

**IIPA 2024 SPECIAL 301 REPORT  
ON  
COPYRIGHT PROTECTION  
AND  
ENFORCEMENT**



**SUBMITTED JANUARY 30, 2024  
TO THE  
UNITED STATES TRADE REPRESENTATIVE  
BY THE  
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®**



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January 30, 2024

**Submitted via regulations.gov Docket No. USTR-2023-0014**

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 2024 Special 301 Review*, 88 Fed. Reg. 84869 (Dec. 6, 2023)

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 concerns affecting the competitiveness of the copyright industries in foreign markets: (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.

On behalf of its member associations, IIPA has filed comments every year since the 1988 Trade Act established the Special 301 review proceeding. 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 continued adherence to the requirements of the Special 301 statute and the intent of Congress by using this important trade tool to improve and strengthen copyright protection and enforcement in the reported countries and to open up these markets for U.S. creators, producers, and workers who rely on copyright protection. 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 expand economic opportunities for the copyright industries by opening markets for American copyrighted materials in digital and hard copy formats.<sup>3</sup>

In the 2023 Special 301 Report, USTR recognized that the Report “serves a critical function by identifying opportunities and challenges facing U.S. innovative and creative industries in foreign markets and by promoting job creation, economic development, and many other benefits that effective IP protection and enforcement support.”<sup>4</sup>

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

<sup>2</sup> See, e.g., 2023 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 2023 National Trade Estimate Report on Foreign Trade Barriers (March 31, 2023). That report is available at <https://ustr.gov/sites/default/files/2023-03/2023%20NTE%20Report.pdf>.

<sup>4</sup> See 2023 Special 301 Report at 4.

Indeed, American creators, producers, publishers, workers, and consumers all benefit when U.S. trading partners enact strong copyright 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 and scholarly content, including books and journals, video games, movies and television programming, and music.<sup>5</sup> Strong copyright protection and enforcement also help U.S. trading partners develop, 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>6</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 2022 Report also illustrates the important contributions of the copyright industries to U.S. exports. According to the report, foreign sales and exports of selected copyright products in overseas markets totaled \$230.3 billion in 2021, exceeding the foreign sales of other major U.S. industries. Leveling the playing field for the U.S. copyright industries in foreign markets would significantly increase these important U.S. exports, boosting U.S. job creation and economic growth.

A particular focus of this IIPA submission is on necessary improvements 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

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<sup>5</sup> See, e.g., 2023 Essential Facts About the Video Game Industry, available at <https://www.theesa.com/2023-essential-facts/> (highlighting the benefits of playing video games, including building skills, providing stress relief, creating a feeling of community and helping players stay connected to friends and family).

<sup>6</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).

applications (apps)) and new digital business models. The end result of these digital technological advances is that more copyrighted material is now legally available, in more diversified ways and with more varied pricing options than at any other time in history, for the enrichment and enjoyment of consumers.<sup>7</sup>

Improving trading partners' legal frameworks to expand digital trade in copyrighted materials would foster job growth in the United States and increase economic opportunities around the world. The *2022 Report* demonstrates the important contributions the copyright industries make to the digital economy, at least as that concept has been defined by the U.S. Bureau of Economic Analysis (BEA). In 2021, the core copyright industries accounted for over 52% of the digital economy value added and over 48% of digital economy employment, and the total copyright industries accounted 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.

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.

IIPA members recognize and 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 2023 along with key issues to focus on in 2024. 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 2024 Submission includes this Cover Letter plus two appendices—Appendix A and Appendix B.

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<sup>7</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>. There are more than 23,000 games available for immediate digital download and play on the three major gaming consoles (more than 10,000 on xbox, see <https://www.xbox.com/en-US/browse/games>; more than 5,000 on Nintendo Switch, see <https://www.nintendo.com/switch/system/>; and more than 8,000 on PlayStation, see <https://store.playstation.com/en-us/pages/browse>), and nearly 30,000 available at any time on the STEAM platform (see <https://store.steampowered.com/about/>). 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 2023 at <https://globalmusicreport.ifpi.org/> (music).

**Appendix A** includes 23 Country Reports with recommendations for designation in USTR’s Special 301 Report this year.<sup>8</sup> These 23 Country Reports cover: **Argentina; Belarus; Brazil; Canada; Chile; China; Colombia; India; Indonesia; Mexico; Morocco; Nigeria; Paraguay; Peru; Poland; Russian Federation; South Africa; Switzerland; Taiwan; Thailand; United Arab Emirates; Uruguay; and Vietnam.**

For these countries, the IIPA recommends:

<b>IIPA 2023 Special 301 Recommendations</b>	
<b>Priority Watch List</b>	<b>Watch List</b>
Argentina	Belarus
Chile	Brazil
China	Canada
India	Colombia
Indonesia	Morocco
Mexico	Nigeria
Russian Federation	Paraguay
South Africa	Peru
Vietnam	Poland
	Switzerland
	Taiwan
	Thailand
	United Arab Emirates
	Uruguay
9	14

**Appendix B** provides a Historical Chart of countries’ placement on Special 301 lists by USTR since 1989 and IIPA’s 2024 Special 301 recommendations.<sup>9</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: video games for consoles, handheld devices, personal computers, and online; motion pictures and television programming distributed in all formats (including cinema, television, online, mobile, DVD, etc.); 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

<sup>8</sup> The Country Reports were prepared by IIPA Staff, including Linda Quigley, Sydney Blitman, and the undersigned. We particularly thank Sydney Blitman 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.

<sup>9</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).

synchronization in audiovisual materials; and fiction and non-fiction books, educational, instructional and assessment materials, and professional and scholarly journals, and databases.

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

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

**Australia:** Australia has developed excellent tools to fight online piracy, including effective laws allowing for injunctive relief against ISPs and search engine providers. Rights holders have succeeded in obtaining orders to disable access to thousands of piracy domains (such as pirate brands like *ThePirateBay* and other content delivery services like pirate cyberlockers), resulting in significant reductions of visits to piracy sites and increases in visits to legitimate video-on-demand (VOD) services. The efficacy of this approach is evident both in the migration of heavy piracy users to legal paid VOD services and the cooperation of online search engine providers to delist piracy sites from their search results.

**Brazil:** Brazil's Ministry of Justice and Public Safety's Operation 404 against online piracy reached its 5th wave in March 2023. The country-wide raid arrested 11 people and blocked 199 websites and 63 Internet applications responsible for infringing copyrights. 32 search and seizure warrants were executed over computers, equipment, and documents belonging to pirates.

**India:** India established a site-blocking remedy in 2019 and, in 2022, rights holders achieved a new milestone, obtaining orders allowing for a domain to be blocked because of its association with a pirate brand. Rights holders are now able to obtain orders to disable access to pirate brands like *ThePirateBay* and to content delivery services like pirate cyberlockers. Rights holders have also obtained the cooperation of online search engine providers to delist piracy sites from their search results, which further reduces piracy. In addition, the Delhi High Court is beginning to grant orders to address two of the latest and virulent forms of piracy of audiovisual content: pirate Internet Protocol TV (IPTV) services and live sports feeds. Furthermore, in February 2022, the Delhi High Court Intellectual Property Rights Division Rules entered into force, followed by similar rules notified in the Madras High Court in April 2023. 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. However, as noted in the India country report, concerns remain for the scholarly publishing sector. Some three years after filing an application to block access to the piracy site *Sci-Hub*, the matter remains pending, despite the operator's own categorical admission to the court that plaintiff publishers are the copyright owners of the works illegally obtained and posted to the site.

**Peru:** The *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (The National Institute for the Defense of the Competition and Protection of Intellectual Property, INDECOPI) collaborated in Brazil's March 2023 Operation 404 wave discussed above, taking down 73 infringing websites based in Peru.

**Philippines:** The Philippine government has recognized that online piracy is a major threat to both the local and international creative industries and has made noticeable efforts to implement a more robust copyright enforcement regime. With the most popular piracy sites and services among Filipino consumers being operated outside of the country, the IP Office of the Philippines (IPOPHL) adopted an administrative site blocking mechanism under Memorandum Circular 23-025 or the Rules on Voluntary Administrative Site Blocking ("Circular"),<sup>10</sup> rolling out the first voluntary site-blocking regime in the Asia Pacific region. The voluntary site-blocking rules will be implemented through "partner agreements" between IPOPHL and several of the country's ISPs. The Circular sets the rules for a voluntary

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<sup>10</sup> See IP Office of the Philippines (IPOPHL) rolls out new site blocking rules to stamp out piracy, redirect consumers to legit markets, IPOPHL, available at <https://www.ipophil.gov.ph/news/ipophil-rolls-out-new-site-blocking-rules-to-stamp-out-piracy-redirect-consumers-to-legit-markets/#:~:text=To%20mark%20the%20celebration%20of,being%20third%20in%20East%20and>



administrative site-blocking process with additional oversight from the National Telecommunications Commission (NTC), which through a Memorandum of Agreement with IPOPHL widens the agency's oversight to over 300 ISPs that are not part of IPOPHL's site blocking partner agreements. Draft IP Code amendment bills also have been introduced in Congress. A stand-alone bill (HB 7600) would strengthen the site-blocking powers of IPOPHL, allowing for an administrative injunctive remedy to disable access to infringing websites. The bill passed its third reading in the House of Representatives earlier this year and has been elevated to the Senate.

IIPA welcomes these positive developments from 2023 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 REGARDING LEGAL REFORM EFFORTS IN OTHER KEY FOREIGN MARKETS**

As detailed in the Country Reports, there are several countries, notably **South Africa, Canada, 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, Ecuador, Germany, Japan, Kenya, Malaysia, Philippines, Saudi Arabia, Singapore, South Korea, and Turkey**, have introduced or 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.<sup>11</sup> 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 two new unwaivable statutory remuneration rights (SRRs) subject to mandatory collective rights management. One of these SRRs is applicable to user generated content (UGC) payable by online content sharing service providers (OCSSPs) such as YouTube (in the context of the implementation of Article 17 of the DSM Copyright Directive but also with reference to Article 18); and the other SRR is applicable to content on streaming services payable by streamers (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 the streaming SRR in Section 62 of the implementing law took place at the end of legislative process in Parliament (with government acquiescence) 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. Indeed, both provisions are subject to annulment proceedings before the Belgian Constitutional Court (with a potential referral to the European Court of Justice). The new SRRs also raise considerable uncertainty as to their practical application. In the case of the streaming SRR, according to the terms of Article 62, it should not apply to content from countries that have Collective Bargaining Agreements (CBAs) in place. Furthermore, it is not clear how the new legal regime will actually work (e.g., how it will impact on both local and foreign rights holders, authors, and performers, how it will ensure the correct distribution, to what time period it should apply, etc.)

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<sup>11</sup> In addition to the concerns highlighted in this section and in the Country Reports in Appendix A, Section V of this submission, *Key Challenges for the Copyright Industries—Protection, Enforcement, and Market Access Issues*, includes details of serious protection, enforcement, and market access concerns in several markets.

## B. Ecuador

Ecuador's 2016 *Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación* (Code of the Social Economy of Knowledge, Creativity, and Innovation, 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 unduly broad 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) (collectively, the WIPO Internet Treaties), each in force in Ecuador since 2002.

Unfortunately, November 2020 regulations by *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) 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. *Secretaría Nacional de Educación Superior, Ciencia, Tecnología e Innovación* (National Secretariat for Higher Education, Science, Technology, and Innovation, SENESCYT), the umbrella entity overseeing SENADI, 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.

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, essentially a catchall, creates great uncertainty because it is not clear what constitutes "other fundamental rights" and how the 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>12</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

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<sup>12</sup> See 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).

broad fair use provision, with all of the problems identified above. Therefore, for all of the reasons discussed above, Article 211 should be removed.

COESCI's list of other exceptions and limitations is extensive.<sup>13</sup> Several exceptions allow widespread uses that clearly fall outside the confines of the three-step test, including: exception 9 for libraries and archives; exception 11 allowing broadcasters to make ephemeral copies for their own transmissions and keep them for a period of five years; exception 24 allowing 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; exception 26 allowing small businesses—a category that due to its broad definition covers the vast majority of businesses open to the public—to freely communicate works to the public; exception 27 eliminating 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; and exception 30 allowing "community radios," which in practice operate as commercial radios, to communicate works to the public without permission from rights holders or remuneration.

In addition to these 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. Although Articles 69 and 70 of SENADI's regulations require 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," this language is inadequate to appropriately cabin the provision's scope of application. 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.

Finally, in addition to the concerns with COESCI, SENADI's decisions, including regarding the use of sound recordings by satellite and cable operators such as the state-owned *Corporación Nacional de Telecomunicaciones* (National Telecommunications Corporation, CNT), are not enforced due to an unnecessarily complicated administrative appeal system that is abused by operators.

### C. 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 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 UGC 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 the EU or worldwide.<sup>14</sup>

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<sup>13</sup> For further details regarding these problematic exceptions and limitations and other concerns with Ecuador's legal framework, see 2023 IIPA at 145-147.

<sup>14</sup> Article 13 of the WTO TRIPS Agreement obligates WTO members to "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." See also Berne Convention Article 9(2) (same, as to reproduction right); WIPO Copyright Treaty (WCT) Article 10 (same, as to all Berne exclusive rights and all exclusive rights granted under the WCT itself); WIPO Performances and Phonograms Treaty (WPPT) Article 16(2) (same, as to all rights provided for under WPPT).

The Belgian OSCCP SRR discussed above is in part based on a similar provision adopted in connection with the German implementation of Article 17 of the DSM Copyright Directive. The German implementation also introduces an SRR for authors and performers, subject to mandatory collective rights management, and exercisable against OCSSPs like YouTube. This means that authors and performers 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 – where the producer has licensed the content to the OCSSP. Moreover, the SRR also applies where use of the content on the OCSSP is subject to an applicable copyright exception (e.g., parody, satire, or pastiche). The SRR is unwaivable and must be administered by CMOs. This provision raises significant questions regarding both its practical application as well as its legitimacy, not least due to the unreasonable restrictions on the freedom of contract. Reportedly, complaints have been filed with German Constitutional Court.

Finally, it is notable that Germany remains a popular jurisdiction for pirate sites as they rely on Germany's hosting provider infrastructure. In particular, a huge number of sites that infringe music are hosted by two hosting providers in Germany.

#### **D. Japan**

In 2019, the Japanese Copyright Act was amended to include an exception, in Article 30-4, that permits the exploitation of a work for data analysis (meaning the extraction, comparison, classification, or other statistical analysis of the constituent language, sounds, images, or other elemental data from a large number of works or a large volume of other such data) or in any other case in which it is not a person's purpose to personally enjoy or cause another person to enjoy the thoughts or sentiments expressed in that work. While the act states that it does not apply if the action would unreasonably prejudice the interests of the copyright owner in light of the nature or purpose of the work or the circumstances of its exploitation, it does not expressly distinguish between use for commercial or non-commercial purpose, nor does it expressly require lawful access to the works in question. It is also not clear what activities are encompassed by the non-personal enjoyment carveout. Rights holders are deeply troubled by the current lack of clarity and certainty, which risks Article 30-4 permitting the use of unlawfully accessed copyright material as the source for text and data mining (TDM) activities. IIPA requests the Government of Japan to clarify that its TDM exception does not permit such uses. It is imperative that the application of the TDM exception is done in a manner consistent with Japan's international obligations, and that the Japanese government issue guidance to confirm that the TDM exception does not allow the use of copyright-protected content without authorization to develop and train artificial intelligence (AI) models, including by commercial operators for commercial purposes, that could generate outputs that unreasonably harm rights holders' interests.

#### **E. Kenya**

While the Government of Kenya has indicated its intention to ratify 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. While there has been no movement on the IP Bill, and the government's position on the bill is unclear, on October 17, 2023, the Kenyan Copyright Board (KECOBO) published a new draft bill, the Copyright and Related Rights Bill (2023 Bill), which is intended to replace the Copyright Act enacted in 2001. To ensure adequate and effective protection and enforcement of IP rights, Kenya's government should address the following shortcomings in Kenya's copyright and enforcement framework, many of which are not properly addressed in the proposed legislation, including by:

- rejecting any proposals 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 technological protection measures (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);
- ensuring that scope of exceptions and limitations to copyright protection is properly confined to the three-step test, including by expressly incorporating the three-step test into the law;
- 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) requiring marketplaces and encouraging all relevant intermediaries, not only those that may avail themselves of safe harbors, to implement "know your business customers" (KYBC) procedures.
- ensuring that the collective management framework and system reflects the essential characteristics of a CMO (that they are non-profit and owned or controlled by their member rights holders) and that CMO operations are in keeping with the principles of transparency, accountability, and good governance consistent with international standards and best practices;
- rejecting any proposal to introduce a statutory licensing scheme for ring back tunes as artists and rights holders should be allowed to freely negotiate fair commercial terms for the use of their recordings, on the back of strong exclusive rights and effective measures to enforce 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.

In addition, a mandatory IP recordation system, established under the Anti-Counterfeit Authority (ACA), went into effect on January 1, 2023. Under this system, it is an offense subject to criminal sanctions to import products protected by IP rights into Kenya if such rights have not been recorded with the ACA. The mandatory IP recordation system raises several concerns, including regarding Kenya's compliance with the Berne Convention, which prohibits

formalities regarding the enjoyment and exercise of copyright rights.<sup>15</sup> Kenya should amend its mandatory recordation system to be voluntary and ensure that copyright is not in scope.

Finally, the Government of Kenya published for consultation the Computer Misuse and Cybercrimes (Critical Information Infrastructure and Cybercrime Management) Regulations, 2023. Notably, the regulations fall short in the critical area of addressing piracy and other intellectual property infringements, which are key concerns regarding computer misuse and cybercrime activity. In particular, the regulations should address the unlawful streaming and downloading of content, including via cyberlockers and stream-ripping sites, which often host malware that infects the computers of users and poses cybersecurity risks.

## **F. Malaysia**

In Malaysia, mandatory one-stop shop CMO licensing could reemerge. A task force made up of government officials and industry players is evaluating whether centralized control over collective licensing is necessary and will report their findings back to the government. This has the potential to revive the previously failed central collective licensing system under Music Rights Malaysia Limited (MRM), which was abandoned in 2020. Such a system would interfere with rights holders' ability to determine how and by whom their rights are managed, as well as how royalties are collected, apportioned, and distributed. Malaysia should desist from this course of action. In addition, Malaysia's outdated term of protection for sound recordings, films, and other works, which remains at 50 years, should be extended to at least 70 years.

## **G. Philippines**

As noted above, the Philippine government has recognized that online piracy is a major threat to both the local and international creative industries and has made noticeable efforts to implement a more robust intellectual property enforcement regime. The IPOPHL has spearheaded the passage of a legislative site-blocking regime and has rolled out the first voluntary site-blocking framework in the Asia Pacific region. The voluntary site-blocking memorandum of understanding (MOU) was signed in September 2023 between IPOPHL and the country's ISPs. It sets the rules and regulations for a voluntary administrative site-blocking process with additional oversight from the National Telecommunications Commission. There are several bills before Congress that propose changes to the IP Code, but the bills contain several problematic provisions that should be removed or revised as indicated below:

- Remove the extended collective licensing (ECL) mechanism: 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.
- Remove the provision for additional remuneration for performers for subsequent communications or broadcasts, which, like the ECL mechanism, interferes 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

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<sup>15</sup> See Berne Convention Article 5(2).

