indonesia, Malaysia, Thailand, and Vietnam have adopted or refined approaches that provide a remedy requiring ISPs to disable access to infringing sites.<sup>16</sup> Moreover, the amendments fail to address several deficiencies in Taiwan's existing legal regime, including the need to:

- Provide a clear 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>17</sup>
- Clarify the ISP liability framework to ensure that all intermediaries are properly incentivized to act against online piracy and that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities and that such intermediaries fulfill certain conditions, including adoption of a repeat infringer policy, with encouragement to institute a KYBC policy, 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;
- 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, i.e., to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the term of 95 years, but in any case, no less than 70 years;

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<sup>15</sup> See prior IIPA, Taiwan, 2019 Special 301 Report (February 7, 2019), pp. 83-84, available at <https://www.iipa.org/files/uploads/2019/02/2019SPEC301REPORT.pdf>.

<sup>16</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>17</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 (IP) Case Adjudication Act.

- Make it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters or of live musical performances;<sup>18</sup>
- Correct problematic TIPO practices regarding tariff setting and tariff dispute resolution for uses managed by collective management, as well as other collective management related issues;<sup>19</sup> and
- Ensure sound recordings are treated the same as literary, musical, and dramatic or choreographic works, including but not limited to providing producers and performers exclusive (rather than mere remuneration) rights for public performance and retransmissions of sound recordings.

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

- Numerous broad exceptions and limitations to protection, including fair use,<sup>20</sup> which would call into question Taiwan's compliance with its WTO TRIPS Agreement obligations;<sup>21</sup>
- A reduction of criminal liability standards (e.g., requiring participation in collective management organizations (CMOs) 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>22</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.

#### **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Implementation:**

Taiwan also passed its Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Implementation Law in 2022 that purports to implement the CPTPP standards.<sup>23</sup> The CPTPP requires compliance with the WIPO Internet Treaties. However, the changes Taiwan will introduce to the Copyright Act will come into effect only if Taiwan joins the CPTPP or when otherwise specified by the Executive Yuan. There is no specific timeline for this process so far. CPTPP members are required to ratify the WIPO Internet Treaties, an important step in improving protection and enforcement. However, the law does not mention the required accession to the treaties or even recognize a commitment to comply with the treaties irrespective of formal accession, which might not be politically possible. The Government of Taiwan should recognize a commitment to comply with the WIPO Internet Treaties irrespective of formal accession.

Additionally, the law does not contain anything on term extension. While term of protection is a "suspended" provision in the CPTPP and not mandatory, this substantive issue was discussed in the copyright reform process in

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<sup>18</sup> The music industry reports that infringement through camcording live concerts is increasing.

<sup>19</sup> Corrections should include allowing the setting of fair market based rates for collectively managed rights (instead of tariffs determined by the Taiwan IP 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>20</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 (e.g., WTO TRIPS Agreement, Article 13) to ensure compliance with Taiwan's international obligations.

<sup>21</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.

<sup>22</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. Also, 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>23</sup> See, e.g., IIPA 2019 at 84-85.

Taiwan and is very important to U.S. rights holders. The implementation law revises the list of copyright infringement offenses that qualify as a “public crime” (i.e., a crime capable of *ex officio* enforcement).<sup>24</sup> Some of the amendments are positive (e.g., both the concepts of unauthorized public transmission and unauthorized reproduction and distribution in digital format are included under “public crime”), but the scope of these changes are limited by the inclusion of the requirements that the “whole” work is exploited “for consideration,” and the minimum damage threshold is set at NTD1 million. This threshold is far too high and does not address goods that have a low market price. It appears that the damage threshold would be applied on a per infringement basis, but this should be clarified by the TIPO. Furthermore, reconsideration of a reasonable minimum damage threshold is needed.

**Collective Management Organization (CMO) Act:** In 2022, Taiwan recently amended its Collective Management Organization Act (CMO Act), but it still presents shortcomings that affect the establishment of new CMOs, such as the obligation for half of the promoters of a new CMO to be residents in Taiwan and obstacles for rights holders’ associations and current members of a CMO to be promoters of a new one, and their governance, such as the introduction of term limits for management-level positions and internal control, which are difficult to apply to CMOs in which a reduced number of rights holders hold significant shares of the market.

**Draft Internet Audiovisual Services Act (IAVSA):** In May 2022, the National Communications Commission (NCC) released a draft “legal framework” for the revised IAVSA, which has been undergoing drafting since 2020. The “framework” for the IAVSA would obligate foreign OTT service providers to register with the NCC, appoint a local agent, comply with a rating system that is potentially inconsistent with international standards, and potentially disclose sensitive commercial information. Although the NCC states that they are primarily concerned with regulating OTT services and promoting “legal” copyrighted streaming content, such requirements, if applied to all OTT services, would stifle business development and add a burdensome barrier to market entry. The draft legal framework also suggests local content prominence obligations and associated penalties for noncompliance. The full revised draft of the IAVSA has not been released to date.

Unfortunately, some local stakeholders have pointed to the significant problem of piracy originating outside of Taiwan (as discussed above) to advocate for local registration requirements. While local registration requirements would discriminate against legitimate services, such requirements would be ineffective against the problem of illicit piracy services located outside of Taiwan that target the Taiwanese market. As noted above, Taiwan needs effective remedies to address this problem, such as no-fault injunctions to block access to foreign-hosted piracy services.

**Draft Digital Information Services Act (DISA):** A Digital Information Services Act (DISA) put forward by the NCC was met with widespread disapproval from stakeholders and was shelved in September 2022. The issues of greatest concern were the breadth of definitions, remedies proposed with respect to certain intermediaries, transparency reports, and description of user rights. IIPA understands the draft was shelved, and there is no interest on the part of the government in re-introducing it any time soon (particularly now in light of the results of the recent elections).

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

**Local Content Quotas:** In January 2017, the NCC issued regulations that included significant local content requirements that limit the broadcasting of U.S. audiovisual content on terrestrial and satellite television.<sup>25</sup> These

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<sup>24</sup> Unfortunately, to qualify as a public crime, the “whole” work must be exploited “for consideration” and the infringement value must exceed NT\$1 million (about US\$32,000). 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>25</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 and 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. These regulations require 40% of these locally produced programs to be new productions. Furthermore, cable TV services must broadcast at least 20% of local programming.

discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, restrict U.S. exports, and should be repealed.

**Additional Barriers Against Audiovisual Content:** Taiwan maintains several 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 Internet Protocol TV (IPTV) offerings above the basic level cable TV services, only *à 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.

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

The deficiencies in Taiwan's enforcement framework outlined above—including 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 WTO 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 laws will run afoul of a number of its WTO TRIPS obligations including, in particular, those under TRIPS Article 13 on exceptions and limitations.

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** The Royal Thai government continues to struggle with the fight against piracy, and a recent government reshuffle raises further questions about the long-term stability of its intellectual property (IP) policies. 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 efforts to combat rampant online piracy in the country, the mechanism has faced difficulties and has had inconsistent and mostly ineffective results to date. Cases should proceed, upon rights holders' election, to the Intellectual Property & International Trade (IP&IT) Court and result in full blocking orders (as opposed to Uniform Resource Locator (URL)-specific orders) properly implemented by Internet service providers (ISPs) in Thailand. Otherwise, enforcement against piracy remains largely non-deterrent, although cooperation with the Police Cyber Taskforce (PCT), the Royal Thai Police Economic Crimes Division (ECD), and the Department of Special Investigations (DSI) has been good, resulting in some enforcement actions against several piracy sites in the past couple of years. Unfortunately, these enforcement actions have not resulted in deterrent outcomes against pirate operators and, as a result, there have not been significant reductions in piracy or needed deterrence. Thai-language piracy sites and services continue to dominate the online ecosystem, unfairly competing with legitimate rights holders.

