

# 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*, *MyFlixxr*, 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

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<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

<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.