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 audiovisual and other works to at least 70 years in keeping with the international standard, as discussed below.
- Clarify the requirements for mandatory accreditation of CMOs with IPOPPL 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.

## **H. Saudi Arabia**

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 early 2023, the Saudi Authority for Intellectual Property (SAIP) held a public consultation on accession to the WPPT. 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 Kingdom 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.

## **I. Singapore**

In September 2021, Singapore passed a TDM exception that permits copying or communicating for computational data analysis.<sup>16</sup> While Singapore’s TDM exception requires the user to have lawful access to the work in question, it does not expressly distinguish between use for commercial or non-commercial purposes, it does not expressly permit a contractual override, and it is not clear what activities or which beneficiaries are encompassed by “computational data analysis” limitation. It is imperative that the application of the TDM exception is done in a manner consistent with Singapore’s international obligations, and that the Government of Singapore issue guidance to confirm that the TDM exception does not allow the use of copyright-protected content without authorization to develop and train AI models, including by commercial operators for commercial purposes, that could generate outputs that unreasonably harm right holders’ interests.

## **J. South Korea**

Several legislators in the National Assembly have proposed amendments to South Korea’s Copyright Act that contain problematic proposals, including a statutory remuneration right for directors, authors (including scriptwriters), and performers. This remuneration right would allow directors, scriptwriters, and performers, all of whom have already assigned their rights, 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 face 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, scriptwriters, and performers, instead of re-investing the profits into the production of other, more niche content. This will ultimately harm the diversity and variety of content

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<sup>16</sup> See Article 244 of Singapore’s Copyright Act of 2021, available at <https://sso.agc.gov.sg/Acts-Supp/22-2021/Published/20211231?DocDate=20211007&ProvIds=P15-P28-&ViewType=Within&Phrase=computations&WiAI=1>

produced. Furthermore, these amendments raise questions regarding the U.S.-Korea FTA (KORUS), Article 18.4.6 on freedom of contract for copyright rights holders.

## **K. 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 its 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 2023 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 remuneration determined by a collecting society. 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 in the section above regarding additional concerns on legal reform efforts in other key foreign markets, 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 and the section above regarding additional concerns on legal reform efforts in other key foreign markets, 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); 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>17</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.

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<sup>17</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.

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 pending constitutional challenges 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>18</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>19</sup> IIPA urges China to follow through on its Phase One Agreement commitments.

Our trading partners should be urged to bring their laws into line with evolving global norms regarding the 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 2024 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 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 treaties also represent 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. The importance of TPMs in supporting a healthy ecosystem for the manufacture, distribution, and security of devices, such as video game consoles and peripherals and the content designed for them, remains as crucial as ever for the growth of the United States' most cutting-edge innovations including immersive entertainment. 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 in this way can TPMs legislation establish effective, practical, and enforceable anti-circumvention prohibitions that protect and support digital content services.

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<sup>18</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>19</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).

Although recent trade initiatives 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>20</sup> To achieve these important goals, negotiators should work with the U.S. government's copyright experts, including those at the U.S. Copyright Office and the U.S. Patent and Trademark Office. The U.S. government should continue to use other bilateral trade dialogues as well to improve copyright protection and enforcement regimes of U.S. trading partners, including by addressing the concerns identified in this filing.

## **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. However, even regarding those exploitations, mandatory collective management should never be imposed. Rights holders should decide how they wish to exercise their exclusive rights.

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 on legal reform efforts in other key foreign markets. IIPA also has significant concerns in several other important markets:

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<sup>20</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. . .").

- **Japan** does not provide a public performance right for producers of sound recordings, depriving U.S. rights holders of significant revenues.<sup>21</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** (as discussed in the Indonesia country report), **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>22</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 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, the most prevalent form of online infringement of music, circumvent TPMs and convert licensed streams (i.e., music authorized only for online streaming) into unlicensed downloadable content.

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

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<sup>21</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>22</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.

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 recommends the following four steps:

**(1) Identification:** Identify and close down services and actors, especially criminal syndicates, engaged in copyright infringement activities 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>23</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) Establish 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 do 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 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>24</sup> Moreover, some services, including some clearly pirate services, attempt to rely on notice and takedown procedures to avoid proper copyright licensing. Clear

<sup>23</sup> The most recent report is USTR’s Out-of-Cycle “2022 Review of Notorious Markets for Counterfeiting and Piracy” (February 2023), available at: [https://ustr.gov/sites/default/files/2023-01/2022%20Notorious%20Markets%20List%20\(final\).pdf](https://ustr.gov/sites/default/files/2023-01/2022%20Notorious%20Markets%20List%20(final).pdf) (NM 2022 Report).

<sup>24</sup> US Copyright Office, Section 512 of Title 17, at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

primary and secondary liability rules are necessary to discourage abuses and to avoid inaction or license evasion. In addition, governments should require marketplaces and 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.

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. 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:** Governments should provide in their respective legal systems mechanisms that ensure ISPs can impose effective relief to remove infringement. Injunctive relief is an effective and efficient means through which to reduce usage of infringing sites and increase traffic to legitimate offerings of copyrighted material. Government agencies and courts in over 42 countries—including **Australia, Belgium, Brazil, Denmark, France, India, Ireland, Italy, Peru, Portugal, Singapore, South Korea, Spain, Sweden, the UK and the United States**—employ or have made legally available injunctive relief or administrative orders to compel ISPs to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities.

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 structurally copyright infringing services, including infringing websites operated both within and outside of Japan.<sup>25</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 basis for permanent injunctions.<sup>26</sup> The recently concluded UK-New Zealand FTA includes a provision that is similar to Article 8(3), serving as a regional and international best practice.<sup>27</sup>

In **Ecuador**, in 2021 SENADI issued an order to block several stream-ripping sites at the request of producers of sound recordings; however, in 2023 the situation changed. SENADI, which was under new leadership, decided not to follow through with a similar request by producers of sound recordings for the blocking of additional stream-ripping sites. The success of the 2021 actions clearly shows that Ecuador has an adequate legal framework to combat online

<sup>25</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).

<sup>26</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>27</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.”

infringement and, based on these initial actions, should develop a more consistent campaign against important targets used for the distribution of illegal content.

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 private sector agreements, especially those that provide enforcement rights, to properly reflect the needs of industry stakeholders, and that any remedies outside of a legal framework are available to all copyright owners.

## **2. *Circumvention of Technological Protection Measures (TPMs), Including Stream Ripping***

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

Unfortunately, there are business models built entirely around providing services, 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. 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.

Circumventing TPMs to enable the play of pirated games remains far too common, and ESA and its members must constantly combat efforts to circumvent TPMs found in video game consoles. To mitigate the dissemination of circumvention devices, circumvention software, and modified consoles used to enable pirated games, the video game industry regularly requests that online marketplaces remove these listings for sale from their platforms. In 2022, ESA had 3,297 listings removed from various online marketplaces worldwide targeting U.S. consumers. Every year, the video game industry spends millions of dollars taking down illegal circumvention and trafficking operations. For example,

“[t]hree members of an international criminal organization known as Team Xecuter were indicted on charges related to the development and sale of ‘illegal devices that hacked popular video game consoles so they could be used to play unauthorized, or pirated, copies of video games,’ according to a federal indictment filed in Seattle.”<sup>28</sup> 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 should promote and adopt copyright and appropriate use policies to require the use of legitimate textbooks and journal publications and discourage the use of unauthorized copies of literary, educational, and professional materials in educational settings. Piracy of journal articles is likewise of significant concern to the publishing industry. Piracy sites such as *Sci-Hub* and the Library Genesis Project (*Lib-Gen*) 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 among the multiple *Lib-Gen* mirror sites.<sup>29</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., illicit streaming devices (ISDs). These ISDs 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. 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 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>30</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 a preset device (e.g., a Kodi Box). Vigorous action is needed to lessen the growing harm to the legitimate digital delivery of copyright materials by these devices.

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<sup>28</sup> Brooke Wolford, *The News Tribune*, “International hackers accused of pirating Xbox, Nintendo, PlayStation games, feds say,” October 2, 2020, available at <https://www.thenewtribune.com/news/nation-world/national/article246183785.html>.

<sup>29</sup> Both *Sci-Hub* and the Library Genesis Project (*Lib-Gen*) were listed as notorious markets in USTR’s 2022 report. See NM 2022 Report. For additional information on *Sci-Hub* and *Lib-Gen* see the Russia Country Report in Appendix A.

<sup>30</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>.



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***

Stopping camcording or the illegal recordings of movies in theaters is a priority for the motion picture industry. 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, and in 2023 there were 187 documented camcording incidents through October.

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. *Broadcast, Pay-TV, and 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 (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) still persists in some markets, particularly in Central America and the Caribbean regions as discussed below.<sup>31</sup>

However, IPTV services have become the dominant threat in major markets. Pirate IPTV services provide access to stolen telecommunication signals or channels and offer on-demand infringing film and episodic television content to a global audience via dedicated web portals, third-party applications, and piracy devices configured to access these services. 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>32</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

<sup>31</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.

<sup>32</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>.

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.

The unlawful retransmission of pay-TV and broadcasting signals, as well as online piracy is an ongoing concern in Central America and the Caribbean. Local ISPs and pay-TV distributors often bundle unauthorized content with legitimately licensed content, making their products and services appealing to final consumers and hampering enforcement. Enforcement authorities, regulators and private stakeholders should work together to protect IP rights and prevent unlicensed consumption of audiovisual content in the region, especially in **Honduras, El Salvador, Guatemala**, and several Caribbean Islands, using tools such as cable retransmission takedown orders, site blocking, and legal proceedings, including cease-and-desist letters.

### **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 (including digital services taxes), or fees (including network usage 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);
- 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.

The Country Reports in [Appendix A](#) include detailed discussions of these formal market access barriers in the markets in which they occur. 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. In addition to the countries identified in the Country Reports, several other countries are considering measures that would impede U.S. creative industries' access to their markets:

- In recent years the Government of **Australia** has undertaken several reviews regarding the availability of Australian content and asymmetry between local content obligations for free-to-air broadcast and the absence of these obligations on digital platforms. In 2019, the Australian Competition and Consumer Commission (ACCC), through its Digital Platforms Inquiry Final Report, recommended “harmonization” of content regulation across broadcast and VOD, introducing the possibility of local content obligations extending to VOD services. The Albanese Government in its 2023 National Cultural Policy outlined a commitment to introduce an investment obligation for VOD services. Such an investment obligation would raise concerns with Australia’s compliance with its obligations under the U.S.-Australia FTA. However, as of late 2023, data on investment in Australian content for streaming services fail to support any assertion of a market failure, indicating a high level of production investment and wide availability of, and access to, Australian content for subscribers, without the need for consideration of quotas or obligations to invest in local content.
- 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.
- **South Korea** also suffers from an unnecessarily cumbersome pre-approval and classification mechanism for the release of music videos. The procedure of approval and classification of music videos by the Korea Media Rating Board (KMRB) is time-consuming and does not reflect the fast distribution cycle of today’s music industry, which releases and promotes music videos at the same time as the sound recording is released. It also generates difficulties in the design of an international release strategy for artists’ projects, as all too often the release of an artist’s music video is delayed on South Korean delivery channels, including on-line platforms, because of the pre-classification process.

Whatever form they take, all market access restrictions that impede the timely entry of legitimate products increase the appeal of unauthorized production and distribution operations. Often these illegal operations saturate the market with infringing and pirated copies, severely damaging the market for legitimate products. 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 jobs, increase exports, and expand economic output. Likewise, the health and competitiveness of our trading partners’ economies also depend on protecting and enforcing copyrights and taking

other steps to open their 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 Rosenbaum/  
Kevin M. Rosenbaum, Executive Director  
International Intellectual Property Alliance

# **APPENDIX A**

## **COUNTRY SURVEYS**

# **PRIORITY WATCH LIST**

# ARGENTINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Argentina be maintained on the Priority Watch List in 2024.<sup>1</sup>

**Executive Summary:** Argentina has long lacked the resources and political will needed to match high rates of piracy, which accelerated and diversified in the past several years. However, the new Administration may provide a fresh start. 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. Pirate sites operating out of Argentina have expanded 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, even as proposals for additional quotas and taxes emerge, 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 COVID-19 pandemic to consolidate the market among local game consumers. The offer of unauthorized physical copies of new releases remains a significant problem for the Argentine recording industry.

IIPA urges the Government of Argentina to make use of the Coordination Center to Combat Cybercrime (*Centro de Coordinación de Combate al Cibercrimo*, 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 new Administration should strengthen the Penal Code and should be urged to revisit efforts to improve the enforcement landscape for copyrighted works.

## **PRIORITY ACTIONS REQUESTED IN 2024**

### **Enforcement**

- Leverage the opportunity presented by the new Administration (December 2023), increasing 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, develop a well-defined public policy that supports the sector in handling copyright infringement cases, and host private sector discussions on potential cross-industry cooperation to tackle online piracy more effectively.
- Engage cybercrime entities 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.
- Create a specialized Intellectual Property (IP) Prosecution Office and establish federal jurisdiction over copyright crimes.
- Assign adequate legal powers and financial resources to the Ministry of Justice's Copyright Office (*Dirección Nacional del Derecho de Autor*) and undertake routine, *ex officio* actions, such as inspections and raids of physical markets to stop commercial piracy.

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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/2024/01/Appendix-B-2024.pdf>.

- Actively involve the Argentine Customs Office (DGA-AFIP), with whom the U.S. Embassy is increasingly engaged, in copyright enforcement actions and to monitor and perform border operations.

### Legal Reforms

- Facilitate introduction of legislation in the renewed Congress as of 2024 for the adequate protection for technological protection measures (TPMs) and rights management information (RMI) and provide legal remedies against their removal.
- Repeal provisions empowering *El Fondo Nacional de las Artes* to charge fees for the "Paying Public Domain."

### Market Access

- Remove quotas for motion pictures, 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 adapt the split of performance rights collections of music performers and phonogram producers to the 50-50 international standard, instead of the currently inequitable split of 67% to performers and 33% to producers.
- Reject other legislative or regulatory proposals 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.

## ENFORCEMENT

- **Leverage the opportunity presented by the new Administration (December 2023), increasing resources and political backing for a coordinated, long-term anti-piracy agenda at the federal level to address online piracy.**

In 2023, in the absence of significant enforcement improvements to promote a legal online environment, Argentina experienced rapid expansion of already high levels of piracy. The levels of online piracy of copyright works in Argentina worsened in the past year. 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 stream ripping and the use of cyberlockers. IFPI's Music Consumer Study 2023 found that 47.9% of all Internet users aged 16 to 64 used stream-ripping sites and services to illegally download music from sites like YouTube in the month before the survey. Data from SimilarWeb reinforced the popularity of stream ripping in Argentina with *ssyoutube.com* being one of the top 100 most popular web sites of any kind in Argentina.

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. 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.

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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).



The illegal distribution of physical and online video games and entertainment software in Argentina continued, and during the COVID-19 pandemic, video game piracy spread over an even greater diversity of formats, including: BitTorrent game content available on Spanish-language illegal linking and download sites, increased availability of online UDGs,<sup>3</sup> and an increase of illegal consoles and devices available from small, local businesses. In 2023, Argentina ranked 14th in the world for the number of connections by peers participating in the unauthorized file-sharing of ESA member video game titles on public peer-to-peer (P2P) networks. By the same metric, Argentina ranked eighth in the world for unauthorized file-sharing of mobile games.

In 2022, through 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 Argentine Ministry of Security issued Resolution #86/2022 that 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 #139/2022 created, within the framework of ForCIC, the CICAT (High Technology Cybercrime Investigation Center). The objective of the Center is to train, prevent, analyze, and investigate cybercrimes, focusing on 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, in which it invited the Provinces and the City of Buenos Aires to join the campaign. The Specialized Cybercrime Unit (UFECI) also reported an increase in cybercrime. Between April 2022 and March 2023, more than 35,000 cybercrimes were registered in Argentina, a number that is equivalent to an increase of 38% in cases compared to the previous 12 months, according to a report carried out by UFECI.<sup>4</sup>

Rights holders have reported very few significant cases of copyright enforcement actions by Argentina's law enforcement authorities in 2023. One positive development was Argentine law enforcement's participation in the latest round of Brazil's Operation 404. However, much more investment in investigation and prosecution of IP crime is required. 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 in 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 Argentine citizen. Argentine officials should leverage the opportunity presented by the new Administration, increasing 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, develop a well-defined public policy that supports the sector in handling copyright infringement cases, and host private sector discussions on potential cross-industry cooperation to tackle online piracy more effectively.**

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<sup>3</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 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.

<sup>4</sup> See [Fiscales.gob.ar, The Specialized Cybercrime Prosecutorial Unit pointed to a continuous rise in cybercrime in its 2023 management report](https://www.fiscales.gob.ar/ciberdelincuencia/la-unidad-fiscal-especializada-en-ciberdelincuencia-senalo-un-alza-continua-de-los-delitos-informaticos-en-su-informe-de-gestion-2023/), December 18, 2023, available at <https://www.fiscales.gob.ar/ciberdelincuencia/la-unidad-fiscal-especializada-en-ciberdelincuencia-senalo-un-alza-continua-de-los-delitos-informaticos-en-su-informe-de-gestion-2023/>.

Law enforcement and administrative authorities are not promoting actions by the private sector, nor are they taking any initiative to tackle copyright piracy through securing the assistance of domain name registrars. IIPA urges Argentina's authorities to partner with rights holders to use industry expertise to combat cybercrime.

In 2023, 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, as well as to combat commercial game piracy in the entire region. ESA reports that from 2022 to 2023, *Mercado Libre* successfully completed approximately 5,300 takedown requests, nearly triple the number it completed during the previous year.

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 2023, through Resolution #1/2023, the Argentine government called for a public consultation regarding the document on the Second National Cybersecurity Strategy. 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.

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, see over 27 million visits per month. 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 Argentine 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."

- **Engage cybercrime entities and the National Communications Agency (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.**

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 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.

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, improved criminal enforcement is still required. Instead, cybercrime entities and ENACOM should 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.**

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.

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.

- **Create a specialized Intellectual Property (IP) Prosecution Office and establish federal jurisdiction over copyright crimes.**

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. Argentine 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.

- **Assign adequate legal powers and financial resources to the Ministry of Justice's Copyright Office (*Dirección Nacional del Derecho de Autor*) and undertake routine, *ex officio* actions, such as inspections and raids of physical markets to stop commercial piracy.**

The Ministry of Justice's Copyright Office (*Dirección Nacional del Derecho de Autor*) is underfunded. The Government of Argentina could strengthen the Office's ability to respond to commercial piracy by assigning it adequate legal powers and financial resources. Moreover, the Government of Argentina should undertake routine, *ex officio* actions, such as inspections and raids of physical markets to stop commercial piracy.

- **Actively involve the Argentine Customs Office (DGA-AFIP), with whom the U.S. Embassy is increasingly engaged, in copyright enforcement actions and to monitor and perform border operations.**

Another potential tool in the fight against piracy in Argentina is with more involvement from the Argentine Customs Office (DGA-AFIP). The Government of Argentina should actively involve the Customs Office 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.