The Royal Thai government enacted amendments to the Copyright Act in February 2022. The amendments, which entered into force in August 2022, include some helpful improvements to the intermediary liability framework and the protection of technological protection measures (TPMs). In 2022, Thailand officially acceded to the WIPO Copyright Treaty (WCT), following through on the government's longstanding promise to join this treaty, and it is now time for the government to join the WIPO Performances and Phonograms Treaty (WPPT). Unfortunately, the recently enacted amendments did not address certain deficiencies in Thailand's legal framework. IIPA urges the Government of Thailand to better address copyright piracy by improving the legislative framework, addressing remaining shortfalls regarding provisions on intermediary liability and protections of TPMs, ensuring that other important provisions, such as term of protection of copyright, align with current international standards and best practices, and providing a clear legal basis to disable access to copyright infringing content.

Moreover, certain 2019 amendments to the copyright law in the name of Marrakesh Treaty implementation created new problems because of the erroneous inclusion of sound recordings in the scope of certain exceptions. To address the continued operation of rogue collective management organizations (CMOs) that undermine music rights holders and users, the Royal Thai government should also promulgate legislation to bring order to music collecting societies that are distorting the market, including measures addressing the establishment and governance of CMOs.

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. IIPA welcomes recent stakeholder engagement by the Royal Thai government, particularly the Department of Intellectual Property (DIP), and looks forward to continuing close coordination.

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<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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## **PRIORITY ACTIONS REQUESTED IN 2023**

### **Enforcement**

- Ensure enforcement units, including the PCT, the ECD, and the DSI, increase the number of enforcement actions against commercial-scale digital piracy services, and critically bring criminal prosecutions through to convictions. This includes taking enforcement action against commercial-scale streaming piracy sites such as *123-hd.com*, *037hdmovie.com*, *Kseriestv.com*, and *Siambit.me*.
- Clarify the criminal prosecution process, which remains excessively lengthy and lacks transparency, against commercial-scale piracy websites.
- 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 CCA Section 20(3) regarding actions to combat pirate websites, including ensuring expeditious and non-burdensome procedures, proper adjudication by the IP&IT Court, and full and fast compliance by Thai ISPs with court orders for full website blocking to disable access to infringing sites.

### **Legislative**

- Introduce changes to Thailand's copyright protection and enforcement framework, including further amendments to the Copyright Act, to:
  - ensure copyright offenses are non-compoundable so that *ex officio* enforcement may ensue;
  - 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;
  - 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;
  - address shortfalls on intermediary liability to clearly establish a basis for liability of online service providers for infringements carried out by third parties using their services, clarify the eligibility criteria for safe harbors to ensure that appropriate repeat infringer policies are an additional condition for eligibility rather than the only necessary condition, and ensure the eligibility criteria includes a requirement for ISPs to implement other measures demonstrated effective in preventing or restraining infringement;
  - ensure that exceptions to TPMs protections are appropriately narrow, for example, to ensure access to content is limited to licensed institutions assisting disabled persons or non-profit educational institutions;
  - reduce 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; and
  - while rights holders consider action to utilize the CCA, provide a clear legal basis to enable courts to order online service providers to disable access to infringing websites.

### **Market Access**

- 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 allows the Film Board to establish ratios and quotas against foreign films, and amend the MPVA to avoid onerous film censorship and classification provisions, as such policies would create new barriers and reduce consumer choice.
- 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 subject online content service providers to mandatory network usage fees.

## **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 reports and is not to be considered an exhaustive review of issues.<sup>2</sup> Overall, piracy in Thailand, especially online piracy, continued to cause major damage to legitimate rights holders and licensees in 2022. Although rights holders have some good cooperation with Royal Thai government authorities, enforcement action against commercial-scale piracy websites and services has been limited and has not significantly reduced levels of online piracy nor provided much-needed deterrence.

**Online Piracy:** Notwithstanding the expanding availability of legitimate services for music and audiovisual materials,<sup>3</sup> increasing access to broadband Internet, particularly on mobile devices, has led to escalating piracy of recorded music, motion pictures, television and streaming content, video games, published materials, and broadcasts. Legitimate services find it difficult or impossible to compete with pirate offerings, and some longtime licensed operators have been driven out of business due to 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. The most popular streaming sites in Thailand are home-grown and operated from within the country, including *123-hd.com* (40.6 million visits in Q4 2022, according to SimilarWeb), *037hdmovie.com* (37.6 million visits during the same period), and *Kseriestv.com* (32.3 million visits during the same period). BitTorrent indexing and tracker sites, cyberlockers, and BBS/forums also remain problematic. The popularity of peer-to-peer (P2P) networks remains. Many of the top piracy sites in Thailand are domestic BitTorrent sites: *Siambit.me* (18.6 million visits in Q4 2022 according to SimilarWeb), *dedbit.com* (3.9 million visits during the same period), and *tt-torrent.com* (7.3 million visits in the same period).

Popular stream-ripping services include *ssyoutube.com* (2.6 million visits from Thailand in Q4 2022 according to SimilarWeb), *y2mate.com* (2.2 million visits in the same period), and *savefrom.net* (1.9 million visits in the same period). 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. Cyberlockers that egregiously or primarily facilitate access to infringing materials also remain a problem in Thailand, such as *Mega.nz* (6.2 million visits from Thailand in Q4 2022) and *4shared.com* (1.8 million visits in the same period).

In 2022, enforcement action against commercial-scale piracy sites was limited, and the criminal prosecution phase continues to be extremely slow moving and lacks transparency. In May 2022, industry worked well with the PCT, the ECD, and the DSI resulting in the closure of streaming site *We-Play.live* and the arrest of the site's owner. In June 2022, a successful enforcement action resulted in the shutdown of the *PGLiveTV* application, which had been in operation since early 2021 and provided access to live channels (including live sports) and VOD content. These raids should now be followed up with prosecutions to achieve permanent reductions in piracy and establish needed deterrence. Legitimate online services are harmed by the increasing threat from copyright infringing websites, and some longtime licensed operators have stopped doing business as a direct result of this intractable piracy. Both U.S.

<sup>2</sup> See, e.g., IIPA, Thailand, 2022 Special 301 Report, January 31, 2022, at [https://www.iipa.org/files/uploads/2022/02/IIPA\\_2022-Spec-301\\_Thailand-1.pdf](https://www.iipa.org/files/uploads/2022/02/IIPA_2022-Spec-301_Thailand-1.pdf).

<sup>3</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.

producers and distributors, as well as local Thai producers and services, are profoundly harmed by Internet pirate platforms that specifically target Thai users with Thai language sites.

An example of the need for a more efficient prosecution process is *Movies2free*,<sup>4</sup> which was shut down by the DSI in November 2019. After the enforcement action, the DSI announced that the piracy site was one of the largest in Thailand and had been generating USD\$160,000 per month in advertising revenue alone.<sup>5</sup> However, the Public Prosecutors Office is still waiting to receive the site owner's pleadings to the charges, more than 3 years after the enforcement action.

Piracy continues to take its toll on the market for legitimate creative content. Illegal apps on smartphones, readily available from Apple and the Google Play stores, are popular among Thai users seeking to access vast amounts of pirated content either for free or at a very low cost. These include apps for downloading infringing MP3 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.