## **LEGAL REFORMS**

- **Facilitate introduction of legislation in the renewed Congress as of 2024 for the adequate protection for technological protection measures (TPMs) and rights management information (RMI) and provide legal remedies against their removal.**

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 of copyright works. TPMs and RMI serve as critical mechanisms for safeguarding digital content. The absence of adequate TPM and RMI provisions in Argentine legislation raises significant concerns regarding the protection of online content, including issues like stream ripping.

TPMs and RMI are integral to ensuring that content creators and rights holders can control the distribution and usage of their intellectual property in the online environment. The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively the WIPO Internet Treaties) mandate the implementation of remedies against the removal of TPMs and RMI. These treaties reflect global recognition of the importance of these tools in the digital era and the need for legal frameworks to protect it. Argentina is a signatory to the WIPO Internet Treaties, which require contracting parties to provide adequate protection and legal remedies against the removal of effective technological measures. Argentina should introduce legislation to meet this important commitment.

- **Repeal provisions empowering *El Fondo Nacional de las Artes* to charge fees for the “Paying Public Domain.”**

Argentina’s *El Fondo Nacional de las Artes* (FNA, National Endowment for the Arts)—is an autonomous body within the Ministry of Culture of the Nation, that has the power to collect fees for copyright works that have fallen into the public domain. According to Law No. #1,224 and Resolution #15,850/77, FNA’s main source of funding is the Paying Public Domain (“DPP”). The DPP is a fee (not a tax) that must be paid in Argentina for the use of a work authored by a national or foreign creator who died more than 70 years ago (the copyright term in Argentina is the life of the author plus 70 years). In 2022, Argentina adopted Resolution #662/2022, extending FNA’s authority to charge fees against DPP rights used in the digital environment. Since the enactment of Resolution #662/2022, the video game industry reports receiving invoices from the FNA for using adaptations of stories from the public domain, including centuries-old mythologies, in video games. This highly unusual practice, rather than furthering the arts, discourages creative expression by introducing unwarranted uncertainty and financial and administrative burdens for the creative sector. The recent enforcement of the PDD reflects the funding pressures the FNA faces; indeed, the legislature recently proposed to close the agency due to budgetary restraints. If Argentina is to continue FNA’s mission to encourage the creative arts, it should do so without burdening the creative community it seeks to support.

## **MARKET ACCESS**

- **Remove quotas for motion pictures, television content, and electronic devices, and refrain from extending quotas to over-the-top (OTT) services.**

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 INCAA and ENACOM to enforce existing quotas<sup>5</sup> and to modify Media Law 26.522 to extend quotas to streaming services. Another proposal by local interest groups would modify the

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<sup>5</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

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 (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-Argentine content industries and impact the competitiveness of audiovisual ecosystems where cross-border services are subject to local content quota requirements.

- **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.**

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.

- **Amend legislation to adapt the split of performance rights collections of music performers and phonogram producers to the 50-50 international standard, instead of the currently inequitable split of 67% to performers and 33% to producers.**

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. This unfair situation can be changed only by legislation. As of October 2023, this disproportionate split in the distribution of revenue from performance rights remains the same.

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are required to allocate 0.5% of the previous year’s annual turnover to acquire, prior to filming, the broadcast rights to independent Argentine film and TV movies. 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 Argentine consumers are unable to get sought-after U.S. content.

- **Reject other legislative or regulatory proposals that burden the creative industries or unfairly target foreign rights holders.**

There are currently four bills that seek to modify the legislative framework for OTT services: the law on “Audiovisual Communication on Digital Platforms,” the law on “Federal Audiovisual Promotion,” the “Federal Law for Production and Industry,” and the law establishing the “Creation of a Fund for AV Industry Workers.” The common themes in all these bills respond to two demands from the entire sector: that platforms pay tribute to the Development Fund and that a portion of their catalogs be dedicated to national films, series, and documentaries.

The bill that has the broadest support, a measure developed by the National Audiovisual Space (EAN), is a new Cinema Law focused on global platforms for funding the local audiovisual sector. The proposals for content quotas also include an obligation to invest in national productions, and that the productions in the catalog be current, no more than two years old, and in part independent. In addition, “proportional visibility” ensures that algorithms establish a prominence ratio of 20% of national productions. Another bill requires 25% and a brand must be identified as “Argentine content.”

- **Reject Executive Order #600/19 that imposes an obligation to unify performance rights tariffs for hotels and establishes a governmental control over tariff rates.**

On September 23, 2019, the music industry filed a judicial review action challenging the constitutionality of the Executive Order #600/19 (Order) that created a single public performance tariff for all hotels and established a governmental control 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.

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Priority Watch List in 2024.<sup>1</sup>

**Executive Summary:** The digital market for creative content in Chile is teeming with infringing materials, a problem exacerbated by a weak legal framework and inadequate dedication and 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, among other deficiencies.

Chile needs to do more to address the piracy problem, including the reform of its online liability framework, which involves a completely ineffective takedown procedure, and the creation of a centralized authority responsible for all copyright-related matters. Chile should also utilize new enhanced legal powers granted by Law #21,577 and Law #21,595, enacted in June and August 2023 respectively, to prosecute crimes related to organized crime. These laws provide more efficient mechanisms for the prosecution of crimes, such as computer-related crimes and violations against intellectual and industrial property. If used properly, these new laws may assist in prosecuting acts of piracy. The Government of Chile should amend the copyright law to address deficiencies in the U.S.-Chile FTA obligations, as well as other needed amendments. Finally, IIPA urges USTR to monitor the impact that any constitutional changes may have on Chile's intellectual property rights (IPRs) landscape and 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.

### **PRIORITY ACTIONS REQUESTED IN 2024**

#### **Enforcement**

- 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.
- Utilize the enhanced legal powers granted by Law #21,577 and Law #21,595 to prosecute crimes related to organized crime and heighten the criminal liability of legal entities in committing criminal offenses.

#### **Legal Reforms**

- Improve and update Chile's legal framework for Internet Service Provider (ISP) liability and online copyright enforcement significantly to foster the development of a healthy digital marketplace.
- Enact amendments to address deficiencies in Chile's copyright law related to the U.S.-Chile FTA.
- Protect the successful Chilean collective management system and discourage or withdraw legislative proposals to amend it.
- 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.

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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/2024/01/Appendix-B-2024.pdf>.

- Abandon the pending amendment to Article 24-H of the Telecommunications law, which creates an unlimited net-neutrality principle, with no distinction between legal and illegal content.
- Adopt other needed legal reforms to effectively fight piracy in Chile.

### **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.

## **ENFORCEMENT**

- **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.**

Chile suffers from a piracy problem and needs a coordinated effort to address the issue. Chile remains without a dedicated, centralized authority responsible for copyright and copyright enforcement. Currently, copyright matters are handled by four different entities: (1) *Departamento de Derechos Intellectuales en la Dirección de Bibliotecas, Archivos y Museos* (Department of Intellectual Property Rights and Direction of Libraries, Archives and Museums), Ministry of Education; (2) Minister of Education; (3) DIRECON – *Dirección de Economía, Departamento de la PI* (Direction of Economy, Department of Industrial Property), Ministry of Foreign Affairs; and (4) the IP prosecutor. The implementation of a unified agency would be advantageous to the fight against copyright infringement and help deliver significant results as has been shown in other countries that have such organizations already in place for enforcement coordination and best practices implementation.

The most prominent forms of piracy in Chile remain stream ripping and the use of cyberlockers. The most popular stream-ripping sites in Chile are *y2mate.com*, *savefrom.net*, and *ssyoutube.com*. These sites received 7.1 million, 1.8 million, and 1.5 million visits from Chile respectively in the second quarter of 2023, according to SimilarWeb data. The most popular cyberlocker in Chile is *Mega.nz*. This site received 7.3 million visits from Chile during the second quarter of 2023, based on SimilarWeb data. Another popular cyberlocker, *1fichier.com*, received over 2.4 million visits during this same period. Piracy streaming sites, piracy apps, and ISD piracy are widespread means of film and television piracy in the country. Signal theft is also a major concern to the local pay-tv industry. Generally, IIPA members report a widespread lack of enforcement efforts by the Government of Chile to tackle online piracy.

The video game industry has reported in previous years that Chilean Customs had conducted several border seizures, and IIPA encourages additional such actions in 2024. As many of these seizures involved repeat importers, IIPA urges Chile to implement policies and measures that deter repeat importers of infringing products. Also, without coordination and cooperation of other agencies responsible for IP, enforcement will remain lacking. Specialized Internet crime police units from *Carabineros* and *Policía de Investigaciones* (Military Police and Investigatory Police) are not focused on IP crimes or any disruptive strategies for broader IP enforcement actions at the local level, despite a good level of technical investigative skills present.

In December 2022, the first “National Policy against Organized Crime” was published with the objective of reducing the criminal activity of criminal organizations operating in Chile through planned and coordinated action by state institutions that have a role in the prevention, control, and prosecution of organized crime. One of its lines of action is to implement an inter-institutional training plan with *Carabineros de Chile*, Investigative Police, Public Prosecutor’s Office, *Gendarmery* (Prison Service Military), General Directorate of Maritime Territory and Merchant Marine, National Customs Service, National Intelligence Agency, Financial Analysis Unit, and Internal Revenue Service on organized crime on topics including: asset investigation; investigation techniques and tools according to updated regulations; criminal types of organized crime and terrorism legislation; information gathering on the Deep and Dark Web; handling of digital evidence and other expertise; and intellectual property, counterfeiting, and piracy.



In addition, in August 2023, Decree 7/2023, “Technical Norm for Information Security and Cybersecurity” was published. This decree requires that each organ of the State Administration must develop an Information Security and Cybersecurity Policy that must follow information security standards. Therefore, since all technical standards consider controls related to the prohibition of the use of pirated software, the use of unlicensed software is not authorized in public organizations.

IIPA urges the Government of Chile to 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.

- **Utilize the enhanced legal powers granted by Law #21,577 and Law #21,595 to prosecute crimes related to organized crime and heighten the criminal liability of legal entities in committing criminal offenses.**

In 2023, two legal reforms were enacted that gave private organizations and the Public Prosecutor enhanced legal powers. Law #21,577 strengthens the prosecution of organized crime offenses, establishes special investigative techniques, and bolsters the confiscation of illicit profits. Law #21,595 pertains to economic crimes. These reforms not only bolster the prosecution mechanisms for organized crime but also generate criminal liability for legal entities. Specifically, these laws provide more efficient mechanisms for the prosecution of crimes, among which are computer-related crimes and violations against intellectual and industrial property. These new laws may assist in prosecuting acts of piracy but, due to their recent enactment, it will be necessary to see the results of the cases brought to court to determine their effectiveness.

## **LEGAL REFORMS**

- **Improve and update Chile’s legal framework for Internet Service Provider (ISP) liability and online copyright enforcement significantly to foster the development of a healthy digital marketplace.**

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>2</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.

Article 85N 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.

Article 85R provides that a court can order access to be blocked to clearly identified infringing content, but only if the blocking does not involve blocking access to other content. This provision creates infinite scope for abuse

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

(as the posting of a single non-infringing work can be relied upon to thwart blocking measures) and significantly limits the power of Chilean judges to order effective remedies to limit and prevent online IP infringement. These limitations on the power of the Chilean judiciary contribute to the low level of online IP enforcement in Chile and the persistent online piracy problem.

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 that would otherwise react to rights holders' take down 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 places 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 measures demonstrated effective in preventing or restraining infringement. 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: (i) clarify that safe harbors should apply only to passive and neutral intermediaries that do not contribute to infringing activities; (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. Finally, to be effective, the system should require measures demonstrated effective in preventing or restraining infringement.

- **Enact amendments to address deficiencies in Chile's copyright law related to the U.S.-Chile FTA.**

Chile's latest copyright 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, including:

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

**Protection of TPMs and Criminalization of Circumvention Devices:** Even in light of its 2018 legislation criminalizing satellite signal decoders, Chile still falls short of its FTA obligation to provide adequate legal protection for TPMs used to control access or restrict unauthorized acts to a protected work. The sale of video game copier devices and modification services on online marketplaces and through social media is pervasive. 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 has not progressed. 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 and 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. IIPA urges Chile to incorporate secondary liability principles in its copyright law to incentivize platforms to cooperate in the fight against piracy, among other goals.

- **Protect the successful Chilean collective management system and discourage or withdraw legislative proposals to amend it.**

A proposed legislative package has been filed by the new government to Congress in which significant changes in the collective management legal regime are proposed. One of the most important pillars of the successful collective management system in Chile is the fact that, for many years, existing collecting societies have enjoyed a statutory framework that allows them to enforce performance rights in the market effectively. The proposed legislation is at an early stage of consideration, but IIPA is concerned changes may interfere with Chile's well-functioning performance rights market. Nevertheless, any such proposals should be strongly opposed to avoid a regression in an otherwise successful performance rights market.

- **Refrain from reducing copyright infringement penalties currently provided in the Intellectual Property (IP) Law.**

The 2019 draft proposal to amend the penal code was distributed for consultation and proposed to dramatically reduce all penalties for copyright infringement and eliminate specific sanctions for the unauthorized reproduction of phonograms (Articles 353, 354, and 355). The proposal would effectively treat copyright infringement as a misdemeanor and would delete specific sanctions for piracy crimes against phonogram producers. It is unclear what the current state of the text is or whether the political will exists to move this proposal forward. Due to the significant volume of opposing comments received from the private sector, the Minister of Justice delayed the project's submission to Congress pending further analysis. At present, the draft is still under consideration at the Ministry of Justice with no specific timeframe.

- **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.**

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 IPRs. 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.

- **Abandon the pending amendment to Article 24-H of the Telecommunications law, which creates an unlimited net-neutrality principle, with no distinction between legal and illegal content.**

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, website, app, or service 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 IPRs 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 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.

- **Adopt other needed legal reforms to effectively fight piracy in Chile.**

**Injunctive Relief:** 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 that ensures ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities. Article 85R of Law No. 17,336 of August 1970 on Intellectual Property (modified by Law No. 21,045 of November 3, 2017) 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 thwart 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 mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities, 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**

- **Avoid enacting legislative proposals on screen quotas that would discriminate against non-Chilean audiovisual works and would contravene the U.S.-Chile FTA.**

In January 2020, the Chamber of Deputies passed a bill adding a chapter on screen quotas to the Audiovisual Promotion Law, and the initiative awaits further debate. This bill 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)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2024 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 there was some slowing of momentum in 2023, in part due to continued disruptions from the COVID-19 pandemic. Persistent and evolving piracy, worsening market access concerns, some timing and deterrence issues in court cases, 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, as well as 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); and the elevation of certain elements of the three-step test into the law. While these developments are laudable, the implementing measures of this law and prior 2019 Opinions, as well as new draft judicial interpretations must be fully and properly implemented. Unfortunately, the amendments did not include several critical reforms, including extending the term of protection to match the international standard of at least 70 years and the adoption of a more effective online responsibility framework.

The Supreme People's Court (SPC) has steadily improved 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.

## **PRIORITY ACTIONS REQUESTED IN 2024**

### **Enforcement**

- Fully implement the *2019 Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*.
- Improve effectiveness of administrative enforcement by addressing repeat infringement and providing timely, consistent, and transparent administrative actions with prompt and efficient transfer of copyright cases from administrative to criminal authorities for investigation and prosecution.

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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/2024/01/Appendix-B-2024.pdf>.

- Improve the effectiveness of civil and criminal enforcement, including by issuing deterrent-level civil and criminal penalties against operators of piracy services, with sufficiently high damages to compensate rights holders and deter piracy.

### **Legal Reforms**

- Swiftly and effectively implement amendments to the Copyright Law, including by accelerating the formulation and promulgation of the new Regulations on Implementation of the Copyright Law (expected in late 2024), to ensure effective implementation relating to: protection of TPMs for both access and copying; narrowly interpreted exceptions to prohibition on circumvention; and the new public performance rights in China and the effective exercise and management of these rights in accordance with international best practices.
- Address shortcomings in China's Copyright Law relating to safe harbors from monetary liability for intermediaries and in its Criminal Law to ensure that criminal penalties are available for all online piracy on a "commercial scale."
- Fully implement the intellectual property rights (IPR) enforcement commitments of the U.S.-China Phase One Agreement.
- Fully implement the Judicial Proposals on Enhancing IP Protection and Serving Promotion of High-Quality Development of Film Industry.

### **Market Access**

- Abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content.
- Immediately and fully implement all the terms of the 2012 U.S.-China Film Agreement and fulfill the Phase One services purchasing obligations.
- Reconsider measures prohibiting foreign involvement in online publishing activities, allow distribution of audiovisual content on online video platforms, and increase the number of approvals for foreign video games to match the number of domestic approved video games.
- Refrain from extending China's burdensome content review regime to books intended for other markets and lift content review procedures for imported physical sound recordings.
- Repeal additional impediments to China's market for U.S. audiovisual content, including higher censorship standards, caps on online distribution of foreign films and TV dramas, burdensome documentation requirements, and investment restrictions.
- Adopt a voluntary, age-based classification system to help eliminate disparate treatment of U.S. content and ensure that China's content review process is transparent, predictable, and expeditious.

## **ENFORCEMENT**

- **Fully implement the 2019 Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines).**

Late in 2022, the China National Intellectual Property Administration (CNIPA) published a three-year Plan (replacing the prior 2020-2021 plan) implementing the *2019 Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, which were jointly released by the Office of the Chinese Communist Party's (CCP) Central Committee and the Office of the State Council in November 2019. CNIPA's plan specifies 114 measures related to intellectual property in six categories (with deadlines). The Plan contains items relevant 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, including lowering criminal thresholds; streamlining evidence processes; establishing a list of repeat infringers; and regulating websites to "remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information."

Moreover, China should separately define criminal violations regarding circumvention of TPMs or trafficking in circumvention technologies as noted in the *Guidelines*. As the world’s primary 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.

Additionally, two other measures will help advance the protection and enforcement of copyright, including measure 56, to “[p]ush 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, to “[f]urther 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 that 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 piracy devices (PDs, also known as illicit streaming devices or ISDs) that are ravaging copyright holders’ legal businesses and are mass exported from China. The fact that the entire Asia-Pacific Economic Cooperation (APEC) member community is considering soft-law approaches to this issue, and Singapore and Malaysia have enacted statutes and implemented them to crack down on local sales of the infringing activities of PD/ISD resellers, indicates that the Government of China can do more to tackle this problem; it is hoped the Three in One approach will be effective.

- **Improve effectiveness of administrative enforcement by addressing repeat infringement and providing timely, consistent, and transparent administrative actions with prompt and efficient transfer of copyright cases from administrative to criminal authorities for investigation and prosecution.**

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, the Entertainment Software Association (ESA) reports that in 2023 China ranked 6th 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. According to this same metric, China ranked 4th in the world for unauthorized file-sharing of console-based video games; however, the level of unauthorized file-sharing for mobile game titles decreased dramatically – bringing the country to a rank of 117<sup>th</sup> in the world in this category. Moreover, the music industry reports that 78% of surveyed users in China admitted to using unlicensed or illegal sources to listen to music.<sup>2</sup> 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.