The provision of the amended CCA that enables disabling of access to infringing websites has been a promising reform, although results with its use in practice have been mixed. In recent years, the Ministry of Digital Economy & Society has forwarded cases to the Criminal Court as opposed to the IP&IT Court, resulting in cases being combined with other criminal matters and decisions resulting in URL-specific blocks that are ineffective. While hundreds of these orders have been issued, the blocks are URL-specific, so they do not result in full website blocking. ISPs are capable of implementing full website blocking, and industry seeks a process whereby the applicants may elect the civil route to obtain full website blocking. Orders should be directed to disable access to entire domains, as opposed to specific URLs, and be dynamic to address sites that “hop” to another domain to circumvent the original order. Full domain site blocking orders should then be properly implemented by ISPs.

**Theatrical Camcorder Piracy:** Thailand continues to represent a potential risk for illicit theatrical camcording, particularly in relation to illegal Thai audio tracks. Although 2020, 2021, and 2022 numbers were anomalous due to COVID-19-related theater closures, in 2019, 18 audio files and three video files of MPA member titles were forensically traced to theater locations in Thailand. If effectively implemented, the Copyright Act provision that deems camcording an infringement of copyright could help, but this provision should be strengthened to adequately address the problem.

**Piracy Devices (PDs) and Apps:** Piracy devices (PDs) include media boxes, set-top boxes or other devices that allow users, through the use of installed piracy apps and software, to stream, download, or otherwise access unauthorized content from the Internet. Such devices are still being purchased in malls and on e-commerce websites but are rarely sold with pre-installed infringing applications, making enforcement action and takedowns more challenging. The number of piracy devices being overtly sold in retail outlets has declined over the last 12 months.

**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, legitimate CMOs, as well as users in Thailand.

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<sup>4</sup> *Movies2free* was the 15<sup>th</sup> most popular site in Thailand with 34 million visits in Q3 2019.

<sup>5</sup> See <https://torrentfreak.com/police-shut-down-thailands-most-popular-pirate-site-following-hollywood-request-191108/>

## COPYRIGHT LAW AND RELATED LEGISLATIVE UPDATES

**CCA Amendment:** In a significant development, the 2016 Amendment to the CCA 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. Since then, there have been many requests for blocking or disabling access to intellectual property rights (IPR) infringing content or activities. However, in only a dozen or so cases have the Courts issued full website blocking orders, and in the majority of other cases, the orders were to disable access to specific content identified in the URLs. IIPA encourages clarity on IP&IT Court jurisdiction to ensure that the Court is prepared to address structurally infringing websites and issue orders for full website blocking (as opposed to URL-specific orders). Upon rights holders' election, cases should proceed to the IP&IT Court and result in full blocking orders properly implemented by ISPs in Thailand.

**Copyright Act Amendments:** Copyright Act amendments were enacted in February 2022 and entered into force in August 2022. The amendments include improvements to Thailand's intermediary liability framework and the protection of TPMs. On July 13, 2022, Thailand officially acceded to the WCT, effective October 13, 2022. It is now time for Thailand to accede to the WPPT. The following are critical issues that remain with the amended Copyright Act that should be addressed in implementation or further amendments to ensure that the Royal Thai government achieves its stated goals of modernizing its copyright law, complying with its international obligations, and fully implementing and adhering to the WCT and WPPT (collectively, the WIPO Internet Treaties).

- **Infringement a Non-Compoundable Offense:** IIPA urges the Royal Thai government to amend the Copyright Act to ensure that IP infringement becomes a non-compoundable state offense, thus enabling the police to act on their own initiative (i.e., *ex officio*) 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.<sup>6</sup>
- **Service Provider Liability Amendments:** The amendments include helpful improvements to the intermediary liability framework, including requiring an effective notice and takedown mechanism and repeat infringer policies. Nevertheless, further improvements are still needed. First, the law should clearly establish an initial basis for liability of online service providers for infringements carried out by third parties using their services. This secondary liability provides legal incentives for online service providers to cooperate with rights holders to deter the unauthorized storage and transmission of copyrighted materials on their services. Without a clear basis for secondary liability, safe harbors (granting exemptions for such liability) would be unnecessary. Second, the eligibility criteria for safe harbors should be clarified to ensure that appropriate repeat infringer policies are an additional condition for eligibility, rather than itself giving rise to an exemption to liability. Finally, the eligibility criteria for safe harbors from liability should include, in addition to the notice-and-takedown requirement, a requirement for ISPs to implement other measures demonstrated effective in preventing or restraining infringement.
- **Technological Protection Measures (TPMs):** 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 and related implementing regulations made several improvements to TPMs protections in Thailand, including prohibiting acts of circumvention of TPMs and trafficking in circumvention technologies, devices, components, and services (e.g., enabling actions against stream-ripping websites or other such services). We request the government issue further regulations or guidelines on the provisions for TPMs to make it clear that service, promotion, manufacture, sale, or distribution of PDs and applications/software/add-ons available thereon violate TPMs protections.

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<sup>6</sup> In May 2022, the Supreme Court of India held that offences under Section 63 of the Copyright Act, 1957 are cognizable and non-bailable offences. *M/s Knit Pro International v The State of NCT of Delhi & Anr.*, CRIMINAL APPEAL NO. 807 of 2022, Sup. Ct. India, May 20, 2022. Thailand should follow India's lead on this issue to fully modernize its system and provide enforcement apparatus the tools necessary to tackle online piracy.

- **Rights Management Information:** Exceptions to protections for rights management information are overly broad and should be narrowed. For example, the blanket exclusion of educational institutions, archives, libraries, and non-profit broadcasting organizations from violating the rights management information protections are inappropriate and unjustified.
- **No-Fault Injunctive Relief:** To improve the effectiveness of enforcement against online copyright piracy, the draft amendments should be amended to provide for no-fault injunctive relief in copyright piracy cases, enabling courts to order online service providers to disable access to copyright infringing websites (analogous to the CCA remedy, which applies to all IP crimes).
- **Theatrical 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 theatrical camcording and a copyright infringement, instead of criminalizing the camcording act itself. Criminalizing the act of camcording, including audio-only captures, 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. IIPA welcomes 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. As of August 2022, the number of CMOs decreased from 40 to 19, with 8 of the 19 confirmed to have applied DIP's code of conduct. Although DIP intends to certify and promote these qualified CMOs, there is no policy to prevent new CMOs from registering. 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 rights holders it claims to represent. Regarding the latter point, IIPA recommends 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, must be authorized by rights holders, and must comply with the code of conduct. Registration criteria should 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. However, the Thai Government should resist proposals to create, by government dictate, a single collection body. While voluntary cooperation between CMOs can be cost-effective and beneficial for participating CMOs and rights holders, experience shows that mandatory single collection bodies lead to inefficient and unaccountable structures.<sup>7</sup>
- **Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** Copyright Act Number 4 B.E.2561 (2018) was published in November 2018 and entered into force 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

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<sup>7</sup> An example of a well-functioning voluntary joint organization is MPC Music Co. in Thailand, which is a joint licensing agency formed by two collective management organizations (CMOs), Phonorights (Thailand) Co., Ltd. (PNR) (for sound recording rights) and Music Copyright (Thailand) Co. Ltd. (MCT) (for musical works rights).

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 Marrakesh 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 regarding 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 Marrakesh Treaty and does not conflict with the “three-step test” of the Berne Convention, WTO TRIPS Agreement, and WIPO Internet Treaties.