In addition to illegal downloading and streaming of copyrighted content, online journal piracy remains a significant and persistent challenge. Given the unfortunate lack of deterrence in the marketplace, online platforms engaged in providing unauthorized copies of journal articles and academic textbooks continue to operate. These platforms host unauthorized PDF copies of academic monographs, edited collections, and textbooks and 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 unauthorized services even reach out to the customers of legitimate publishers pretending to represent those rights owners. Administrative enforcement measures are without lasting impact, as administrative authorities are unwilling to act against previously sanctioned entities unless the rights holder files a new complaint for the same infringing conduct. Rights holders must meet lengthy procedures involving repetitious and complicated evidentiary requirements. Pirated

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<sup>2</sup> International Federation of the Phonographic Industry (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).



print publications and compromised log-in credentials continue to be available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit textbooks advertise and sell the infringing copies. 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.

*Sci-Hub* and *Lib-Gen*, repositories of large volumes of pirated content, remain among the top sites 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.

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.

The emergence of these new technologies for enabling mass infringement, especially in the online and mobile environments, requires a vigorous enforcement response. China should provide in its legal system mechanisms that ensure Internet service providers (ISPs) can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.

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 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 Cultural Law Enforcement Administrations (CLEAs) and improving the mechanism between NCAC, the Ministry of Industry and Information Technology (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.

The NCAC should establish a mechanism with the MIIT and ISPs to shut down infringing sites operating without a business license, and the government should, consistent with the *Guidelines*,<sup>3</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."

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.

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<sup>3</sup> See, e.g., IIPA 2020 at 23 for additional information on the *Guidelines*, which were issued jointly by the Communist Party of China's Central Committee (CPCCC) and the State Council.

Additionally, NCAC should provide measures demonstrated effective in preventing or restraining infringement. Further, NCAC should be empowered to prevent platforms from imposing practical barriers to reporting infringements at scale – including burdensome formalities and limitations on the number of infringements that can be reported or processed. Administrative remedies have had limited effect to curb infringement via unlicensed user uploaded content (UUC) platforms. Finally, improvements should be made for the prompt, more efficient, and transparent transfer of administrative complaints to the criminal authorities for investigation and prosecution.

- **Improve the effectiveness of civil and criminal enforcement, including by issuing deterrent-level civil and criminal penalties against operators of piracy services, with sufficiently high damages to compensate rights holders and deter piracy.**

Pirate streaming sites, cyberlockers, IPTV services, and Piracy-as-a-Service (PaaS) providers accessed globally yet operated from within China, continue to be a growing problem. China enforcement agencies have taken limited enforcement actions in recent years. A more comprehensive enforcement strategy coupled with strong deterrent penalties are required to reduce the major piracy services sourced from China.

A small number of criminal enforcement actions, albeit two years ago, 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 (RMB1.5 million, approximately US\$214,286) 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>4</sup> More recently, on November 3, 2023, the Supreme People's Court announced “representative” cases involving IP protection of movies, including two criminal cases (the *Yyets* case and one other case referred by MPA and local rights holders) and six other civil IP litigations.<sup>5</sup>

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 5,000 of these entities own 70,000 screens and 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. Several Chinese rights holders have an active litigation strategy against such “mini-VOD” locations. China should also reduce documentation requirements to commence civil action.

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<sup>4</sup> In this case, it was confirmed by the Shanghai No. 3 Intermediate People's Court that since 2018, this pirate service provided unauthorized streaming and downloading of 32,824 movies and TV dramas (most were foreign titles with Chinese subtitles) through the website and apps, accumulating 6.83 million members. The website's illegal business volume reached RMB12 million (~US\$1.7 million). In 2021, the principal of the piracy service was sentenced to imprisonment of three and a half years, as well as fine of RMB1.5 million (~US\$212,000); the illegal gains were confiscated. Fourteen additional defendants were also punished by the lower people's court.

<sup>5</sup> See The Supreme People's Court Release of Representative Cases Involving Film Intellectual Property Protection, available at [https://mp.weixin.qq.com/s/Dn4\\_zeFw5QsKDmTPD2p6Og](https://mp.weixin.qq.com/s/Dn4_zeFw5QsKDmTPD2p6Og), November 3, 2023. The cases were announced by the Court at the 1st IP Protection Forum of the Film Festival of the Golden Rooster Awards and Hundred Flowers Awards and in the media. This represents the first time that the SPC has presented representative cases only focusing on the IP protection of movies. According to the SPC, from 2013 to 2022, the people's courts across the county concluded 11,600 civil litigations in the first instance involving IP protection of movies. The SPC reported that in past five years, movie-related civil lawsuits increased by an average of 7.46% year-on-year, while common civil lawsuits annually increased 2.73% during the same period. Both criminal cases highlighted by the SPC as “representative” were initiated by MPA, along with local industry partners. The first criminal case mentioned was against an illegal camcording syndicate that camcordered over 100 international and local theatrical films and sold the camcordered copies to VOD mini cinemas during the period from June 2016 to February 2019. In 2020, four defendants who played key roles in the piracy syndicate, were sentenced by the Yangzhou Intermediate People's Court to imprisonment of between four and six years and fines ranging from RMB600,000 (~US\$85,000) to RMB5.5 million (US\$777,000); the illegal gains were confiscated. The second criminal case was the case involving the *Yyets.com* (*rrys.tv*, *zimuzu.tv*) piracy services, discussed above.

Recently, the Kunshan Intermediate People's Court found two defendants who illegally sold game plugins for an online game guilty of copyright infringement and sentenced them to four years in prison with fines of RMB 20M (~US\$2.8 million). In May 2023, the Yangzhou City Intermediate People's Court found that the defendants committed the crime of copyright infringement related to a major online game from a U.S. publisher. The Court sentenced them to three years in prison, suspended for three years, with total fines of RMB 700K (~US\$99,000). Earlier in October 2022, the Sucheng Lower People's Court sentenced the principal offender who developed and operated a copycat online game private server to four years and four months in prison with a fine of RMB 6.5M (~US\$900,000) for copyright infringement.

In April 2023, the Public Security Bureau (PSB) in Jiangsu released a model case against illegal sales of cracked device chips (used to crack game consoles, build virtual operating systems, and run pirated console games downloaded from the network) and pirated console games downloading services. The Xuzhou Intermediate People's Court sentenced six defendants to three years in prison for copyright infringement, with probation applicable, and imposed fines ranging from RMB 200K (~US\$28,000) to RMB 6M (~US\$850,000), forfeiting illegal gains of RMB 3.04M (~US\$430,000). In the 2022 Guangzhou Model Cases of Combating Infringement and Piracy (released in May 2023), the Guangzhou PSB cracked a major criminal gang of infringement of game copyrights. Without the copyright holders' consent, the criminal gang copied a variety of software in the main board of the infringing game consoles and established a company to engage in the production, warehousing, and sales of the game consoles, sold throughout the country through e-commerce platforms. The case is still pending.

The Xuzhou police and 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. As a result of these actions, one hacker programmer, two manufacturers, and seven distributors and retailers were raided.

A positive criminal action against digital music piracy involved *Hires.cn*, a UUC platform that offered, in exchange for payment of credits, unlicensed music downloads to users. The infringing downloads were primarily shared by a small group of users controlled by the website operator. The Chongqing PSB seized 25 TB of infringing music content. This included 1,500 verified infringing sound recordings. In April 2023, the defendant was found guilty of copyright infringement and was sentenced to three years' imprisonment, suspended for four years. A fine of RMB550,000 (~US\$78,000) was imposed and the illegal proceeds of over RMB 500K (~US\$70,500) were confiscated in accordance with the law. In the area of physical piracy, in April 2022 the Anhi Chuzhou PSB, in cooperation with Guangzhou PSB, raided five factories that produced 1.2 million infringing vinyl products (as well as other physical formats). Although a positive development, this highlights the scale of China as the source of infringing physical products.

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 and ensure timely enforcement of monetary damages. Also, the same companies that operate services like *RenRen*, against which rights holders have sought relief in China, also 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 PDs, 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 IPTV piracy landscape. (Indeed, enforcement actions taken against distributors in Singapore and Malaysia, after new laws were enacted and went into force in both countries, as well as in Taiwan in Q3 2023, indicate the need for China, as the source of the problem, to take action to fix it.)

Civil and criminal enforcement against copyright infringement involves challenges for IP rights holders, including, among other things, costly and burdensome civil litigation requirements contrasted with low damages

awards. The combined result of such “high costs and low benefits” of bringing civil cases is to force rights holders to rely on administrative and criminal enforcement rather than civil litigation. While the situation might improve with the recent introduction of “Internet Courts” in several cities, for the time being, the effectiveness of copyright enforcement in China remains dependent on the action of the State in taking up rights holders’ administrative and criminal complaints. In some industries, notice-and-takedown procedures on major platforms have proven ineffective at addressing large-scale piracy abuses on their services. Platforms are frequently reluctant to take action against infringing activity occurring on the platform and some have onerous requirements to file takedown notices (including requirements to register IP or entities before being able to file takedown notices); opaque or inconsistent approaches to taking action on takedown notices, and/or extended delays in processing takedown notices. 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.

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.

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 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.

Despite some of the mentioned shortcomings of the civil enforcement system, Chinese courts have also issued judgments with some notable improvements in damages awards and recognition of copyright. 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 that recognized that the map of a multiplayer online battle arena (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. China’s recent accession to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, which entered into force on November 7, 2023, may hopefully address one of the largest remaining hurdles.

## **LEGAL REFORMS**

- **Swiftly and effectively implement amendments to the Copyright Law, including by accelerating the formulation and promulgation of the new Regulations on Implementation of the Copyright Law (expected in late 2024), to ensure effective implementation relating to: protection of TPMs; narrowly interpreted exceptions to prohibition on circumvention; and the new public performance rights in China and the effective exercise and management of these rights in accordance with international best practices.**

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>6</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. 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 but have not yet been implemented. IIPA encourages China to expedite the process to revise the Regulations 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 ensure effective implementation and application of these new performance rights, including the protection of foreign sound recordings, ensuring the effective exercise and management of these rights in accordance with international best practices, and providing an adequate framework for tariffs that reflect the economic value of the use of the rights in trade.

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 TRIPS Agreement into the law to appropriately confine exceptions and limitations. China should ensure all exceptions to and limitations on copyright protection in the Copyright Law 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 that 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

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<sup>6</sup> See, -, IIPA 2022.

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, perform 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, rights holders still suffer from a lack of a mechanism that ensures ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities.

- **Address shortcomings in China’s Copyright Law relating to safe harbors from monetary liability for intermediaries and in its Criminal Law to ensure that criminal penalties are available for all online piracy on a “commercial scale.”**

Despite these improvements, the Copyright Law as amended did not address several deficiencies in China’s legal framework, including matching the international standard of at least 70 years of protection for sound recordings and works, including audiovisual; introducing mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities; improving available online liability rules and notice and action provisions, and aligning the scope of the making available to the public right with international standards by removing the “server test,” which requires that the act of making available occurs via copies stored in China.

First, 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 piracy services may be held liable for IP infringements carried out by third parties using their services or networks. Furthermore, the “server principle” that has been adopted is causing enforcement problems. While Chinese enforcement authorities (including courts) have taken action against infringing websites that are hosted outside China, they have done so only limited to instances in which the act of making available occurs via copies stored in China, thus limiting rights holders’ abilities to enforce against sites with copies stored outside of China.

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 legal basis for mechanisms that ensure ISPs can impose effective relief to address infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities, especially in cases where the sites are operated outside of China or where the identities or locations of the website owners are unknown.

Previously, a provision to provide mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities, had been removed from an earlier version of the Copyright Law Amendment (in 2012). The recorded music industry continues to lobby the government to provide such mechanisms through separate regulations. In January 2021, the Cyberspace Administration of China (CAC) released the draft Measures on Administration of Internet Information Services (revised draft for public consultation) that appeared to stipulate a similar mechanism, although further clarifications were required to ensure that rights holders could request the relevant governmental agencies to require Internet access providers to prevent access to infringing websites (and other online services). However, there has been no further movement on the draft by the CAC.

The Copyright Law should also 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, which would build upon the Provisions by the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Communication through Information Network. Further, it should be clarified that, upon obtaining knowledge of infringement (including through a notice) or otherwise becoming aware of circumstances from which infringement is apparent, intermediaries should 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. Marketplaces should be required and all relevant intermediaries encouraged to institute a "know your business customer" (KYBC) policy 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.

Finally, Chinese law still falls short of international norms and standards regarding the term of protection for sound recordings and other works, including audiovisual. A minimum term of at least 70 years from publication for the protection of sound recordings and works, including audiovisual, has become the international standard, yet China's Copyright Act still provides for only 50 years of protection.

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>7</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 WTO TRIPS Agreement by revising the criminal threshold (which can now more flexibly be met through a combination of numerical and monetary thresholds) 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>8</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 the intellectual property rights (IPR) enforcement commitments in the U.S.-China 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 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,

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<sup>7</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 ten years imprisonment for the crime of copyright infringement and from three years to five years imprisonment for the crime of selling infringing copies.

<sup>8</sup> China should clarify that a single episode of a television program counts as one copy toward the threshold.

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 hopefully 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.

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. 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. 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.

- **Fully implement the Judicial Proposals on Enhancing IP Protection and Serving Promotion of High-Quality Development of Film Industry.**

Most recently, in November 2023, the SPC released new Judicial Proposals on Enhancing IP Protection and Serving Promotion of High-Quality Development of Film Industry. The Proposals, supported by multiple associations of the local film industry, call for the enhancement of IP protection for a specific industry (film). They include four key objectives for the film industry: (i) accelerate accomplishment of high-quality development of film industry under the rule of law, and advocate and execute industry practices that encourage innovation and creation; (ii) intensify copyright awareness, strictly implement the Copyright Law, improve protection of film copyright and copyright-related rights, including respecting the rights of screen writers, directors, cinematographers, lyricist, composers, and performers; (iii) utilize technical measures of content protection (for example, block chain and digital water marking) and innovate the license system to reduce infringement from the source; and (iv) actively and widely publicize IP protection during the process of disseminating films, for example, through industry forums and public service advertisements with the theme of anti-piracy and anti-camcording.

## **MARKET ACCESS**

- **Abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content.**

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, and publications.<sup>9</sup> After the case concluded in 2009, China eased several market access restrictions,<sup>10</sup> but many core

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<sup>9</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/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds363/ab/r/\\*%20not%20rw\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds363/ab/r/*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#).

<sup>10</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



activities of copyright industries remain restricted or prohibited. For example, the Negative Investment List, revised in 2021, 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 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.

- **Immediately and fully implement all the terms of the 2012 U.S.-China Film Agreement and fulfill its Phase One services purchasing obligations.**

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 74,225 movie screens as of mid-2023—most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen. IIPA urges China to meet its trade commitments and open its marketplace to U.S. producers instead of continuing down its current protectionist path, which may have resulted in a contracting box office.<sup>11</sup> 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.

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>12</sup> Unfortunately, more than eleven 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 China’s 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 comparable markets and the international norm. 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 a large number of domestic productions (which was 531 in 2022),<sup>13</sup> as well as around 75,000 theatrical screens in 2021.<sup>14</sup> In the case of “flat fee films,” which are imported by private distributors outside of the box

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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>11</sup> Nancy Tartaglione, China Box Office Drops To \$4.4B In 2022 Amid Covid Swings, Lack Of Product, January 2, 2023, available at <https://deadline.com/2023/01/china-box-office-2022-covid-avatar-hollywood-1235209768/>.

<sup>12</sup> According to a 2012 White House Press Release:

“This agreement with China will make it easier than ever before for U.S. studios and independent filmmakers to reach the fast-growing Chinese audience, supporting thousands of American jobs in and around the film industry,” said Vice President Biden, who spent the day in the Los Angeles area with Vice President Xi Jinping of China. “At the same time, Chinese audiences will have access to more of the finest films made anywhere in the world.”

See <https://obamawhitehouse.archives.gov/the-press-office/2012/02/17/united-states-achieves-breakthrough-movies-dispute-china>.

<sup>13</sup> Statista, Film industry in China - statistics & facts, August 31, 2023, available at <https://www.statista.com/statistics/260392/number-of-feature-films-produced-in-china/>.

<sup>14</sup> Id.

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 nine films theatrically released in the country in 2021 bringing in revenue of US\$10.68 million, which is 0.15% of the year's total share of the theatrical box office revenue. Just nine independent theatrical releases in China represents the lowest percentage of slots ever allocated for independent films recorded by the Independent Film and 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 CFA, which replaced State Administration of Press, Publication, Radio, Film and TV (SAPPRFT) in 2018, still permits only one film importer, the China Film Group (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 determines the release dates and length of theatrical runs of foreign films, often restricting the ability of U.S. producers to obtain full commercial value of films.

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 for almost seven 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.

- **Reconsider measures prohibiting foreign involvement in online publishing activities, allow distribution of audiovisual content on online video platforms, and increase the number of approvals for foreign video games to match the number of domestic approved video games.**

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>15</sup> Furthermore, when China revised the Foreign Investment Catalogue in June 2019, the country lifted certain

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<sup>15</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).

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.

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 the 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 SAPPRFT proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content. 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 approved fewer than ten video games from American publishers since June 2021. China should increase the number of approvals for foreign video games to match the number of domestic approved video games.

- **Refrain from extending China’s burdensome content review regime to books intended for other markets and lift content review procedures for imported physical sound recordings**

China appears to now be applying its content review regime to books intended for other markets. Books merely being printed in China but otherwise intended for distribution in other markets now also appear subject to China’s burdensome content review regime. Books that were previously being printed in and exported from China without issue appear to be subject to the more stringent application of the regime. Extending the reach of its burdensome content review regime to books merely being printed in the country but otherwise intended for distribution in other markets places an arbitrary and unjustified discriminatory burden on foreign publishers, who, for decades, have used printing partners in China, and is arguably a disguised restriction on international trade.

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.

- **Repeal additional impediments to China’s market for U.S. audiovisual content, including higher censorship standards, caps on online distribution of foreign films and TV dramas, burdensome documentation requirements, and investment restrictions.**

China continues to introduce additional impediments to its market for U.S. audiovisual content, limiting the U.S. industry’s ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market. In June 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 formalizes 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. While these regulations have not been officially promulgated, provisions to further tighten the content review process for imported content have been implemented, and IIPA is concerned that industry-wide application of the genre-based restrictions began in early 2020, in particular for animation, further exacerbating the uncertainty and uneven playing field faced by U.S. audiovisual companies.

In July 2023, the revised Anti-Espionage Law, first introduced in November 2014, came into effect. The revisions significantly broaden the scope of what constitutes “espionage” and give the relevant authorities new powers to investigate and prosecute suspected espionage activities. Many of these provisions were already present in other existing rules, such as the Anti-Espionage Law’s Implementing Rules, released in 2017 which dealt with enforcement procedures; and the Provisions on Anti-Espionage Security Precautions from 2021, which have now largely been copied in the revised Anti-Espionage Law. Still, the consolidation of these amendments into a single, powerful Anti-Espionage Law with broad applicability is significant. The most notable change is the broadened definition of “espionage,” which can now involve the collection, storage, or transfer of any information deemed to be relevant to national security interests, including “documents, data, materials, or items.” The definition was previously more limited to classified information and state secrets. The broadened definition potentially raises uncertainties even under friendly collaborations.

- **Adopt a voluntary, age-based classification system to help eliminate disparate treatment of U.S. content and ensure that China’s content review process is transparent, predictable, and expeditious.**

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. Such a system will attract investment and boost China’s potential as a regional film and television production hub.