- **Inadequate Term of Protection:** Thailand should extend its term of copyright protection to align it with the international trend of 70 years after the death of the author, or, in cases in which term is calculated based on publication (such as sound recordings), to at least 70 years from publication. Unfortunately, the most recent amendments to the Copyright Act do not change the term of protection, which remains at 50 years. In the case of sound recordings, there are now at least 73 countries worldwide that provide 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—including the classics of Soontaraporn, Suraphol Sombatcharorn, and Paiboon Buth—will soon fall out of copyright protection, even though 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 because, 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 considering amendments to the MPVA (which, as of late 2022, we understand may proceed via a new Film & Games Act). The motion picture industry continues to urge the Ministry to delete Section 9(5) and the related Section 68, because 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. In a positive development, in 2019 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 IPR issues, i.e., they call into question the ability of rights holders to enter into exclusive distribution arrangements in Thailand.

**Over-the-top (OTT) Regulations:** Various government agencies, including the NBTC and the Electronic Transactions Development Agency (ETDA), have considered 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 moderation). The NBTC has also made public comments suggesting forcing content providers to pay for network usage fees. Such regulations, if extended to OTT services, would impose burdensome requirements on foreign content service providers, stifle innovation and the development of a thriving OTT ecosystem in Thailand, and raise costs, particularly in the absence of a robust enforcement 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 WTO TRIPS Agreement enforcement provisions, including Articles 41, 42, 45, and 61.

# UNITED ARAB EMIRATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 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 2023.<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 because of weak enforcement that allows diverse methods of piracy to persist, sub-par copyright protection in its laws, and crippling market access barriers. The UAE recently improved its legal framework, enacting Federal Decree-Law No. 38 of 2021 on Copyright and Neighboring Rights (“Decree-Law No. 38”) and Executive Regulation No. 47/2022 on the Implementing Regulation of Federal-Decree Law No. 38/2021 on Copyrights and Neighboring Rights (“Executive Regulation No. 47”), which provide rights holders with important exclusive rights to protect their works and sound recordings in the digital environment. Notwithstanding this legislation, the Government of UAE should further amend its copyright law to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively known as the WIPO Internet Treaties) and ensure UAE’s standards for copyright protection and enforcement meet international norms and best practices.

It has been 19 years since the UAE first passed federal legislation providing for the possibility of collective management of rights. Despite this, the music industry’s repeated attempts to establish a market for the collective management of broadcasting and public performance rights have remained frustrated by the government’s failure to permit music rights holders to establish a collective management organization (CMO) and to commence collective licensing activities. The government has provided positive indications of progress on this front in the last year, including a May 2022 memorandum of understanding (MOU) between the International Federation of the Phonographic Industry (IFPI) and the UAE Ministry of Economy to work together to support local recorded music. THE MOU provides that the parties will work together to create a copyright framework that aligns with international standards, and enforces and protects the rights of record producers and that allows the music industry to commence collective licensing. However, concrete progress is still needed. The UAE is a major hub for tourism and retail and is a regional hub for legitimate music services and sold-out concerts. Yet, the widespread use of music in shopping malls, hotels, and other public settings, with no ability to license it from a CMO, denies American and other foreign rights holders the opportunity to effectively exercise their rights and undermines the rule of law in the country. This inability to license 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, immediately work with music rights holders, and allow rights holders (whether local or foreign) to establish a CMO and control the exercise of their rights in accordance with international best practices in transparency, accountability, and governance. The government should also issue an operating license to such 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.

### **PRIORITY ACTIONS REQUESTED IN 2023**

- Take immediate action to enable rights holders (whether local or foreign) to establish a music CMO in UAE and to control the exercise of their rights in accordance with international best practices of transparency, accountability, and governance, and to permit such 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.

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<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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

- Revise the copyright law to implement the WIPO Internet Treaties and to harmonize the copyright term with the international norm of life of the author plus 70 years and 70 years for sound recordings.
- The Telecommunication and Digital Government Regulatory Authority (TDRA) should engage with domain name registrars and other intermediaries, such as advertisement providers, payment providers, help desk support services, and virtual private networks (VPNs), encourage them to cooperate with rights holders, and require them to take effective action to prevent their services from being used by infringers.
- Encourage more transparency from enforcement authorities.
- Adopt high standard remedies that support the creative industries' current business models, including remedies that effectively respond to current challenges and reflect international best practices, such as the introduction of a clear legal basis for no-fault injunctions against online intermediaries to complement the existing website blocking program operated by the government.
- Encourage customs authorities to ban the importation of illicit streaming devices (ISDs).

## **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 affects not only 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—including India, Iraq, Iran, and the Gulf Cooperation Countries—by exporting copycat products and digital piracy equipment, such as ISDs.

**Unlawful Public Performance and Broadcasting of Music:** At present, because of the impossibility of licensing public performance and broadcasting by rights holders collectively, most of the music that is used in such a way is *de jure* unlawful in the UAE. This lack of ability to license collectively is due to the government's 19-year hold out in issuing an operating license to a music CMO, as discussed below. The absence of meaningful progress so far on licensing a music CMO raises questions regarding the UAE's compliance with the WTO TRIPS Agreement. Simply put, the UAE's regulatory inaction means that the existing law has limited effect, and no remedy exists for the ongoing, country-wide infringement of music public performance and broadcast rights. Furthermore, there is a risk that due to the absence of a genuine CMO, unscrupulous operators would start licensing third-party rights without any mandate to do so. As such, music rights holders are denied revenues from the widespread use of their works and recordings.

**Online Piracy and Social Media:** Several notorious online piracy sites are heavily accessed in the UAE, including *cima4u.ws*, a streaming website that embeds popular movies and series content from third-party cyberlockers. SimilarWeb also reports that movie piracy websites *fmovies.to* (streaming) and *yts.mx* (torrents) are among the top 100 most popular websites in the UAE. The motion picture industry noted that in recent years, *Telegram* has become a full-fledged global piracy hub for films and that the presence of copyrighted content on *Telegram* acts as a growth driver. While there has been improvement in compliance rates for the removal of infringing links and channels, *Telegram's* response to takedown notices varies greatly, from almost immediate removal to no removal despite multiple re-notifications. Furthermore, the motion picture industry reports that discovery of infringing content is facilitated by piracy bots, and *Telegram* lacks a transparent and appropriate procedure for handling repeat infringers. In 2017, the TDRA reported that it had blocked approximately 473 websites for intellectual property (IP) violations. However, the TDRA stopped publishing the number of blocked websites thereafter.

According to IFPI, stream ripping has become the most dominant form of music piracy in the UAE, with rates considerably higher than the global average. A May 2022 IFPI study found that more than two-thirds (69%) of Internet users in the UAE said they illegally downloaded music from YouTube. Popular stream-ripping sites include

*Savefrom.net* (1.5m visits from the UAE in Quarter 3 2022 according to SimilarWeb), *SSyoutube.com* (1.3m visits from the UAE during the same period), *Y2Mate.is* (1.2m visits from the UAE during the same period), *Y2mate.com* (1.1m visits from the UAE during the same period), and *YT1s.com* (0.8m visits from the UAE during the same period). *SnapTube*, *TubeMate*, and *VidMate* are among the most widely used unlicensed mobile stream-ripping apps focused on YouTube access. Cyberlockers and direct download sites are an additional popular source of pirated content in the UAE. Cyberlocker *Mega.nz* (2.2m visits from the UAE in Quarter 3 2022 according to SimilarWeb) and BitTorrent sites *1337x.to* and *The Pirate Bay* (1.4m visits and 1.1m visits, respectively, during the same period) are also popular. Sites, such as *Sm3ha* and *Ghanely*, which offer MP3 downloads in Arabic, are also widely used.

**Internet Protocol TV (IPTV) Piracy and Hybrid Set-Top Boxes:** Recently, the number of mobile applications that enable illegal showings of copyrighted TV programs or exclusive TV has increased. Access to the pirated content on Internet Protocol TV (IPTV) services is generally provided via an application that can be installed on consumer hardware or downloaded directly to a user's device, such as a smartphone or tablet. Pirate IPTV services are extremely difficult to monitor, as a subscription to access the service is required. Thus, discovering and monitoring these services takes substantial resources.

The use of ISDs is an ongoing concern for copyright owners in the UAE. These devices can be used either to receive the free-to-air (FTA) channels—which is a legal act—or to receive the pirated TV channels or access pirated video-on-demand (VOD) by installing certain IPTV applications. These illicit streaming devices (ISDs) and the channels or content they carry are marketed, promoted, and illegally sold to consumers in high volumes through several sales channels, such as door-to-door, small retailers, Internet sales, or over social media accounts. Because the hardware of the device itself is not necessarily illegal, it is often difficult to prevent the importation and sale of these devices in the UAE. Importation of the hardware is subject to approval from TDRA. In practice, offenders often install infringing IPTV applications on devices after importation. However, the TDRA and the customs authorities do not conduct inspections on these devices after importation. Examples of these ISDs are the ones known and used for *UKTV Abroad*, *King-iptv.net*, and *Kingiptv.org*.

**Pirate Free-to-Air (FTA) Channels:** Pirate FTA channels remain a problem for the motion picture and television industry. The FTA channels are clear, unencrypted channels that can be received and viewed without 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 and addressing IPTV and ISD piracy more broadly. 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, although this problem requires continued attention.

## **COPYRIGHT ENFORCEMENT ISSUES IN UAE**

**Raids and Piracy Prevention Efforts:** Industry sectors report that unjustified delays have impeded enforcement in the past three years, and the UAE police and economic departments are hesitant to consider serious actions against infringers.<sup>2</sup> While the Dubai Police has created a dedicated platform on their website to file criminal complaints against IP violating websites,<sup>3</sup> Internet service providers (ISPs) normally ask rights holders to contact the TDRA (the governmental body that monitors the operations of the ISPs in the UAE) for enforcement actions. The TDRA investigates and may take action on the rights holder notice or alternatively may request more information or reject the

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<sup>2</sup> For example, in February 2022, King Printers Company Limited, the UAE-based company and copyright holder of website *www.printarabia.ae*, filed a criminal complaint with Dubai Police against the website *astuae.com* for infringing upon its copyrighted website content. Dubai Police refused to receive the complaint and instead, requested it be accompanied with a report from a registered IP expert analyzing the elements of infringement. While the copyright holder complied with this request and filed the complaint under No. 4277/2022, the request of Dubai Police was unjustified because it delayed the prosecution process and imposed additional costs on the copyright holder. The Dubai Police request signals a potential new practice that could deter copyright holders from filing criminal cases and ultimately further weaken enforcement procedures in the UAE.

<sup>3</sup> The dedicated platform is titled *eCrime*, and is accessible at the following site: <https://www.dubaipolice.gov.ae/wps/portal/home/services/individualservicescontent/cybercrime>.

notice entirely. The TDRA may order ISPs to implement the website blocks based on copyright violations or based on censorship. Dubai Police perform similar functions as the TDRA, ordering ISPs to block websites based on criminal offenses or complaints from rights holders. The Criminal Investigation Department (CID) has been working closely with rights holders and licensees to stop sales of hybrid ISDs. Unfortunately, these types of operations require arrangements between different departments, which slows down investigations. For example, the electronic crime unit is not permitted to correspond with organizations outside of the UAE, such as social media service providers, without a court order. Correspondence between the TDRA and CID is also relatively slow, which impedes the collection of information and evidence in piracy investigations.

The government also has an important role to play in promoting piracy prevention efforts and needs to encourage the ISPs to restrict access to illegal IPTV services and intermediaries that facilitate the operation of such services, such as (i) domain name registrars, (ii) advertisement providers and payment providers; (iii) websites that offer gift cards or redeemable vouchers to buy or refill personal accounts to illegal IPTV services; (iv) helpdesk support numbers for these illegal services; and (v) illegal VPN Internet protocol addresses dedicated to streaming content to hybrid set-top boxes. Additionally, ISPs need to be encouraged to act more expeditiously. While the ISPs provide platforms for reporting IP violations, they act slowly on complaints. The ISPs or the TDRA also need to publish statistics on the blocked violating websites. Addressing these areas would greatly improve the enforcement environment in the UAE. *Etisalat* and *Du*, the two primary ISPs in the UAE, have cooperated with rights holders to a limited degree by responding to notice and takedown requests. These ISPs currently have special platforms on their websites for reporting IP violations,<sup>4</sup> but they do not publish any statistics related to the takedown rates. Moreover, it takes the special platforms far too long, around 10-14 days, to take down violating websites after receiving a complaint from a rights holder.

**Judicial and Case Law Developments:** Over the past few years, the judicial system in the UAE has shown signs of improvement. Prosecutors have been analyzing the facts in IP cases and referring cases to the courts on the grounds of violations of IP or cybercrime-related laws. Also, the Higher Criminal Court in Dubai issued a judgment in a case against an administrator of the torrent website called *arabscene.org*. The court decided to block the website, as it exhibited 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 because it involved a website that was hosted outside the UAE, setting a strong precedent for other similar offenders. In addition, 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. People import a high volume of goods into the Free Zone areas and often use the territory as a regional hub for goods in transit. The administrative authorities in the Department of Economic Development (DED) do not have jurisdiction over those areas, and therefore, no one performs regular or random inspections of the facilities therein. The UAE should ramp up its 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 act 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, risking that they would end up back in the market. 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, has been that customs authorities have not been acting against counterfeit and pirated goods unless they

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<sup>4</sup> The special platforms for reporting IP violations include <https://www.du.ae/surfsafely> and <https://www.etisalat.ae/en/generic/contactus-forms/web-block-unblockn.jsp>.

first receive a complaint from a rights holder. The law has recently been amended to provide *ex officio* authority so that customs authorities may take actions even in the absence of complaints by rights holders.<sup>5</sup>

**Training Programs:** In 2022, the Brand Owner's Protection Group (BPG) organized virtual educational IP awareness sessions in association with IP authorities and customs authorities in the UAE on one side, and with IP owners on the other side. The goal of these sessions was to provide the authorities with technical information about existing IP rights and ways to identify violations to those rights. Those educational sessions were co-hosted by the Emirates IP Association, INTERPOL, Dubai Customs, Dubai Police, and all Economic Development Departments (EDE) in the UAE.

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 many speakers from the private and public sectors that shed light on various IP violations. These organizations continue to conduct events to combat IP crime and illicit trade.

**Ensuring Consistent Enforcement:** For some time, enforcement authorities were reluctant to act, but then the Prime Minister called on officials to cooperate as much as possible with companies to encourage investment. This call was misunderstood, however, 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 ISDs containing IPTV apps for pirating paid TV channels.

## **OTHER COPYRIGHT LAW AND RELATED ISSUES**

On January 2, 2022, Decree-Law No. 38 entered into force, and on May 11, 2022, the Executive Regulation No. 47 implementing Decree-Law No. 38 was issued. While Decree-Law No. 38 and Executive Regulation No. 47 make some improvements to UAE's copyright framework, concerns remain, as discussed below.