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. A March 2016 Notice allowing refunds from the Film Development Fund to cinemas that report favorable annual box office receipts from the screening of Chinese films incentivizes cinemas to screen more Chinese domestic films, further disadvantaging the competitiveness of foreign films in the Chinese market. 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 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.

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

As noted above, China is still not in full compliance with the WTO’s market access case (DS 363), and many of the market access barriers discussed above raise concerns under China’s international obligations, including under the General Agreement on Trade in Services (GATS), TRIPS Agreement, and the Phase One Agreement (including

Article 1.2 to ensure fair and equitable market access to persons that rely upon IP protection).<sup>16</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>16</sup> For example, in the 2022 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 55, Report available at <https://ustr.gov/sites/default/files/2023-02/2022%20USTR%20Report%20to%20Congress%20on%20China's%20WTO%20Compliance%20-%20Final.pdf>.

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2024.<sup>1</sup>

**Executive Summary:** For both Indian and foreign-based creative industries, the promise of continued growth is threatened by a variety of factors including piracy; criminal enforcement difficulties; 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; inadequate terms of protection; as well as collective management issues and sub-par tariffs. India's copyright legal framework is missing key provisions, including with respect to technological protection measures (TPMs) and rights management information (RMI). IIPA urges the Government of India to pursue the necessary legal reforms to fully comply with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties).

With regard to the proposed Digital India Act, IIPA urges the Government of India to reform its online liability framework concerning infringing content so that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities. Further, IIPA is concerned about the need for effective legal remedies against piracy services even when those services do not directly infringe but play an important contributory role. Stronger enforcement could transform India into a more engaging business environment for the creation and dissemination of copyrighted works.

Criminal enforcement against Internet piracy continues to be challenging at both the national and state levels. 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. While criminal enforcement in India is lacking, judicial enforcement, particularly through the Delhi High Court, has been successful. More recently, the Parliamentary Standing Committee on Communications and Information Technology, as well as the Parliamentary Standing Committee on Commerce, have continued to blame weak enforcement for the high levels of piracy in India.

Despite the difficulties, 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 (as well as a previous erroneous interpretation of the current provision) 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 and interpretation is undermining the creative market in India and should be affirmatively rejected.

## **PRIORITY ACTIONS REQUESTED IN 2024**

### **Enforcement and Administrative Actions**

- Strengthen and standardize the national intellectual property (IP) enforcement regime through a national central authority, as suggested by the Parliamentary Standing Committee on Commerce.
- Establish a uniform, state-level cybercrime law (to include IP crimes) and enforcement procedures, as well as state-level IP crime units across the country, and strengthen existing state-level IP crime units, as recommended in the National IPR Policy.

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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/2024/01/Appendix-B-2024.pdf>.

- Ensure speedy takedown of infringing content through the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (2021 IT Rules), updated April 2023.
- Provide commercial certainty in the statutory licensing and rate-setting process in India, including Section 31D Royalty Rates.
- Re-register Phonographic Performance Limited India's (PPL) operating license to ensure the proper collective management of producers' "performance" rights.
- Effectively enforce the Cinematograph (Amendment) Act 2023, which has amended the Cinematograph Act, 1952 to criminalize camcording.

### **Legal Reforms**

- Reject the proposal to amend Section 31D of the Copyright Act to broaden the statutory license to cover all Internet transmissions of sound recordings, musical works, and literary works, which is inconsistent with India's international obligations, and rescind the 2016 Office Memorandum erroneously interpreting the current provision to include such transmissions.
- Amend the Copyright Act to fully comply with the WIPO Internet Treaties and ensure any ongoing review of copyright law and legislation relating to online liability is used as an opportunity to bolster, and not weaken, existing IP protections.
- Reform the Information Technology Act, 2000 (IT Act), particularly if India proceeds with its proposed Digital India Act (DIA) to no longer require notification from a government authority for an Internet Service Provider (ISP) to take down infringing content and to reduce the 36-hour deadline for removal.
- Expressly include IP infringement as a basis for mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities under the IT Act or under the 2021 IT Rules.

### **Market Access**

- Eliminate local body entertainment taxes (LBET) imposed over and above the national Goods and Services Tax (GST).
- Eliminate high tariffs on video game software and hardware.
- Agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.
- Remove onerous sets of economic regulations on the broadcast sector.
- Remove Direct to Home (DTH) Guidelines that prohibit DTH operators from entering exclusive contracts with any broadcaster.
- Remove foreign ownership restrictions, including foreign direct investment (FDI) restrictions for Indian news channels.
- Reject calls to mandate providers to pay a network usage fee to ISPs.

## **ENFORCEMENT AND ADMINISTRATIVE ACTIONS**

- **Strengthen and standardize the national intellectual property (IP) enforcement regime through a national central authority, as suggested by the Parliamentary Standing Committee on Commerce.**

India is hindered by widespread piracy and a challenging enforcement environment, both at the National and State levels. 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. The Delhi High Court Intellectual Property Rights Division Rules entered into force in February 2022, followed by similar rules issued in the Madras High Court in April 2023. The rules establish an IP Division in the High Courts of Delhi and Chennai that seeks to ensure that the judges hearing IP cases are well versed in intellectual property 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.

Related to civil enforcement, the seminal 2019 Delhi High Court decision in *UTV Software Communication Ltd. V 1337x.To and Ors.*<sup>2</sup> established permanent orders to disable access to piracy websites as a viable remedy to curtail online infringement in India. The decision has been followed by many recent decisions disrupting or disabling thousands of domains with improved speed of implementation and coverage. Later that year, the Delhi High Court made these orders “doubly dynamic,” meaning variations of the same piracy service can be blocked quickly and efficiently while the case is pending.<sup>3</sup> In 2022, rights holders achieved a new milestone in India, obtaining orders allowing for a domain to be blocked based on its association with an already-blocked site of the same name or brand.<sup>4</sup> This “pirate brand” order 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. Prominent sites like *Fmovies.to*, *Yts.mx*, and *movierulz* have been blocked in India and deemed “pirate brands.”

In June 2022, the Delhi High Court granted an interim injunction in favor of rights holder plaintiffs directing 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>5</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 considering the large-scale infringement occurring via short form video apps.

Rights holders further achieved an order to block a cyberlocker known as *mixdrop*,<sup>6</sup> and the Court's reasoning released in its written judgment in June 2023 is helpful both in its definition of a cyberlocker as an illegal ecosystem by which users can profit from piracy through incentive programs, and in its finding of liability against the cyberlocker operators for contributing to the infringement of third-party users of the cyberlocker. Further in January 2023, for the first time the Delhi High Court ordered ISPs to block access to twenty stream-ripping sites.<sup>7</sup> The latest positive precedent from the Delhi High Court in August 2023 includes domain suspension and “Right of Information” (ROI) orders from domain registrars.<sup>8</sup>

In 2023, further precedent was established in *Universal City Studios LLC & Ors vs. dotmovies.baby & Ors.*, CS(COMM) 514 of 2023, whereby the court ordered domain registrars to “lock and suspend” domains for which access is ordered to be disabled, and required registrars to provide to plaintiffs “any details relating to the registrants of the said domain names including KYC, credit card, mobile number, etc.”<sup>9</sup> Also in 2023, the Delhi High Court granted an interim injunction restraining over 12,000 websites on the grounds of unauthorized streaming and broadcasting of cricket matches being conducted between India and Sri Lanka.<sup>10</sup> The Court opined in the judgment that it may be useful for the legislature to formulate a policy by which such disputes may be addressed so it will not take up the time

<sup>2</sup> See *UTV Software Communication Ltd. v 1337x.To et Ors*, April 10, 2019, available at [https://indiankanoon.org/doc/47479491/?\\_cf\\_chl\\_tk=2Fw0s2GRI5l\\_czPzh7h1hTkdcT9UJfPxl\\_uWUJe3Hq-1674682018-0-qaNycGzNCqU](https://indiankanoon.org/doc/47479491/?_cf_chl_tk=2Fw0s2GRI5l_czPzh7h1hTkdcT9UJfPxl_uWUJe3Hq-1674682018-0-qaNycGzNCqU).

<sup>3</sup> See *Warner Bros. Entertainment Inc. v. Hindilinks4u.To.*, August 9, 2022, available at <https://www.casemine.com/judgement/in/64fde40ef6fa7f68ca49e182>.

<sup>4</sup> See *Universal City Studios LLC & Ors. v. Vegamovies.run & Ors.* CS (COMM) 265 of 2022, available at <https://indiankanoon.org/doc/106006995/>.

<sup>5</sup> See *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>.

<sup>6</sup> See *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>7</sup> See *Sony Music Entertainment India Private Limited & Ors. vs. YT1s.com & Ors.*, February 22, 2023, available at [https://dhcappl.nic.in/dhorderportal/GetOrder.do?ID=603/2023/1677228368072\\_25914\\_2023.pdf](https://dhcappl.nic.in/dhorderportal/GetOrder.do?ID=603/2023/1677228368072_25914_2023.pdf), and IFPI's press release: <https://www.ifpi.org/recording-industry-successful-in-first-ever-stream-ripping-blocking-case-in-india/>.

<sup>8</sup> See *Universal City Studios LLC & Ors vs. dotmovies.baby & Ors.*, CS(COMM) 514 of 2023, available at [https://www.livelaw.in/pdf\\_upload/universallcitystudiosllcandorsvdotmoviesbabyandors-487890.pdf](https://www.livelaw.in/pdf_upload/universallcitystudiosllcandorsvdotmoviesbabyandors-487890.pdf).

<sup>9</sup> See *Universal City Studios LLC & Ors vs. dotmovies.baby & Ors.*, CS(COMM) 514 of 2023, August 9, 2023, available at [https://www.livelaw.in/pdf\\_upload/universallcitystudiosllcandorsvdotmoviesbabyandors-487890.pdf](https://www.livelaw.in/pdf_upload/universallcitystudiosllcandorsvdotmoviesbabyandors-487890.pdf).

<sup>10</sup> See *Star India Pvt. Ltd v Live4wap.click & Ors.*, Delhi High Court, November 1, 2023, available at [https://dhcappl.nic.in/dhorderportal/GetOrder.do?ID=chs/2023/1673847075669\\_81907\\_2023.pdf](https://dhcappl.nic.in/dhorderportal/GetOrder.do?ID=chs/2023/1673847075669_81907_2023.pdf) (“This Court finds itself inundated with such suits, which keep cropping up every now and then. It may be useful for the Legislature to formulate some kind of a policy by which such disputes can avoid being taking up the time of the courts.”)



of the courts.<sup>11</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.

Similar progress, unfortunately, cannot be reported with respect to the publishing industry. Sci-Hub, an adjudged piracy site, continues to provide access to millions of infringing copies of scientific, technical, and medical journal articles in the country. An application for injunctive relief against the site remains unavailing now three years since the claim was filed by STM publishers.

India is also home to pirate infrastructure providers that provide the backbone for piracy turn-key solutions that are used worldwide, such as *WHMCS Smarters*.<sup>12</sup> Indian law still does not expressly address Piracy-as-a-Service (PaaS). It should be clarified that the commercial provision of middleware to enable, with knowledge, piracy sites and services is actionable, and IIPA encourages the government to act against such services.

As piracy trends remain troubling, more must be done to fight piracy overall, including ensuring pirates cannot simply circumvent blocking orders by changing domains. In addition to mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis upon rights holders' applications to appropriate authorities, the Motion Picture Association (MPA) and the International Federation of the Phonographic Industry (IFPI) are engaged in search engine delisting with Google, which has been shown to lend increased efficacy to the former. IIPA urges the Government of India to build on these positive developments by strengthening and standardizing the national IP enforcement regime through a national central authority to coordinate with state-level enforcement units, as suggested by the Parliamentary Standing Committee on Commerce.

- **Establish a uniform, state-level cybercrime law (to include IP crimes) and enforcement procedures, as well as state-level IP crime units across the country, and strengthen existing state-level IP crime units, as recommended in the National IPR Policy.**

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 and 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>13</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.

The Telangana Intellectual Property Crime Unit (TIPCU), which launched in 2016, has not been as active recently. The Maharashtra IP Crime Unit (MIPCU), formerly the Maharashtra Cyber Crime Unit (MCDU), 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 known significant 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. Enforcement in India needs consistency, which entails establishing a uniform, state-level cybercrime law (to include IP crimes) and enforcement procedures and state-level IP crime units across the country.

An important decision was delivered by the Indian Supreme Court in *Knit Pro International v State of Delhi* (2022). In May 2022, the Supreme Court of India held that offenses under Section 63 of the Copyright Act, 1957 are

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<sup>11</sup> *Id.*

<sup>12</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.

<sup>13</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)).

cognizable and non-bailable offenses. 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 jurisdiction. However, it remains to be seen whether police officials in different states leverage the Supreme Court's ruling and pro-actively act against piracy-related crimes, and whether trial court judges correspondingly treat piracy-related crimes more seriously. IIPA urges the Ministry of Commerce and Industry to analyze and, as necessary, seek to amend, any penal provisions or ancillary provisions in the Copyright Act that may still lead to conflict with this important Supreme Court judgment.

However, with copyright infringement remaining a low priority, the greater challenge involves investigation and arrest. IIPA urges the Indian government to better prioritize IP crimes, and in addition, mobilize to address middleware services and other PaaS actors and to modernize its laws on secondary liability, knowledge, and constructive knowledge. 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, 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. While criminal copyright infringement falls under a national criminal code, cybercrime enforcement and related proceedings fall upon the individual states.

IIPA 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, including on mobile devices; (iii) India should establish a centralized IP crime unit within the CBI's Cyber Crime Detective Unit; (iv) India should focus on training prosecutors and police officers on the seriousness of IP offenses and their links to organized crime; (v) India should encourage greater cooperation and cross-training between national and state law enforcement agencies and the creative industries; and (vi) India should strengthen existing state-level IP crime units, as recommended in the National IPR Policy.

- **Ensure speedy takedown of infringing content through the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (2021 IT Rules), updated April 2023.**

The 2021 IT Rules were updated in April 2023 to require all intermediaries to appoint "Grievance Officers" and to remove copyright infringing content "as expeditiously as possible and shall be resolved within seventy-two hours of such reporting" to the Grievance Officer. The Indian government has now made it theoretically possible for pirated content distributed via an intermediary such as Telegram to be removed at an administrative level, without requiring rights holders to involve the courts, but whether this is being implemented in practice is unclear. Further, the time limits specified for such removals are too long and unhelpful for rights holders.<sup>14</sup>

If an intermediary does not respond to a takedown request within 72 hours, the rights holder may appeal to the Grievance Appellate Committee, formed by the Ministry of Electronics and Information Technology (MeitY). The Committee has up to 30 days to reach a decision. Further, the Rules refer to content removal, not shutting down an intermediary's operations (the latter is possible only in cases of an "emergency nature," and requires a senior government official, of the rank of Joint Secretary, writing a report to the MIB Secretary). IIPA urges the Government of India to ensure speedy takedown through these Rules.

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<sup>14</sup> See PIB Delhi, Ministry of Electronics & IT, *Three Grievance Appellate Committees (GACs) Notified on the recently amended "IT Rules 2021*, January 28, 2023, available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1894258>.

- **Provide commercial certainty in the statutory licensing and rate-setting process in India, including Section 31D Royalty Rates for Radio Broadcasts.**

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 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.

- **Re-register Phonographic Performance Limited India’s (PPL) operating license to ensure the proper collective management of music 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 pertaining to music 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 music rights in India. The lack of accreditation for PPL India is causing confusion in the market and, worse, encourages users to avoid obtaining licenses for their uses of recorded music. On October 4, 2023, the DPIIT notified the receipt of an application from PPL for registration as a Copyright Society under section 33 of the Copyright Act, 1957.

- **Effectively enforce the Cinematograph (Amendment) Act 2023, which has amended the Cinematograph Act, 1952 to criminalize camcording.**

Unauthorized camcording of films is an ongoing challenge for rights holders in India, and criminal referrals to date against suspects have unfortunately not resulted in meaningful steps to deter such activities. The passage of the Cinematograph (Amendment) Bill, 2023, amended the Cinematograph Act, 1952 and explicitly criminalizes camcording.<sup>15</sup> The Parliamentary Standing Committee on Communications and Information Technology, which identified weak enforcement at the state level as the major reason for the proliferation of camcording in India, recommended this change. IIPA urges the Government of India to enforce the Cinematograph (Amendment) Act to address the problem of unauthorized camcording in cinemas.

On November 3, 2023, the MIB announced that it established an administrative takedown mechanism, not under the Copyright Act, but instead under Sections 6AB and 7(1B)(ii) of the Cinematograph Act.<sup>16</sup> As of November 2023, the MIB has authorized 12 officers in nine cities<sup>17</sup> (“Nodal Officers”) to receive complaints of copyright

<sup>15</sup> The Cinematograph Act, 1952 explicitly criminalizes camcording and makes 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 and introduced penalties against camcording. This law is a step in the right direction to deter content theft. The Cinematograph (Amendment) Act also imposes penalties higher than those specified in the Copyright Act, 1957. Camcording will now be punishable by imprisonment of between 3 months to 3 years and a fine of between INR 3 lakhs (US\$3,640) to up to 5% of the audited gross production cost.

<sup>16</sup> Section 6AB of the Cinematograph Act, 1952 provides that no person shall use or abet the use of an infringing copy of any film to exhibit to the public for profit at a place of exhibition that has not been licensed under the Act or in a manner that amounts to the infringement of copyright under the provisions of the Copyright Act, 1957. Section 7(1B)(ii) provides that the Government may take suitable action for removing or disabling access to such an infringing copy exhibited or hosted on an intermediary platform in a manner in contravention to Section 6AB.

<sup>17</sup> The nine cities are Delhi in Northern India; Mumbai in Western India; Bangalore, Hyderabad, Chennai, and Trivandrum (Kerala) in Southern India; and Calcutta, Cuttack (Odisha) and Guwahati (Assam) in Eastern India.

infringement (under the Cinematograph Act) against intermediaries. It remains to be seen if this mechanism will be effective, but IIPA notes several concerns with the process. For example: (i) the complaint form requires copyright holders to list infringing URLs; (ii) the complaint form requires copyright holders to list “films” being infringed, rather than “content,” which may exclude live or recorded sports broadcasts; and (iii) no timelines are specified. Further, the application can be brought by any third party with only discretionary ability for the Nodal Officer to hear from the applicant with proof they have a proper interest. This could subject the process to abuse.

## **LEGAL REFORMS**

- **Reject the proposal to amend Section 31D of the Copyright Act to broaden the statutory license to cover all Internet transmissions of sound recordings, musical works, and literary works, which is inconsistent with India’s international obligations, and rescind the 2016 Office Memorandum erroneously interpreting the current provision to include such transmissions.**

Following the 2012 revision to the Copyright Act, which created a statutory license for the use of musical works and sound recordings for radio and television broadcasting, 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 that Section 31D applies only to television and radio broadcasting and not Internet transmissions.<sup>18</sup> In October 2023, the Division Bench of the Bombay High Court reaffirmed the crucial point made by the single judge in the Bombay High Court’s findings that Section 31D of the Indian Copyright Act does not cover Internet broadcasting.<sup>19</sup>

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>20</sup> Since then, the Government of India has regularly convened stakeholder roundtables to raise the matter, including as recently as November 2023, 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.