### **Decree-Law No. 38**

Decree-Law No. 38 introduced several improvements to UAE's copyright legal framework, including criminalizing the acts of storing electronically illegal copies of copyrighted works (Article 40(c)), which should allow for actions against cyberlockers hosted in UAE. Consistent with the WPPT, Article 18 of Decree-Law No. 38 provides producers of sound recordings with exclusive rights of reproduction, distribution, rental, and making available to the public. Further, Article 18(5) provides sound recording producers with the exclusive rights of broadcasting and communication to the public. However, to ensure that the UAE's copyright legislation is fully compliant with the WIPO Internet Treaties and other relevant international copyright standards, the government of the UAE should make the following amendments to its copyright legal framework:

- **Extend the term of protection for works and sound recordings:** Increase the term of protection for works and sound recordings in Article 20 from life-plus-50 years to life-plus-70 years for works or in cases in which term is calculated based on publication, to the term of 95 years (but in any case, no less than 70 years) and for sound recordings from 50 years to at least 70 years from the date that the recording is made or, if published, from that date, in keeping with international norms.

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<sup>5</sup> Decree-Law No. 38 of 2021 on Copyright and Neighboring, Article 38(1)(“ Subject to the legislation in force in the country, the customs authorities may, on their own or at the request of the Author, the right holder, their successors, or their representatives, may order by a reasoned decision not to clear customs - for a maximum period of twenty (20) days - in respect of any items in violation of the provisions of this Decree-Law.”).

- **Provide a clear legal basis for injunctions against intermediaries:** To complement the existing website blocking program operated by the government, introduce a clear legal basis for injunctions against intermediaries to enable rights holders to apply to the courts for injunctions requiring online intermediaries to prevent or disable access to infringing websites (both those hosted in the UAE and those hosted in other countries but available in the UAE) to help tackle piracy and support the growth of the market for copyrighted works and sound recordings in the UAE.
- **Limit the scope of copyright exceptions and limitations:** Confine the exceptions and limitations outlined in Article 22 to the three-step test of the Berne Convention and the WTO TRIPS Agreement, including the following: the private copying exception, libraries and archives exception, the exception for performance of a work in meetings with family members or by students in an educational institution, and the transient and incidental copies exception.
- **Provide adequate protections for technological protection measures (TPMs) and electronic rights management information (RMI):** Article 40 provides for civil and criminal liability for “[u]nlawfully disrupting or impairing any technical protection or electronic data aiming at regulating and managing the rights prescribed by this Decree-Law” and increased penalties for repeat offenders. While this is a welcome step, to meet the obligations of the WPPT, UAE should add provisions, including definitions for “technological protection measures” and “rights management information,” to its law that ensure adequate protections for TPMs and RMI.<sup>6</sup>
- **Clarify that registration of copyright works is voluntary:** Article 4 states that “registers of the Ministry shall be considered a reference for the data of the Work and its ownership.” It should be clarified that the registration of works is voluntary and not a formal requirement, consistent with international treaties including Article 5(2) of the Berne Convention and Article 20 of the WPPT, which prohibit formalities on both the enjoyment and the exercise of rights.
- **Clarify the jurisdiction of the Grievances Committee for Copyrights and Neighboring Rights (Grievances Committee):** Pursuant to Article 37, the Grievances Committee, which is established under the Ministry of the Economy, has jurisdiction to “adjudicate grievances filed by the interested parties against the decisions issued by the Ministry.” In practice, the Grievances Committee—which consists of one specialized judge and two specialists—is entitled to look into challenges from copyright holders against the decisions issued by the Ministry of Economy. However, the Article states that the Grievances Committee’s decisions can be challenged only before the “Competent Court,” which is defined in Article 1 as the “Federal Court of Appeal,” instead of the First Instance Courts. Article 37 should be clarified to ensure: (i) the scope of jurisdiction of the Grievances Committee is limited to disputes between a CMO and its members and/or its licensees; (ii) the Grievances Committee shall hear and determine matters referred to it expeditiously; and (iii) parties may appeal the decisions, on procedural grounds, to the First Instance Courts.

### **Executive Regulation No. 47/2022 on Implementing Federal Decree-Law No. 38/2021**

While the Executive Regulation No. 47 contains several provisions addressing collective management, these provisions and some other articles should be amended consistent with international standards and best practices, including:

- **Amend the definition of Collective Management Organizations (CMOs):** Amend the definition of “collective management organizations” in Article 1 to ensure: (i) CMOs are non-profit and owned or

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<sup>6</sup> See Articles 18 and 19 of the WPPT requiring “adequate legal protection and effective legal remedies” against the circumvention of TPMs and the removal or alteration of RMI without the permission of right holders.

controlled by their member rights holders (whether local or foreign), so that rights holders are able to control the exercise of their rights and to ensure that the CMO is operating according to good standards of transparency, accountability, and governance; (ii) rights holders are able to, without restriction, determine the scope (rights, uses, repertoire, and territory) and character (exclusive or non-exclusive) of the rights mandates they give to the CMO; (iii) CMO tariffs are determined by the CMO in negotiation with users (or their representatives), reflecting what would be negotiated between a willing buyer and willing seller; and (iv) rights holders have fair and balanced voting powers in their CMOs that reflect the value of their rights under management.

- **Extend the time for renewal of CMO permits:** Under Article 15(6), CMO permits are to be renewed annually. To provide the legal certainty that justifies the substantial investment and allows for the long-term planning required to set up a CMO, permits should instead be renewed only every 3 years, at a minimum.
- **Ensure CMO members have the power to determine CMO operating costs:** Article 15(10) states that a CMO “may deduct a percentage of the total funds collected in return for managing the collection and distribution of the financial remuneration for use, provided that the deduction percentage does not exceed 25% of the total amounts collected. This percentage is only for administrative expenses, and the Ministry may reduce this percentage whenever it deems so.” However, it should be up to CMO management to budget, plan, and obtain the agreement of rights holders regarding acceptable and reasonable spending at the outset.
- **Clarify registration of copyright works is voluntary:** Clarify Article 2 on copyright registration to ensure that the registration of copyright works is voluntary and not a formal requirement, consistent with international obligations that prohibit formalities on both the enjoyment and the exercise of rights, including Article 5(2) of the Berne Convention and Article 20 of the WPPT. Further, the data and documents requirements for an application of registration of a copyright work in Article 2(6), particularly the requirement for “a copy of the passport or identity card of each applicant, author, and transferee” in subsection h, should be removed, because they are burdensome and interfere with the enjoyment and exercise of rights.
- **Remove formalities regarding the importation and distribution of works:** Article 5 contains burdensome requirements for the importation and distribution of copyright works, particularly that the Copyright Register “shall contain all data regarding the names of importers and distributors and the rights related therein, including the document proving their rights to import or distribute works in the country, and data relating to their activities and the authorities that authorized them to import or distribute works as set out in the Register.” Such requirements should be removed, because they are incompatible with the WIPO Internet Treaties and the Berne Convention.
- **Ensure compulsory licenses for the reproduction or translation of copyright works for educational purposes are appropriately narrow:** Article 7 states that “Any person may apply to the Ministry to obtain a license to reproduce or/and translate a work protected by law, in order to meet the needs of education of all kinds and levels, or the needs of public libraries or archives, and in accordance with the conditions set forth in this Decision.” Such a broad compulsory license violates rights holders’ exclusive rights, interferes with contractual freedoms, undermines legal certainty, and is outside the scope of the three-step test governing exceptions and limitations to copyright protections. Any compulsory license for reproduction or translation should be appropriately narrow and strictly conform to the Berne Convention Appendix.<sup>7</sup>

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<sup>7</sup> 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>.

**Prevention of Music Rights Holders' Exercise of Legal Rights:** In May 2022, IFPI and the UAE Ministry of Economy signed an MOU to work together to support local recorded music, including by creating a copyright framework that aligns with international standards and enforcing, collecting, and protecting the rights of record producers. However, the establishment of a CMO remains a work in progress. Revenue generated by CMOs through the licensing of broadcast and public performance rights is an essential element in supporting the development of local artists and in developing the UAE as a hub for music production in the region. Yet, due to government inaction to accredit a CMO, 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. Moreover, without an accredited CMO, U.S. music exported to the UAE cannot be monetized when broadcast or performed publicly, and various UAE businesses use music without making any payments to rights holders, despite neighboring rights protection recognized in the UAE copyright law.

By way of background, for 19 years after enacting federal legislation providing for the possibility of the right of reproduction by means of a reprographic process and to engage in digital uses of editions, the Government of the UAE did not accredit a single CMO, leaving rights holders with no means to manage their rights collectively. However, in a positive development, in March 2022, the UAE Ministry of Economy granted permission to the Emirates Reprographic Rights Management Association (ERRA) in Sharjah to establish a book publishing CMO to administer and manage the collective rights of copyright owners for their paper and online book publications in the UAE.

The establishment of a book publishing CMO is welcome, and the music sector also expects that the UAE government will make progress at long last on licensing a truly representative music CMO. The UAE should take immediate action to enable rights holders to establish a music 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, enabling music rights holders to finally begin collectively licensing their broadcast and public performance rights under the UAE copyright law.

**Countering Rumors and Cybercrimes Decree-Law Should Include IP:** The Cyber Crime Law of 2012 (updated in 2018) was repealed by Federal Decree-Law No. (34) of 2021 on Countering Rumors and Cybercrimes (Decree-Law No. 34). The new law does not expressly include criminal offenses relating to copyright infringement or intellectual property rights (IPR) infringement, but it implies that copyright infringement offenses are included. For example, Article 50 punishes, with imprisonment or monetary fines, those who use or help third parties use communication services of audio or video broadcast channels unlawfully using an information network or any Information Technology (IT). Article 53 punishes, with imprisonment or monetary fines, those who use, store, make available, or publish illegal content and do not remove it or prevent access to its content within a period specified in the orders issued to them. Article 59 states that upon rendering a judgment of conviction of any crimes stipulated in the Decree-Law, the court may decide to take any of the following measures: (i) order that exploiter be placed under electronic supervision or monitoring; (ii) close down the violating site completely or partially for the duration decided by the court; or (iv) punish the exploiter with imprisonment or monetary fine. While Decree-Law No. 34 implies that copyright infringement cases are included, Decree-Law No. 34 should be further updated to include clear criminal offenses relating to copyright infringement. Moreover, Decree-Law No. 34 does not include ISP liability for IP infringement carried out through the ISP. The UAE should issue implementing regulations to clarify that Decree-Law No. 34 applies in cases of IP infringement.

## **MARKET ACCESS**

**Music Licensing:** The failure to implement a collective management regime in the country effectively prevents producers and performers from licensing large parts of the market (as noted above), which serves as a market access barrier. This inaction is also protectionist and discriminatory, considering 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. 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 before allowing rights holders to proceed with any action for copyright infringement. This requirement is a detrimental change from its old policy, which permitted 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 Ministry of Culture (previously the 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 Department and Customs authorities impose administrative fees of US\$7,500 to file complaints against copyright violators.

**APPENDIX B**  
**CHART OF COUNTRIES'**  
**SPECIAL 301 PLACEMENT (1989-2022)**  
**&**  
**IIPA'S 2023 SPECIAL 301 RECOMMENDATIONS**

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2022)  
AND IIPA 2023 SPECIAL 301 RECOMMENDATIONS**

<b>IIPA 2023 SPECIAL 301 RECOMMENDATIONS AND USTR 301 PLACEMENT 2022-2006 (AS OF APRIL/MAY OF EACH YEAR)</b>																		
<b>COUNTRY</b>	<b>IIPA RECOMMENDATION 2023</b>	<b>2022</b>	<b>2021</b>	<b>2020</b>	<b>2019</b>	<b>2018</b>	<b>2017</b>	<b>2016</b>	<b>2015</b>	<b>2014</b>	<b>2013</b>	<b>2012</b>	<b>2011</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>
ALGERIA		WL	WL	PWL	WL													
ARGENTINA	<b>PWL</b>	PWL																
ARMENIA																		
AUSTRALIA																		
AUSTRIA																		
AZERBAIJAN																		
BAHAMAS																		WL
BAHRAIN																		
BARBADOS		WL																
BELARUS									WL									
BELIZ																	WL	PWL
BOLIVIA		WL		WL														
BRAZIL	<b>WL</b>	WL	WL + OCR															
BRUNEI												WL	WL	WL	WL			
BULGARIA		OCR					WL	WL	WL	WL	WL							WL
CANADA	<b>WL</b>	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL + OCR
CHILE	<b>PWL</b>	PWL	WL + OCR															

COUNTRY	IIPA RECOMMENDATION 2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	
CHINA (PRC)	<b>PWL</b>	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL +306	PWL	PWL +306	PWL	PWL	PWL	PWL	PWL	PWL	PWL + 306
COLOMBIA	<b>WL</b>	WL	WL	WL	WL	PWL	WL+ OCR	WL+ OCR	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
CROATIA																			WL
CYPRUS																			
CZECH REPUBLIC														WL	WL	WL	OCR		
DENMARK																			
DOMINICAN REPUBLIC		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
ECUADOR	<b>WL</b>	WL	WL	WL	WL	WL	WL	WL	PWL	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	PWL	PWL
EL SALVADOR											OCR								
ESTONIA																			
EUROPEAN UNION																			WL
FIJI															OCR				
FINLAND										WL	WL	WL	WL	WL	WL				
GEORGIA																			
GERMANY																			
GREECE					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
HONDURAS									OCR										
HONG KONG																			
HUNGARY															WL	WL	WL	WL	
INDIA	<b>PWL</b>	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL						

COUNTRY	IIPA RECOMMENDATION 2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006
INDONESIA	<b>PWL</b>	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + GSP	PWL	PWL	PWL	WL	WL	PWL + OCR
IRELAND																		
ISRAEL											WL	PWL (9/12 to WL)	PWL	Pending	PWL + OCR	PWL+ OCR	PWL	PWL
ITALY											WL	WL	WL + OCR	WL	WL	WL	WL	WL
JAMAICA					WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
JAPAN																		
JORDAN																		
KAZAKHSTAN																		
KENYA																		
KUWAIT			WL	WL	PWL	PWL	PWL + OCR	PWL	PWL	WL+ OCR	WL	WL	WL	WL	WL	WL	WL	WL
KRYGYZ REPUBLIC																		
LATVIA																		WL + OCR
LEBANON			WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL
LITHUANIA																	WL	WL
LUXEMBOURG																		
MACAU																		
MALAYSIA				OCR	OCR								WL	WL	WL	WL	WL	WL
MEXICO	<b>PWL</b>	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
MOLDOVA																		
NAMIBIA																		