- **Amend the Copyright Act to fully comply with the WIPO Internet Treaties and ensure any ongoing review of copyright law and legislation relating to online liability is used as an opportunity to bolster, and not weaken, existing IP protections.**

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

<sup>18</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>19</sup> See *Wynk Ltd. and Ors. v. TIPS Industries Ltd.*, (Division Bench) (Commercial Appeal No. 424 of 2019) (Bombay High Court), October 20, 2023, available at <https://spicyip.com/wp-content/uploads/2023/10/Wynk-v.-TIPS-31D.pdf>.

<sup>20</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>.

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:

- Provide in its legal system mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.
- Re-insert Technological Protection Measures and call for faster notice-and-takedowns.
- 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) – This section 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.
  - 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;
- Providing civil and criminal penalties for violating TPM provisions and for the unauthorized removal of RMI.
- 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 ensure it is limited to lawful sources, among other things.
- Chapter V—As applicable, increase the standard term of protection from life of the author plus 60 years, to life of the author plus 70 years to meet contemporary international standards of protection, and increase the term of protection for sound recordings 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.

Moreover, in August 2023, the Indian Parliament passed the Jan Vishwas (Amendment of Provisions) Bill, 2022. The bill aims to amend forty-two Acts including the Copyright Act to decriminalize certain offences, reduce the compliance burden on individuals and businesses, and to ensure ease of doing business. The Bill proposes the omission of section 68 of the Copyright Act, which provides for penalty for making false statements for the purpose of deceiving or influencing any authority or officer in the execution of the provisions of the Copyright Act.

IIPA urges the Government of India to amend the Copyright Act to fully comply with the WIPO Internet Treaties and to ensure that any ongoing review of copyright law and legislation relating to online liability is used as an opportunity to bolster, not weaken, existing IP protections.

- **Reform the Information Technology Act, 2000 (IT Act), particularly if India proceeds with its proposed Digital India Act (DIA) to no longer require notification from a government authority for an Internet Service Provider (ISP) to take down infringing content and to reduce the 36-hour deadline for removal.**

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.

In June 2022, 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 (DIA), which will replace the IT Act and will aim to ensure an open, safe, trusted, and accountable Internet for its users. IIPA urges the Government of India to use these reforms as an opportunity to improve the currently inadequate online liability framework in India.

On March 9, 2023, MeitY held a consultation to officially announce that the IT Act will be replaced with the new DIA. The bill is likely to review the intermediary safe harbor framework in India. The MeitY questioned if safe harbors should be applicable to all intermediaries and if there should be a categorization of intermediaries under the new Bill.

To resolve the situation with the online liability regime, the Indian government should use the ongoing introduction of the DIA to amend Section 79 of the IT Act 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 passive and neutral intermediaries that do not contribute to infringing activity; (ii) implement measures demonstrated effective in preventing or restraining infringement; (iii) require marketplaces and 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; and (iv) 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.

To this end, local media reports as of September 2023 indicate that MeitY may introduce a “safe harbor” certification mechanism in the anticipated DIA draft. Should MeitY replace the existing intermediary safe harbor protections with a licensing-like certification mechanism without appropriate protections and considerations for copyright law, infringing online platforms would have unfettered protection to violate the rights of copyright holders. The anticipated draft DIA is expected to be tabled before the parliament during the winter parliamentary session of 2023.

- **Expressly include IP infringement as basis for mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities under the 2021 IT Rules.**

The express inclusion of IP infringement as a basis for mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities under the IT Act or under 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. However, more progress is needed in tackling unlicensed services using alternative domain names, which is the most common practice.

## **MARKET ACCESS**

- **Eliminate local body entertainment taxes (LBET) imposed over and above national Goods and Services Tax (GST).**

In 2017, India rolled out a unified Goods and Services Tax (GST) nationwide. Cinema tickets are subject to a GST rate of between 12% and 18%, 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, Local Body Entertainment Taxes (LBETs) collected by state governments have been left out of the GST, prompting state governments (Tamil Nadu and Kerala) to attempt to tax entertainment products (particularly cinema tickets) over and above GST. LBETs 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 patchwork of high, differing tax regimes). IIPA urges India to subsume all local taxes on cinema tickets into the national GST system.

- **Eliminate high tariffs on video game software and hardware.**

The Government of India maintains 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.

- **Agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.**

The Government of India has expressed reservations about renewing the WTO e-commerce moratorium on customs duties for electronic transmissions. Without this moratorium, customs duties would likely raise prices for consumers, placing India out of step with regional and international best practices and stifling the growth of India's expansive market for creative digital content and related services. IIPA urges the Government of India to agree to a further extension of the WTO e-commerce moratorium.

- **Remove onerous sets of economic regulations on the broadcast sector.**

The Government of India regulates the uplink and downlink of satellite signals beaming into India. Foreign broadcasters are required to set up offices in India licensed by the government and must pay prescribed fees per channel beaming into India. More generally, India's Telecom Regulatory Authority (TRAI) imposes an onerous set of economic regulations on the broadcast sector, thus stifling innovation and hindering competition. For example, TRAI has issued tariff orders that prescribe price ceilings for channels that broadcasters bundle into bouquets and then charge to consumers (these orders were upheld by India's Supreme Court in 2018), creating regulatory uncertainty around pricing of pay-TV channels. Despite some helpful moves in late 2022, TRAI has not done away with prescriptive pricing and packaging restrictions and has not moved towards forbearance despite several requests from content providers and broadcasters. Despite the lifting of many foreign direct investment restrictions in 2015, the government's attempt at price controls and prescriptive economic regulations reduces the sector's competitiveness to attract foreign direct investment (FDI). IIPA urges the Indian government to remove these regulations.

IIPA also encourages the Government of India to carefully consider the impact of forthcoming bills, such as the Digital India Act, the National Broadcasting Policy, and the Broadcasting Services (Regulation) Bill, on the industry, as well as the interaction between these bills. If industry and other relevant stakeholders, including within government, are not consulted widely, such bills could create ambiguity for industry, impede ease of doing business, and stymie the development of a dynamic and durable broadcast sector and creative economy.

- **Remove Direct to Home (DTH) Guidelines that prohibit DTH operators from entering exclusive contracts with any broadcaster.**

The Direct to Home (DTH) guidelines, issued by TRAI, prohibit DTH operators from entering exclusive contracts with any broadcaster. The rules also prohibit DTH operators from carrying signals of any broadcaster who has entered any exclusive contracts with any distribution medium, and/or against whom any litigation is pending in such regard. These regulations limit choice and undermine competition laws.

- **Remove foreign ownership restrictions, including foreign direct investment (FDI) restrictions for Indian news channels.**

Although India in recent years has raised the foreign direct investment (FDI) cap for Indian news channels from 26% to 49%, foreign investments above 49% for news channels require government approval. Further, FDI in digital news sites is restricted to the earlier limit of 26%. Recently, the Indian government helpfully clarified that the 26% cap does not apply to OTT platforms, so those platforms can carry news from any news channel that has uplinking/downlinking permission and would not require FDI approval for hosting news feeds.

- **Reject calls to mandate providers to pay a network usage fee to ISPs.**



Internet service providers (ISPs) in India have issued public calls to mandate content providers pay a network usage fee to ISPs, such as via a licensing framework under an anticipated Telecommunication Bill. If implemented, such proposals would restrict trade and freedom of contract. Helpfully, as of November 2023, Indian government officials have signaled that they intend to exclude content providers (e.g., over-the-top (OTT) and video-on-demand service providers) from the scope of the new Telecommunication Bill, leaving the commercial relationship between content providers and ISPs to market dynamics. However, ISPs and trusted service providers continue to call for network usage fees and TRAI's intervention in the OTT market.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2024, due to serious, ongoing 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. Additionally, 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. Moreover, IIPA is concerned about Indonesia's moves toward imposing customs duties on electronic transmissions and related opposition to extending the WTO e-commerce moratorium.

#### **PRIORITY ACTIONS REQUESTED IN 2024**

##### **Enforcement**

- Bring enforcement actions against commercial-scale digital piracy services and seek criminal prosecutions of major piracy services operating in Indonesia.
- Continue consistent and expeditious enforcement of the Copyright Law and Regulation Nos. 14 and 26 of 2015 to disable access to piracy sites and domains.
- Combat illicit live streaming and unauthorized camcording piracy by taking appropriate criminal enforcement action, as well as enacting regulations or guidelines confirming that this activity is illegal.
- Monitor the marketplace and combat the proliferation of piracy devices (PDs) (including illicit streaming devices/set-top boxes) and piracy apps, as well as piracy syndicates operating piracy brands.

##### **Legal Reforms**

- Ensure any revision of the Copyright Law is in line with international commitments and best practices.

##### **Market Access**

- Eliminate screen quotas and prohibitions on dubbing imported films.
- Reject content review and classification requirements for over-the-top (OTT)/video-on-demand (VOD) and avoid localization requirements.
- Improve regulations related to collective management.
- Support an extension of the WTO e-commerce moratorium prohibiting customs duties on electronic transmissions and rescind Regulation No. 190/PMK.04/2022 requiring importers to file a customs declaration for any import of intangible goods through electronic transmission.
- Remove the local production requirement for Free-to-Air TV and Pay-TV advertising.

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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/2024/01/Appendix-B-2024.pdf>.

- Exempt curated content services (including over-the-top (OTT)/video-on-demand (VOD) content service providers) from the scope of Ministerial Regulation 5 (MR5).
- Reject any extension of existing problematic content quotas, content censorship, and ownership restrictions to VOD services in the proposed revision of the Broadcasting Act.

## **ENFORCEMENT**

- **Bring enforcement actions against commercial-scale digital piracy services and seek criminal prosecutions of major piracy services operating in Indonesia.**

Enforcement action against commercial-scale piracy websites and services has been limited and has failed to noticeably reduce levels of online piracy or provide much-needed deterrence. Homegrown piracy sites and “brands” such as *lk21*, *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 repertoires such as anime and Korean and Chinese dramas (with Bahasa and English subtitles).<sup>2</sup> The motion picture and television industry and the recording industry 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.

- **Continue consistent and expeditious enforcement of the Copyright Law and Regulation Nos. 14 and 26 of 2015 to disable access to piracy sites and domains.**

In 2023, IIPA members noted improvements in the processes and speed in which piracy websites were made inaccessible in Indonesia, particularly for the motion picture industry. Nonetheless, piracy in Indonesia inflicts losses on Indonesian creators, as well as U.S. book, motion picture and television, music, and video game creators. 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. 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. For example, IFPI’s 2023 Music Consumer Study (MCS) found that Indonesia had one of the highest music piracy rates in the world, with stream ripping as the key component of this piracy. More than three-quarters (78%) of respondents to the study from Indonesia said that they regularly pirated music and 68% said they used stream ripping to do so. As a further illustration of the popularity of downloading music in this way, web monitoring company Similarweb reported 81.5 million visits from Indonesia to stream-ripping site *SaveFrom* in the final quarter of 2023, 80.2 million visits to *Y2Mate.com*, and 48.4 million visits to *SSYouTube.com*. In 2023, Indonesia ranked fourth in the world for the number of connections by peers participating in the unauthorized file-sharing of ESA member mobile video game titles on public peer-to-peer (P2P) networks.

Digital piracy in Indonesia remains a serious concern with infringing websites and services or syndicated piracy networks, such as piracy operations with names like: *Indoxxi*, *LK21*, and *Bioskoperen*. These are well known to the government. Not much digital piracy enforcement has ensued over the past few years. The government needs to improve the capacity and efficiency of law enforcement agencies to investigate and prosecute these major piracy operators and syndicates.

Under the revised Copyright Act and Regulations Nos. 14 and 26 of 2015, rights holders have successfully petitioned the Indonesian government to order ISPs to disable access to thousands of infringing domains. Stakeholders have observed that there is a time lag between the issuing of a recommendation letter from DJKI and the action on the part of KOMINFO to block and disable access to the domain. The Regulations could be further improved by ensuring

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

faster response times to rights holders who apply to the government for verifications and through the implementation of dynamic site blocking. Despite these government efforts to block infringing websites and services, the syndicated piracy networks (including *Indoxxi*, *LK21*, *nonton*, and *Bioskoperen*) avoid government blocking orders by routinely changing domains.

As noted, the Directorate General of Intellectual Property's (DGIP's) efforts in this area improved in 2023 related to the speed of scheduling verification meetings and process improvements to ensure that hopped domains, redirects/proxies/mirrors, and alphanumeric variations could be quickly and efficiently blocked in a single action. Nonetheless, for other areas of piracy, enforcement efforts remain inadequate. More needs to be done to address criminal piracy syndicates that continue to plague the creative industries in Indonesia.

Moreover, 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 do not receive deterrent-level penalties. The government should criminally investigate operators of major online piracy services, (such as *Indoxxi*, *LK21*, *nonton*, and *Bioskoperen*), 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.

There also remains no clear remedy for rights holders against sellers who sell devices separately from the sale of IPTV subscriptions or sellers who find ways to distance themselves from the installation of compatible infringing apps.

- **Combat illicit live streaming and unauthorized camcording piracy, by taking appropriate criminal enforcement action, as well as enacting regulations or guidelines confirming that this activity is illegal.**

Illicit live streaming continues to be a major concern in Indonesia. In addition to taking appropriate criminal enforcement action, the government should also issue clear guidelines and regulations on live-streaming piracy, including expressly outlawing these activities and prioritizing a decrease in these illegal acts. Despite a reduction in known incidents of camcording, the government should also 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>3</sup>

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. Moreover, the Indonesian government should implement a program to socialize the amended regulations, so they are widely accepted by the public.

- **Monitor the marketplace and combat the proliferation of piracy devices (PDs) (including illicit streaming devices/set-top boxes) and piracy apps, as well as piracy syndicates operating piracy brands.**

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<sup>3</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.

Streaming devices that run with proprietary infringing apps enabling 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, or loaded by vendors upon import and prior to sale as an “after sale” service. 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>4</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. The *Loklok* piracy app remains a significant problem for the audiovisual industry.

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 is dominated by three syndicates: *Indoxxi*, *Lk21* (also known as *Dunia21* and *Layarkaca21*), and *Bioskopkeren*. The government needs to 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.

## **LEGAL REFORMS**

- **Ensure any revision of the Copyright Law is in line with international commitments and best practices.**

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). 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, and it remains to be seen whether potential revisions will result in enhanced or weakened copyright protections.

Any new exceptions or limitations (including mandatory collective management of rights or statutory licenses) must be confined to the three-step test, consistent with Indonesia’s international obligations (e.g., Article 13 of the WTO TRIPS Agreement). Imposing collective management or statutory licenses regarding uses of exclusive rights currently individually licensed would be inconsistent 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 collective management organization (CMO) must be voluntary, transparent, and governed by rights holders, without interference by Indonesia’s government.

IIPA believes the priority for the Indonesian government should be to remedy the concerns listed by IIPA in its submissions on copyright shortcomings and delineated below:

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<sup>4</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.”).

**Internet Exception:** The Law provides a broad exception under Article 43(d) for “making 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 a terrible precedent and would act to discourage and severely undermine legitimate business models built on the rights of authors, rights holders, and related rights owners to control the manner and means in which they authorize the making and disseminating of content through information and communication technologies. This provision would conflict with Indonesia’s international obligations under TRIPS, the Berne Convention, the WCT, and the WPPT. For these reasons, it should be deleted in its entirety.

**Termination of Transfers of Rights:** Article 18 and Article 30 of the Law on Copyrights provide that rights in musical works and musical performances that are transferred under sold flat agreements or indefinite transfers shall revert to the authors or performers after 25 years. Article 122 extends the effect of these rules retrospectively to all transfers before the entry into force of Articles 18 and 30. This reversion rule frustrates the freedom to contract and is an unlawful deprivation of property rights. It is also unclear how these provisions impact existing contracts, and this leads to legal and business uncertainty. Certainly, a curtailing of all contracts to a 25-year contract term would have a significant negative impact on investments in the Indonesian music industry, as investors have a shorter time frame to recoup their investments.

**Clarification of the Making Available/Communication to the Public Right:** Articles 23 and 24 of the Law on Copyrights give exclusive making available rights to performers and producers. This exclusive right is in line with the obligation under Article 14 of the WPPT. Article 27 of the Law on Copyrights provides equitable remuneration right to producers and performers for broadcasting and communication to the public of sound recordings. However, communication to the public is defined in Article 1, paragraph 16 to include the act of making available. This is inconsistent with Articles 23 and 24. There is an obvious drafting error in the legislation because the making available right cannot be both an exclusive right (Articles 23 and 24) and an equitable remuneration right (Article 27). The making available right has to be an exclusive right for Indonesia to meet its obligations under the Article 14 of the WPPT. Specifically, the definition of “Communication to the public” in Article 1, paragraph 16 should be amended to exclude the act of making available.

**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 several 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:** The Law provides that RMI violations occur only when moral rights are affected (Articles 6 and 7 of the Copyright Law). 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.

**Registration, Invalidity, and Recordation Requirement:** While registration of copyright remains voluntary under the Law, the substantive examination for voluntary registration will apparently address whether a work is “substantially similar” to another previously registered work as a ground for refusal. This substantive examination is intended to enable the authorities to review and invalidate false applications or registrations to address a concern about abuse of the voluntary copyright registration process. IIPA suggests introducing a more forceful deterrent, including fines and penalties, against anyone who knowingly files a false application or applies in bad faith. Additionally, the registration and recordation system potentially violates the prohibition of formalities under the Berne Convention. Article 83 appears to impose a requirement to record licenses, with lack of recordation meaning a license “shall have no legal effect on third parties.” This 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 problematic because it is largely redundant (acts of copyright infringement, unless exempt under an exception, amount to piracy). 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.

#### **Other Needed Legal Reforms:**

**Term Extension for Phonograms:** Currently, under Article 63(1)(a) and (b) of the Law of Indonesia (No. 28 of 2014) on Copyrights (the “Law on Copyrights”), the term of protection of economic rights of phonogram producers and performers is 50 years from fixation of the phonograms or performances. This is much shorter than the term of protection conferred by Article 58 of the Law on Copyrights on authors of certain works such as musical, artistic, literary, dramatic, and architectural works, which is the life of the author plus 70 years. The Law on Copyrights should be

amended to extend the term of protection of related rights to at least 70 years to meet the emerging international standard and be more in line with the authors' term of protection.

**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.

In 2023, a set of “Draft Government Regulations on Music and Song Licensing” was released for consultation, and these Draft Regulations contained many draft provisions seeking to regulate the activities of Digital Service Providers, including provisions on takedown response time, as well as provisions that require Digital Service Providers to obtain permissions from rights holders and phonogram producers and performers. IIPA urges the Indonesian government to take care to adhere closely and ensure consistency with the provisions of the Law of Copyrights in drafting this set of “Draft Government Regulations on Music and Song Licensing,” as well as imposing an appropriate response time for the proposed notice and takedown system (in this case, “3x24 hours” is too long, and it should be an expeditious takedown), and finally to closely consult with the rights holders as to the practical aspects of the Regulations.

## **MARKET ACCESS**

- **Eliminate screen quotas and prohibitions on dubbing imported films.**

The Indonesian government has expressed its intention to amend the 2009 Film Law, which contains a 60% local screen quota and prohibits imported films from being dubbed into local language. In September 2019, without official notice or industry consultation, “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 May 2016 decision to remove the film sector from its Negative Investment List. Indonesia should prioritize amending or rewriting the Film Law to remove such barriers and incorporate international best practices.

- **Reject content review and classification requirements for over-the-top (OTT)/video-on-demand (VOD) and avoid localization requirements.**



In October 2015, the Indonesian Broadcasting Commission (*Komisi Penyiaran Indonesia*, KPI) notified platform operators regarding pre-censorship and classification requirements for programs on all TV channels. The KPI suggested that non-compliance may violate the Broadcasting Ethics and Broadcast Program Standard, thus subjecting operators to fines and imprisonment. If implemented, these requirements would negatively impact the Pay-TV industry by raising costs, creating new barriers to entry, and reducing consumer choice. Additionally, in the past few years, there has been growing pressure for The Ministry of Communications and Informatics (Kominfo), the Indonesian Censorship Board (LSF), and the KPI to broaden their mandates by applying similar strict censorship and classification requirements towards OTT/VOD providers, which would have the same negative impact as previously described.

- **Improve regulations related to collective management.**

For the music industry, the mandatory multi-layered collective licensing system remains problematic. The government-appointed national CMO (LMKN) structure is top-heavy and has insufficient relevant experience. This creates unnecessary structural layers, increases the overall administrative costs, and slows down decision-making. Furthermore, rights holders have insufficient control of the licensing decisions including the setting of tariffs and, as a result, the tariffs are fixed and the rates are extremely low. There is also uncertainty as to whether it is mandatory for all rights to be licensed through LMKN as the singular CMO for performance rights, and how other CMOs, such as *Wahana Musik Indonesia*, operate in relation to LMKN.

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. The definitions of “Digital Intermediary Service Providers” or “Digital Service Providers” in Regulation 56/2021 also leave room for doubt as to which entities this CMO regulation applies to, and clarity would be appreciated. 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.

- **Support an extension of the WTO e-commerce moratorium prohibiting customs duties on electronic transmissions and rescind Regulation No. 190/PMK.04/2022 requiring importers to file a customs declaration for any import of intangible goods through electronic transmission.**

The Ministry of Finance issued a new regulation (Regulation No. 190/PMK.04/2022) requiring importers to file a customs declaration for any import of intangible goods through electronic transmission. This burdensome requirement severely disadvantages creative content seeking to enter the Indonesian market. In addition, by creating new tariff lines for digital products that are transmitted electronically, which includes the 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 expressed reservations about permanently extending the e-commerce moratorium. Such duties would likely raise prices for consumers, place Indonesia out of step with regional and international best practices, and stifle the growth of Indonesia’s market for creative digital content and related services.

- **Remove the local production requirement for Free-to-Air TV and Pay-TV advertising.**

Indonesia’s Broadcasting Law (No. 32 of 2002) includes a requirement that any Free-to-Air TV and Pay-TV advertising aimed at the local market must be locally produced. Although regulations issued in 2007 provided a series of exemptions, KPI’s more recent statements regarding implementation raised concerns. Such a burdensome rule, if implemented, would likely result in consumers absorbing the additional associated costs. The timeline for revising the Broadcasting Law remains unclear, especially given the upcoming 2024 general elections.

- **Exempt curated content services (including over-the-top (OTT)/video-on-demand (VOD) content service providers) from the scope of Ministerial Regulation 5 (MR5).**

The Ministry of Communication and Information Technology (KOMINFO) issued Ministerial Regulation 5 (MR5), which came into effect in late 2020. MR5 requires domestic and foreign online service providers to register and comply with content takedown requests from authorities and grants law enforcement authorities access to electronic systems and data. In July 2022, KOMINFO temporarily blocked some online intermediary platforms for failing to comply with MR5. The blocks were subsequently lifted when the firms registered with KOMINFO under MR5. Such requirements have the potential to stifle business development, add a significant barrier to market entry, and are out-of-step with international best practices when it comes to the regulation of curated content services such as VOD service providers.

- **Reject any extension of existing problematic content quotas, content censorship, and ownership restrictions to VOD services in the expected revision of the Broadcasting Act.**

A 2020 constitutional court case brought by two Indonesian broadcasters arguing that VOD services should be regulated under the Broadcasting Act was unsuccessful. However, it appears that a long-anticipated revision of the Broadcasting Act could still be undertaken in the future. IIPA remains concerned that a revision of the Broadcasting Act could seek to extend existing problematic content quotas, content censorship (conducted by KPI), and ownership restrictions to VOD services. Industry is also closely monitoring amendments to the Internet Transactions Law (ITE Law) which may potentially be barriers for 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>5</sup> While the Indonesian government has made past progress towards meeting the GSP criteria, these efforts have stalled and regressed in some respects. IIPA urges the Government of Indonesia to make further progress to remedy the deficiencies outlined in this report to avoid suspension or withdrawal of Indonesia’s GSP benefits, in whole or in part.

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

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be placed on the Priority Watch List in 2024.<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. 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 Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, 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 Mexico is still facing a long-standing problem of lack of adequate application and enforcement of its current laws and regulations, affecting legal certainty and security in the business environment. The lack of proper enforcement of current laws, in the absence of other key updated provisions or implementing regulations, has significantly hampered the growth of the digital marketplace in Mexico. 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 the rule of law. Obstacles also 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. Moreover, Mexico's implementation of the WIPO Internet Treaties and the USMCA, including reforms to the Federal Copyright Act and the Federal Criminal Code, is endangered by a lack of implementing regulations and three constitutional challenges, which have generated a chilling effect on practical implementation of the reforms.

Enforcement issues in Mexico also are a concern. For a long time, criminal enforcement activity pertaining to intellectual property (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. In 2023, the prosecutor and agencies responsible for initiating criminal investigations reinstated their previous criteria to reject complaints of IP infringements without proof of direct economic benefit. Civil cases in Mexico are expensive and difficult for rights holders (especially small businesses) to undertake and are slowed by procedural hurdles. The IP legal regime in Mexico is still missing some of the basic tools to address online infringements, including cooperation among 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 2024**

### **Enforcement**

- Develop and adopt a high-level national anti-piracy plan to target major online piracy and counterfeiting operations and to coordinate federal, state, and municipal enforcement activities, which has been one of IIPA's long-recommended enforcement measures.
- Provide the *Instituto Mexicano de la Propiedad Industrial* (Mexican Institute of Industrial Property, IMPI) and *Instituto Nacional del Derecho de Autor* (Mexican Copyright Office, INDAUTOR) with sufficient resources,

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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/2024/01/Appendix-B-2024.pdf>.

improved coordination with the Federal Police, and coordinated investigative and other support from the Scientific Police (in the National Guard).

- Encourage prosecutors to take *ex officio* actions against online piracy and hard copy piracy, focusing on online service operators and seeking deterrent sentences, including incarceration and financial penalties.
- Apply a coherent standard of “commercial scale” based on international practice, permit the initiation of criminal investigations against counterfeiting and piracy, and investigate and prosecute IP infringement cases absent proof of actual lost profits.
- Provide training to improve IPR expertise in the judiciary.
- Improve enforcement against theatrical camcord piracy.

### Legal Reforms

- Publish the implementing regulations of the 2020 Copyright Act amendments and reject interpretations of those amendments that would impede the positive progress made by them.
- Amend the Copyright Act to address issues not resolved in the 2020 amendments.
- Provide incentives for ISPs to cooperate in enforcement against online copyright infringement, including applying the reform of the 2020 Copyright Law to provide secondary liability for copyright infringement.
- 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 Bill to Amend the Federal Copyright Act related to “Literary Translation Contracts.”
- Address issues in the General Law of Libraries, such as requiring the delivery of works within 90 calendar days following the date of their commercial distribution.
- Reject amendments to the Copyright Law that would establish a remuneration system through a “Private Copy Levy” (PCL).
- Reject any interpretation of the Copyright Law that would interfere with exclusive rights, including introduction of a making available remuneration right for performers in addition to the already existing and sufficient exclusive right.

### Market Access

- Reject policies proposing Local Content Quotas.
- Reject discriminatory investment obligations in the audiovisual industry.

## ENFORCEMENT

- **Develop and adopt a high-level national anti-piracy plan to target major online piracy and counterfeiting operations and to coordinate federal, state, and municipal enforcement activities, which has been one of IIPA’s long-recommended enforcement measures.**

The Government of Mexico needs to do much more to ensure effective enforcement of existing laws and regulations and to strengthen the rule of law for the benefit of the protection of IPR. Mexico needs to fully implement the USMCA enforcement obligations. These regulations are crucial for the implementation of key aspects of the reform such as the procedural rules for the notice and stay down obligation for online service providers. One of IIPA’s long-recommended enforcement measures is for Mexico to develop and adopt 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. Mexico also should implement 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) *Unidad Especializada en Investigación de Delitos contra los Derechos de Autor y la Propiedad Industrial* (the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright, UEIDDAPI) within *Fiscalía General de la República* (the Attorney General’s Office, FGR). Moreover, FGR should improve the forensic standards for digital enforcement

and eliminate the required experts and mandated registrations (as a practice, if not a legal requirement) for criminal cases.

The lack of coordination among enforcement bodies remains a major problem in Mexico. Rights holders report that online infringement remains high. For example, video game publishers experienced among the highest levels worldwide of e-commerce infringement in Mexico, notably of modded hardware and circumvention device listings. Three federal agencies are engaged in copyright enforcement in Mexico: 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; and the Scientific Police (part of the Federal Police) of *Secretaria de Gobernacion* (the Secretary of the Interior) have assisted rights holders by providing information on illegal software websites and seizing the domain names of infringing sites. Establishing a centralized coordinator for copyright enforcement would improve the efficiency and effectiveness of each of these agencies.

Further, Mexico needs to address the importation of circumvention devices used in video games that are entering Mexico in small consignments and via courier packages and enhance penalties against repeat importers. One video game company reported that, despite four separate customs training sessions in 2023 that included many examples of sales of circumvention devices and modified consoles with bundled games as well as installations services available in the country, customs officials identified zero circumvention device-related seizures or detections in 2023. Repeat importers of infringing consoles with built-in pirated games continue operating undeterred. The 2020 Copyright Law reform does not clearly include “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.

In late 2022, the president began the militarization of customs to combat corruption, drugs, and smuggling. As of today, this action has not hindered customs functions. However, such militarization of customs in Mexico may slow administrative functions, leading to higher prices in international trade processes. The professionalization of customs has been delayed due to several leadership changes at the National Customs Agency, which has changed leadership at least four times during the present Administration. 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.

The Government of Mexico should also eliminate the “welfare marketplaces” (in Spanish: “*tianguis del bienestar*”) initiative or similar policies, which take goods that have been seized by the authorities and offer them to the general public. The initiative is problematic from a consumer health and safety standpoint,<sup>2</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.

Finally, the Government of Mexico should increase international cooperation with U.S. prosecutorial and law enforcement authorities to facilitate exchange of communication and cooperation in criminal investigations and enforcement proceedings in Mexico.

- **Provide the *Instituto Mexicano de la Propiedad Industrial* (Mexican Institute of Industrial Property, IMPI) and *Instituto Nacional del Derecho de Autor* (Mexican Copyright Office, INDAUTOR) with sufficient resources, improved coordination with the Federal Police, and coordinated investigative and other support from the Scientific Police (in the National Guard).**

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<sup>2</sup> See the U.S. Department of Homeland Security’s (DHS) Immigration and Customs Enforcement, *Counterfeit Goods: A Danger to Public Safety*, available at <https://www.ice.gov/features/dangers-counterfeit-items>; see also, the 2020 DHS report on *Combating Trafficking in Counterfeit and Pirated Goods*, available at [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) and the United Nations Office on Drugs and Crime Fact Sheet on counterfeit goods, available at [https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit\\_focussheet\\_EN\\_HIRES.pdf](https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf).

The piracy level in Mexico remains high (according to the International Federation of the Phonographic Industry's (IFPI) 2023 Music Consumer Study (MCS) approximately 50%). Further the ability to tackle piracy has worsened due to budget cuts in recent years, including in several key IP enforcement agencies (e.g., IMPI), which have led to reductions or curtailments in effective enforcement activities, including in several key IP enforcement agencies, particularly the FGR. The FGR is responsible for federal criminal enforcement. One video game publisher reported a decline in counterfeit game product seizures from 35,315 products seized in 2022 to only 3,045 in 2023 despite IP trainings for customs officials, and zero police raids in either year. Yet, the market shows that illicit products remain available. On July 1, 2020, a comprehensive amendment to the "Industrial Property Law" (Patents and Trademarks) was also enacted. The law entered into force in November 2020. As part of this new law, IMPI is now empowered to issue blocking orders against infringing sites which, in practice, is a clarification of the powers that IMPI previously exercised as part of its general duties. However, IMPI requires the petitioner to comply with an extreme – and sometimes impossible – burden of proof equivalent to providing certificates of copyright ownership of all the content available in the illegal sites to block that content. The Government of Mexico should allow the initiation of administrative proceedings before IMPI to seek site blocking of websites that offer infringing content, without requiring the industry to prove copyright ownership of all content provided in the pirate websites. Instead, the burden should be calibrated, and IMPI should require the owner/operator of the infringing sites to produce evidence that they have authorization to make the copyright works in question available.

- **Encourage prosecutors to take *ex officio* actions against online piracy and hard copy piracy, focusing on online service operators and seeking deterrent sentences, including incarceration and financial penalties.**

IIPA continues to recommend several detailed "structural" reforms and agency actions to improve criminal enforcement that have been detailed in previous submissions.<sup>3</sup> 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. In one 2023 case involving 7,000 video game consoles preloaded infringing games, the prosecutor terminated the investigation claiming the products did not show the publisher's trademarks and copyrighted works, despite evidence established at the time of seizure. This complicates online or digital matters that do not involve hard goods. However, the problem of online piracy in Mexico is evident: in 2023, Mexico ranked 26th in the world for the number of connections by peers participating in the unauthorized file-sharing of Entertainment Software Association (ESA) member video game titles on public peer-to-peer (P2P) networks, and by the same metric, fifth in the world for unauthorized file-sharing of mobile games.

Furthermore, it is crucial that prosecutors understand that expert opinions are not required in every case to analyze genuine and counterfeit specimens. 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, which undermines effective 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

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<sup>3</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>.

shipments and trans-shipments. The FGR has been reorganized under the current administration and is closed to the general public, meaning that there have been no coordination meetings with rights holders or rights holder organizations, and such practices, which are common in other countries, are not allowed. The lack of communication with the private sector and the absence of any significant enforcement action by FGR against IPR violations have significantly worsened the situation in the last year. FGR and UEIDDAPI should provide standardized criteria that could allow the initiation of enforcement procedures in FGR and UEIDDAPI. Currently these agencies have changed their previous criteria to determine a “commercial scale,” affecting the initiation of any criminal investigation against counterfeiting and copyright piracy.

IMPI and National Customs Agency have attempted to create an effective partnership to fill in the void. These agencies have delivered timely and decisive results in border enforcement. 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. However, despite these efforts and amendments to the Customs Code in 2018, problems persist. The amendments to the Customs Code did not provide the necessary *ex officio* authority for customs officials to conduct independent seizures of infringing goods and components—a USMCA obligation.<sup>4</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. The lack of action by customs authorities and FGR undermines the enforcement of law and protection of IPR.

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, without the need for a mandatory and certified registration. Mexico needs to change its Copyright Act to ensure these presumptions of ownership apply to all works (it currently exists only for sound recordings), even after the 2020 amendments.

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 Agreement obligations, Mexico should have “effective” criminal remedies, 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 procedural hurdles discussed above.

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 will be taken against piracy and counterfeit goods. 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.

The Government of Mexico should coordinate municipal, state, and federal government criminal enforcement actions (across Mexico’s 32 states and 2,400+ municipal governments). Also, another long-standing IIPA

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<sup>4</sup> See 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>.

<sup>5</sup> See WTO TRIPS Agreement, Articles 41 and 61.

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 *Procuraduría Federal del Consumidor* (Office of the Federal Prosecutor for the Consumer, PROFECO) to use its *ex officio* powers for consumer protection, and its resources against street market piracy.

- **Apply a coherent standard of “commercial scale” based on international practice, permit the initiation of criminal investigations against counterfeiting and piracy, and investigate and prosecute IP infringement cases absent proof of actual lost profits.**

In 2023, FGR and UEIDDAPI, the agencies responsible to initiate criminal investigations, reverted to their previous criteria to reject complaints of IP infringements based on the lack of loss of profits or lack of commercial scale, affecting the initiation of – and creating more burdens to initiate – any criminal investigation against counterfeit and copyright piracy. As a result, criminal penalties have not been available in Mexico for commercial scale infringements without a direct economic benefit. 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.” This change would allow the initiation of enforcement procedures in FGR and UEIDDAPI, and criminal penalties would be available in Mexico for commercial scale infringements absent proof of actual lost profits (in other words, without a direct economic benefit).

- **Provide training to improve 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.

- **Improve enforcement against theatrical 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. Camcords have resurfaced as a piracy problem in Mexico upon theaters reopening in 2021 post-pandemic, 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 derived from camcording because of its harm to the legitimate online distribution platforms and services that provide revenue for financing the development of new creative works worldwide.

## **LEGAL REFORMS**

- **Publish the implementing regulations of the 2020 Copyright Act amendments and reject interpretations of those amendments that would impede the positive progress made by them.**

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), finally implementing its treaty obligations in the 2020 amendments to the Copyright Act. The 2020 package of amendments represent needed reform to Mexico's copyright law. The full list of legal reforms adopted in 2020 improvements includes: the notice and takedown, safe harbor, and related provisions; protection for TPMs and RMI; explicit 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.

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 Congress and based on similar grounds as the first challenge. In both cases, *Asociación Mexicana de Productores de Fonogramas y Videogramas* (Association of Producers of Phonograms and Videograms, AMPROFON), IFPI's national affiliate in Mexico, *Ilustre y Nacional Colegio de Abogados de México* (National Bar Association of 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. In addition to these challenges, the Supreme Court is deciding a third constitutional proceeding (*Amparo* No. 556/2022) brought by the Article 19 Association, whose membership is unknown, that could undermine the notice and stay down provisions of the Federal Copyright Act. The public version of the draft ruling of the Supreme Court concludes that several notice and stay down provisions of said Copyright Act are allegedly "unconstitutional general rules." Content creators and copyright holders have not been allowed to appear before the courts to defend their rights or file *amici* briefs in this *Amparo* proceeding. Therefore, the draft decision does not take into account the interests of creators and copyright holders. As of January 2024, a final decision was not available and the hearing on the case was postponed, but IIPA is concerned that the Mexican Supreme Court may rule that these provisions are unconstitutional. Although the new laws remain in force in the interim, the challenges have 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.

As mandated by the copyright reform, the Mexican government, and particularly INDAUTOR, were given 180 days to publish implementing regulations for the copyright law. However, after more than two years since the new legislation was enacted, the obligation remains pending. The copyright sector is justifiably concerned by this delay because it indicates that the Secretary of Culture and INDAUTOR may not be adequately prioritizing this matter. This concern would be further exacerbated if the regulatory process has been put on hold due to the constitutional challenges to the law and Supreme Court *Amparo* case No. 556/2022, even though these cases do not currently affect the validity and operation of the law. It is thus important that the Mexican government proceeds to defend vigorously the constitutionality of the adopted legislation and promptly introduce the implementing regulations to prevent a breach to Article 20.88 of the USMCA.