COUNTRY	IIPA RECOMMENDATION 2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006
NETHERLANDS																		
NEW ZEALAND																		
NICARAGUA																		
NIGERIA	<b>WL</b>																	
NORWAY												WL	WL	WL	WL	WL		
OMAN																		
PAKISTAN		WL	WL	WL	WL	WL	WL	WL+ OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL
PALESTINIAN AUTHORITY																		
PANAMA																		
PARAGUAY		WL	WL	WL	WL				WL + OCR	WL + 306 + OCR	WL	306	306	306	306	306	306	306
PERU	<b>WL</b>	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
PHILIPPINES											WL	WL	WL	WL + OCR	WL + OCR	WL + OCR	WL	WL
POLAND	<b>WL</b>														WL + OCR	WL	WL	WL
PORTUGAL																		
QATAR																		
ROMANIA			WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
RUSSIAN FEDERATION	<b>PWL</b>	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL + GSP
SAN MARINO																		
SAUDI ARABIA			PWL	PWL + OCR	PWL	WL									WL + OCR	WL	WL	WL + OCR
SERBIA AND MONTENEGRO																		
SINGAPORE																		

COUNTRY	IIPA RECOMMENDATION 2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	
SLOVAK REPUBLIC																			
SLOVENIA																			
SOUTH AFRICA	<b>PWL</b>																		
SOUTH KOREA																WL	WL	WL	
SPAIN								OCR	OCR	OCR	OCR		WL	WL	WL	WL			
SWEDEN																			
SWITZERLAND	<b>WL</b>				WL	WL	WL	WL											
TAIWAN	<b>WL</b>															WL (then OFF due to OCR)	WL	WL	
TAJIKISTAN						WL	OCR	OCR	WL+ OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	
THAILAND	<b>WL</b>	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL	PWL + OCR	PWL	WL	
TRINIDAD & TOBAGO		WL	WL	WL					WL	WL	WL								
TUNISIA																			
TURKEY		WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL							
TURKMENISTAN		WL	WL+ OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL							
UNITED ARAB EMIRATES	<b>WL</b>			WL	WL	WL													
UKRAINE			PWL	301	PFC	PWL + GSP	WL	WL	WL	WL	WL	PWL	PWL						
URUGUAY																			
UZBEKISTAN		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL							
VENEZUELA		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL							
VIETNAM	<b>PWL</b>	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL								
YEMEN																			

**USTR 301 PLACEMENT 2005-1989  
(AS OF APRIL/MAY OF EACH YEAR)**

COUNTRY	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
ALGERIA																	
ARGENTINA	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL
ARMENIA				WL	WL	WL											
AUSTRALIA							WL	WL	WL	WL		WL	PWL	PWL	PWL		
AUSTRIA								OO	OO								
AZERBAIJAN	WL	WL	WL	WL	WL	WL											
BAHAMAS	WL	PWL	PWL	WL + OCR	OCR	OCR											
BAHRAIN								WL	WL	WL	WL						
BARBADOS																	
BELARUS	WL	WL	WL	WL	WL	WL	WL	OO									
BELIZ	WL	WL															
BOLIVIA	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO							
BRAZIL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
BRUNEI																	
BULGARIA	WL	WL						PWL	WL	OO	OO						
CANADA	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
CHILE	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
CHINA (PRC)	PWL	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL
COLOMBIA	WL	WL	WL	PWL	WL												

COUNTRY	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
COSTA RICA	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
CROATIA	WL	WL	WL														
CYPRUS									OO	OO	OO	WL	WL	WL	WL		
CZECH REPUBLIC						WL	WL	WL	OO								
DENMARK						WL	WL	WL	WL								
DOMINICAN REPUBLIC	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
ECUADOR	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL			
EGYPT	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL	WL
EL SALVADOR										WL	WL	WL	WL	WL			
ESTONIA								OO									
EUROPEAN UNION	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	
FIJI																	
FINLAND																	
GEORGIA					OCR												
GERMANY								OO	OO	OO	OO	OO		WL	WL		
GREECE				WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
GUATEMALA	WL	WL	WL	WL	WL	PWL	PWL	WL									
HONDURAS								WL	WL	OO	OO	OO					
HONG KONG							OCR	WL	WL	OO							
HUNGARY	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL		
INDIA	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
INDONESIA	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL						
IRELAND						WL	WL	WL	WL	OO							
ISRAEL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO					

COUNTRY	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
ITALY	WL	WL	WL	WL	WL	PWL + OCR	PWL	PWL	WL								
JAMAICA	WL	WL	WL	WL	WL	WL	WL	WL									
JAPAN					OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
JORDAN							WL	WL	WL	OO	OO						
KAZAKHSTAN	WL	WL	WL	WL	WL	WL		OO									
KENYA																	
KUWAIT	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						
KRYGYZ REPUBLIC					OCR												
LATVIA	WL	WL	WL	WL	WL	WL											
LEBANON	PWL	PWL	PWL	PWL	PWL	WL	WL	OO									
LITHUANIA	WL	WL	WL	WL	WL	WL											
LUXEMBOURG									WL								
MACAU					WL	WL	PWL	PWL									
MALAYSIA	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
MEXICO	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
MOLDOVA						WL											
NAMIBIA																	
NETHERLANDS								OO									
NEW ZEALAND				WL	WL		WL							WL	WL		
NICARAGUA								OO	OO								
NIGERIA																	
NORWAY																	
OMAN						WL	WL	WL	WL	WL	OO						
PAKISTAN	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL

COUNTRY	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
PALESTINIAN AUTHORITY						OCR											
PANAMA								OO	WL	OO		OO					
PARAGUAY	306	306	306	306	306	306	306	PFC	PWL	WL	OO	OO		WL			
PERU	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
PHILIPPINES	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL
POLAND	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL			
PORTUGAL										OO							WL
QATAR				WL		WL	WL	WL	OO	OO	OO						
ROMANIA	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL						
RUSSIAN FEDERATION	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	OO					
SAN MARINO									WL								
SAUDI ARABIA	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	PWL
SERBIA AND MONTENEGRO															WL	WL	WL
SINGAPORE						WL	WL	WL	WL	WL	WL	OO					
SLOVAK REPUBLIC	WL	WL	WL	WL	WL												
SLOVENIA						OCR											
SOUTH AFRICA							WL	WL		OO	WL						
SOUTH KOREA	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL
SPAIN						WL	WL	OO				WL	WL	WL	WL	WL	WL
SWEDEN							WL	WL	WL								
SWITZERLAND																	
TAIWAN	WL	PWL + OCR	PWL	PWL	PWL	WL	WL			OO	WL	WL	PWL	PFC	WL	WL	PWL
TAJIKISTAN	WL	WL	WL	WL	WL	WL											

COUNTRY	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
THAILAND	WL	WL	WL	WL + OCR	WL	PWL	PFC	PFC	PFC	PWL	PWL						
TRINIDAD & TOBAGO																	
TUNISIA								OO									
TURKEY	PWL	PWL	WL	WL	WL	PWL	WL	WL	WL								
TURKMENISTAN	WL	WL	WL	WL	WL	WL											
UNITED ARAB EMIRATES					WL	OCR	WL										
UKRAINE	PFC + OCR	PFC	PFC	PFC	PFC	PWL	PWL	WL									
URUGUAY	WL	WL	WL	PWL	PWL	WL	WL	OO	OO								
UZBEKISTAN	WL	WL	WL	WL	WL	WL											
VENEZUELA	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
VIETNAM	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO						
YEMEN								OO									

**KEY:**

301: 301 Investigation  
306: Section 306 Monitoring  
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 Ukraine and Indonesia where  
GSP IPR review initiated June 2012  
DS: Dispute Settlement