- **Amend the Copyright Act to address issues not revised in the 2020 amendments.**

More revisions are needed to the Copyright Act, as well as in the Industrial Property, Criminal, and Criminal Procedure Codes. For example, Article 232bis of the Copyright Act limits liability and excludes certain activities relating to the manufacturing of, or trafficking in, circumvention devices or technologies, and additionally, provides many exceptions and limitations that are problematic, including those to-be-determined by INDAUTOR.

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

- Establish explicit secondary liability.
  - Amend the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates.
  - Add criminal provisions to enforce against the production or distribution of piracy devices.
  - 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.
- **Provide incentives for ISPs to cooperate in enforcement against online copyright infringement, including applying the reform of the 2020 Copyright Law to provide secondary liability for copyright infringement.**

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. 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 114octies). 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 have not been in practice in Mexico’s legal regime because they are subject to constitutional challenges before the 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.

There is a lack of leadership between agencies, including IMPI, and no agency has tried to take the lead and to enhance cooperation or facilitate communication with ISPs with the purpose to improve a notice and takedown system in Mexico. As part of its constitutional rights, ISPs have the right to file an injunction (*amparo*) against a takedown order by IMPI that could suspend the decision of authority and frustrate the takedown of the infringing content.

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 Infinitem, 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. The Government of Mexico should amend the Civil Code and improve the procedures of the judicial power to add pre-established remedies and allow the recovery of 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).

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.

- **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.**

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) was published in the Federal Official Gazette.<sup>6</sup> 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 Law 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 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 ten years of imprisonment and 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.

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<sup>6</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/lfpccpcia.htm>.

- **Reject the Bill to Amend the Federal Copyright Act related to “Literary Translation Contracts.”**

On February 15, 2022, a draft bill, which would add 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 if 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 would also prohibit the publication of the translated work with alterations, additions, deletions, or any modification made without authorization of the translator.

- **Address issues in the General Law of Libraries, such as requiring the delivery of works within 90 calendar days following the date of their commercial distribution.**

On June 1, 2021, the General Law of Libraries (GLL)<sup>7</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. 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>8</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.

- **Reject amendments to the Copyright Law that would establish a remuneration system through a “Private Copy Levy” (PCL).**

The Government of Mexico should reject proposed amendments of the Copyright Law that would establish a remuneration system through a PCL. Such amendments would require manufacturers and importers of equipment, devices, and technological goods to pay a fixed “compensatory remuneration” for the supposed copying, storing, compacting and/or reproduction of protected works that could occur in the future. This initiative will normalize copyright infringement, offering a blank check to consumers of devices for the unrestricted copying of content, on the assumption that the relevant manufacturer or distributor has already “prepaid” for the reproduction of protected works.

- **Reject any interpretation of the Copyright Law that would interfere with exclusive rights, including the introduction of a making available remuneration right for performers in addition to the already existing and sufficient exclusive right.**

The Government of Mexico should reject any interpretation of the Copyright Law that would interfere with the exclusive rights granted by the Law and those required by international treaties. The introduction of a making available remuneration right for performers in addition to the already existing and sufficient exclusive right would be one such example, and IIPA urges the Government of Mexico not to introduce such a measure.

## **MARKET ACCESS**

- **Reject policies proposing Local Content Quotas.**

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<sup>7</sup> General Law of Libraries (*Ley General de Bibliotecas*), June 1, 2021, available at <https://www.diputados.gob.mx/LeyesBiblio/pdf/LGB.pdf>.

<sup>8</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>.

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, limiting the number of screens in which a given movie can be exhibited, or regulating the dubbing of films 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.

- **Reject discriminatory investment obligations in the audiovisual industry.**

In recent months, there have been legislative efforts aiming to establish 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. Mexican policymakers should reject any such attempt to impose investment obligations.

### **Cooperation and Training**

IMPI has entered a Memorandum of Understanding (MOU) with ESA on August 18, 2022, to enforce and protect video games' IP. IMPI has conducted enforcement activities under the auspices of the MOU and in accordance with the current laws and regulations, including infringement referrals, online inspection visits, and investigations, promoting the importance of IP to creative and innovative industries. Practical efforts to execute the MOU have continued in 2023, including an ESA-led training with 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)

### 2024 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 2024.<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 United States and its allies, the suspension of operations in Russia by many U.S. and international companies, and a disturbing trend in Russia to ignore the intellectual property rights (IPR) of companies that have withdrawn from the market. As such, this submission largely draws from IIPA’s submissions from prior years. The Government of Russia recently 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 an existing license agreement with a Russian entity 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 extraordinary step for a WTO member, contravening the rule of law and serving as a *de facto* expropriation of U.S. IP. Russia should abandon these proposals and instead focus on improving criminal, civil, and administrative enforcement, particularly against organized criminal syndicates and large-scale unlicensed services; addressing long-standing problems with collective management of music rights; addressing the camcording of motion pictures; and taking action to prevent or disrupt the proliferation of illegal screenings of films in Russian theaters.

#### **PRIORITY ACTIONS REQUESTED IN 2024**

##### **Enforcement**

- Increase the number and effectiveness of criminal copyright digital piracy cases, especially deterrent criminal actions directed against organized criminal syndicates.
- Improve administrative enforcement against large-scale unlicensed services, including by imposing deterrent-level penalties.
- Improve civil enforcement, including by amending the Civil Code or other relevant law to address the issue of “domain hopping.”
- Take action to prevent or disrupt the unauthorized screenings of motion pictures in cinemas.

##### **Legal Reforms**

- Ensure recent legal reform proposals do not worsen copyright protection and enforcement.
- Continue to resist efforts to implement state-sanctioned IP theft regardless of existing license agreements, which would have serious, long-term implications for Russia’s economy and creative ecosystem.
- Reject proposed legislation that would allow esports event organizers to profit from copyright-protected video game content without authorization from rights holders.
- Convert the memorandum of understanding (MOU) between Internet service providers (ISPs) and rights holders into law with broader applicability and sanctions for non-compliance, and enforce the addendum to the MOU.
- Implement regulations on the operation of collective management organizations (CMOs) that confirm that rights holders, whether local or foreign, have the legal and practical ability to determine how to exercise their rights.
- Amend the Administrative Code and Criminal Code to adequately address theatrical camcording.

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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/2024/01/Appendix-B-2024.pdf>.

- Amend the Civil Code, Part IV, to incentivize ISPs to cooperate with rights holders to effectively address online piracy.
- Amend the Civil Code and Criminal Code to provide adequate protection for technological protection measures (TPMs).

### **Market Access**

- Remove market access restrictions negatively impacting the U.S. creative industries.

## **ENFORCEMENT**

- **Increase the number and effectiveness of criminal copyright digital piracy cases, especially deterrent criminal actions directed against organized criminal syndicates.**

Effective enforcement means focusing criminal enforcement actions against the owners and operators of sites engaged in large-scale infringing content causing significant economic harm to all rights holders. The Government of Russia has unfulfilled commitments to take such action against digital piracy under the 2006 U.S.-Russia Bilateral WTO Market Access Agreement Side Letter on Intellectual Property Rights (2006 IPR Side Letter). In the 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>2</sup> Also in 2012, Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, *inter alia*:

Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content....Take actions against the creators and administrators of websites through which intellectual property crimes are committed....Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites.<sup>3</sup>

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

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*, and *DDoS-Guard*, as well as dealing with registrars such as *Reg.ru*, *Beget*, and *RU-CENTER* remains a significant concern for rights holders.

Examples of the types of large-scale online piracy problems that persist are evident in the annual Notorious Markets List, and in IIPA’s past filings with the U.S. government. Many commercial-scale sites in Russia, including those sites on the Notorious Markets List, operate unimpeded, offering unauthorized copies of films, TV programs,

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<sup>2</sup> WTO Working Party Report (paragraph 1339).

<sup>3</sup> U.S.–Russia Intellectual Property Rights (IPR) Action Plan (2012).

music, books and journal articles, and video games. The U.S. government included six Russian online sites on the 2022 Notorious Markets List, including *Sci-Hub*, *Lib-Gen* (and its related sites), *VK.com* (*vKontakte*), and *MP3juices*.<sup>4</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. However, 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, with significant 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. *VK.com* is still one of the main platforms for promoting video game piracy sites and marketplaces. Russian 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>5</sup> However, video game piracy remains a significant problem in Russia and fuels piracy in other markets.

The video game industry historically has experienced overall very weak compliance in Russia with takedown notices regarding links to pages with infringing content via forums, cyberlockers, and direct download sites, and very quick reposting of materials that are taken down. BitTorrent sites are significant sources in Russia for downloading illegal copies of video games, with no abatement in recent years. In 2023, Russia ranked number one in the world for the number of connections by peers participating in the unauthorized file-sharing of Entertainment Software Association (ESA)-member video game titles on public peer-to-peer (P2P) networks. By the same metric, Russia ranked first in the world for unauthorized file-sharing of PC-based games, and second in the world for console-based games.

The most prominent forms of music piracy in Russia remain BitTorrent and stream ripping. The most popular BitTorrent site (and the most popular piracy site of any kind) in Russia is *rutracker.org* (which received over 55 million visits from Russia in Q3 2023, a 25% increase in popularity over the last two years). Visits to the site remain high as Russian users have learned how to circumvent the block imposed on the site by authorities and can easily access the large amounts of both English and Russian content available on the site, including enormous quantities of discographies for many music artists. The continued popularity of the site is demonstrated in its position as the 126th most visited site of any kind in Russia.

*SaveFrom.net* continued to be the most popular stream-ripping site in Russia, receiving 24.5 million visits in Q3 2023 according to Similarweb. *SSYouTube.com* and *Y2Mate.mx* each received six million visits from Russia over the same period. At the same time, Russian-language MP3 download site *Zaycev.net*, which offers popular music content to download or stream, was visited 11 million times from Russia in Q3 2023.

Russia also 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

<sup>4</sup> See USTR, "2022 Review of Notorious Markets for Counterfeiting and Piracy," available at [https://ustr.gov/sites/default/files/2023-01/2022%20Notorious%20Markets%20List%20\(final\).pdf](https://ustr.gov/sites/default/files/2023-01/2022%20Notorious%20Markets%20List%20(final).pdf) (2022 NML). The 2022 NML also included three physical markets in Russia, all of which are on the list for the prevalence of counterfeit materials.

<sup>5</sup> Unauthorized digital goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats," or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.



operate globally. For example, *Newalbumreleases.net* is a popular linking site that has a large library of newly released popular music available and is often the first site to feature links to newly leaked pre-release music content. *Songswave.com* (formerly *music-bazaar.com*) and *mp3va.com* are sites that have the look and feel of legal music sites like Amazon or iTunes but sell music content as downloads at a considerable discount, with all of the revenue accruing to site operators and none actually reaching artists or record labels. 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.se* (also *Sci-Hub.ru* and *Sci-Hub.st*) continues to be the most problematic piracy site for professional and scholarly 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" collection of piracy sites. As of November 2021, *Sci-Hub* claimed its servers hold some 88 million copyright-protected journal articles, as well as millions of books found on *Lib-Gen*, *Z-Library*,<sup>6</sup> and numerous other mirror sites.<sup>7</sup>

In October 2018, publishers successfully sought an injunction to block the sites' primary domain in Russia. In 2019, a permanent block was issued against *Libgen.org*, while a permanent injunction against several *Sci-Hub* mirrors in Russia took effect in 2020. It remains the unfortunate case that despite the seizure of some 244 *Z-Library*-related domains by the Department of Justice in November 2022—and the arrest of the alleged Russian operators in Argentina<sup>8</sup>—*Z-Library* operators appear determined to continue the infringing conduct. Despite a further seizure of several alternative *Z-Library* domains (such as *singlelogin.click*) in November 2023, with assistance from enforcement authorities in Europe, various domains remain live.

In addition to these large-scale book and journal piracy platforms, Russian Internet users also use P2P file-sharing services. An AAP member has registered 6.1 million P2P downloads of pirated copies of its books by Internet users in Russia since May 2021, with 2.9 million of those downloads by Internet users in Moscow. Finally, publishers have identified dozens of pirate platforms (among them *Vdoc.pub*, *torrentdownload.info*, *pixel-brush.ru*, *VK*, *prizrak.ws*, *libramar.net*, and *torrentdownloads.me*) 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.

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 "value of the crime" definition 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 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

<sup>6</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 U.S. Attorney's Office, Eastern District of New York Press Release, *Two Russian Nationals Charged with Running Massive E-Book Piracy Website*, November 16, 2022, available at <https://www.justice.gov/usao-edny/pr/two-russian-nationals-charged-running-massive-e-book-piracy-website>.

<sup>7</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>.

<sup>8</sup> See supra note 6.

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, although challenges still exist. 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 roughly the past 12 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. For the video game industry, enforcement efforts are also complicated by several 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 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.

- **Improve administrative enforcement against large-scale unlicensed services, including by imposing deterrent-level penalties.**

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).

- **Improve civil enforcement, including by amending the Civil Code or other relevant law to address the issue of “domain hopping.”**

Civil judicial and administrative remedies have improved over the years (with legal reforms in 2013, 2014, 2017, and 2020), but enforcement difficulties continue.<sup>9</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

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<sup>9</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.

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.

Nevertheless, overall, rights holders have seen some positive results of the reforms to civil laws and procedures. Some sites exhibited dramatic decreases in traffic right after such court orders, and some sites 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.

- **Take action to prevent or disrupt the unauthorized screenings of motion pictures in cinemas.**

After Russia's invasion of Ukraine in February 2022, the U.S. film, broadcast, and streaming industries, 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. At first, the theaters did not advertise the screenings openly, referring to them as "private club" events. However, by August 2023, most of the theater chains included such screenings in their schedules and started promoting them along with the legal exhibitions, such as *Barbie*, *Blue Beetle*, and *Oppenheimer*. Theaters 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>10</sup> The Ministry of Culture conducts sporadic raids in theaters before major domestic releases, with penalties usually limited to warnings to suspend the illegal screenings for the first weekend. It appears that such raids happen under pressure from local producers and do not reflect the government's determination to prevent piracy.

## **LEGAL REFORMS**

- **Ensure recent legal reform proposals do not worsen copyright protection and enforcement.**

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 through governmental approval.

In September 2023, following the President's recommendations, the Ministry of Justice published draft amendments to the Criminal Code that include a proposal to further increase the threshold for criminal liability for

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<sup>10</sup> On August 23, 2022, Webwatch reported a partial capture of *Top Gun: Maverick* from Moskva Cinema in Moscow.

copyright infringement.<sup>11</sup> The State Duma hasn't yet considered the proposal, but if adopted, it would worsen criminal enforcement.

Also in September 2023, the State Duma Committee on the State Building and Legislation proposed a draft law amending Part IV of the Civil Code. The bill would establish a procedure for the use of orphan works, including creation of a database for orphan works and appointment of a collective management organization to manage rights for such works. The draft would limit the possible uses of the orphan works as follows: reproduction and distribution of the copies, making them available to the public, and creation of derivative works. The remuneration rates are subject to determination by the government. If the potential licensee is unable to identify the copyright holder, the licensee would have the right to apply to the CMO authorized by the Ministry of Culture with a statement of intent to use the corresponding copyrighted work. The Ministry of Culture would determine the necessary and sufficient measures to be taken by a potential licensee to identify the rights holder before applying to the CMO. The authorized CMO must place an announcement about the rights holder's search on its official website. If the rights holder is not identified within 30 days, the CMO will record information about the copyrighted work in the database, including the measures taken to find the rights holder, after which the CMO will have the right to grant the right to use the work on the terms of a non-exclusive license. The CMO will deposit the remuneration in a dedicated account until the rights holder submits a payment request. Although the draft contains a provision securing the rights holder's right to terminate the license agreement concluded by the CMO and recover damages if the CMO fails to take proper measures to identify the rights holder, the procedure for determination of fees and rights holders' search creates unnecessary state involvement in rights management, raising concerns that rights holders' copyright rights will be undermined.

- **Continue to resist efforts to implement state-sanctioned IP theft, which would have serious, long-term implications for Russia's economy and creative ecosystem.**

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.

- **Reject proposed legislation that would allow esports event organizers to profit from copyright-protected video game content without authorization from rights holders.**

Russian lawmakers recently proposed legislation that would allow esports tournament organizers to profit from video game content without obtaining licensing agreements directly from video game publishers. The bill contemplates the creation of a public-law company (PLC), which would replace the role of rights holders to manage licensing fees associated with the use of games in esports tournaments, interfering with the exclusive right of publishers to maintain brand integrity and to exercise rights to their protected works.

- **Convert the MOU between ISPs and rights holders into law with broader applicability and sanctions for non-compliance, and enforce the addendum to the MOU.**

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<sup>11</sup> The current version of the Criminal Code sets out a 100k RUB (~US\$1,100) threshold; the proposal would increase the threshold to 500k RUB (~US\$5,500).

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. 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 Memorandum of Understanding (MOU), signed in November 2018 and extended until May 2024, between some ISPs and certain local rights holders regarding delisting of infringing sites from search engines. In August 2023, the parties to the MOU agreed to extend it to music and literary works and simplified the approval procedure for the new members, eliminating the requirement to apply via a non-commercial organization for certain rights holders. The candidates for membership still must obtain approval by most of the existing members; however, they can now apply directly if they own a catalog of at least 100 works.

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 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.

- **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.**

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>13</sup> That commitment had a deadline of 2013. The 2006 IPR Side Letter had similar obligations to correct this problem. Russia should ensure that key principles of collective management of rights are reflected in legislation, including (but not limited to) the following:

- The essential characteristics of a CMO include that the CMO is non-profit and owned or controlled by its member rights holders (whether local or foreign), such that rights holders are able to control the exercise of their exclusive rights and to ensure that the CMO is operating according to good standards of transparency, accountability, and governance.
- While collective licensing is normally used where it is uneconomical for rights holders to exercise their rights individually, the decision for whether to use collective licensing must rest with the rights holder.
- CMO tariffs should be determined by the collecting society in negotiation with users (or their representatives), according to the economic value of the use of the rights in trade.
- Rights holders should have fair and balanced voting powers in their CMO that reflect the value of their rights under management.

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<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.

<sup>13</sup> WTO Working Party Report (Paragraph 1218).

After years of missed deadlines, Russia adopted new legislation in 2017 (in force, May 2018) that did not address key relevant issues and created even more problems, instead of fixing the collective management system in Russia. 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.

- **Amend the Administrative Code and Criminal Code to adequately address theatrical camcording.**

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 of Russia 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.

- **Amend the Civil Code, Part IV, to incentivize ISPs to cooperate with rights holders to effectively address online piracy.**

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 incentivize cooperation with rights holders to effectively address 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.

- **Amend the Civil Code and Criminal Code to provide adequate protection for technological protection measures (TPMs).**

Article 1299 of the Civil Code prohibits the commercial distribution (i.e., trafficking) in circumvention devices and services that circumvent 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**

- **Remove market access restrictions negatively impacting the U.S. creative industries.**

While U.S. industries have largely suspended operations in Russia, significant market access barriers remain, including a discriminatory Value-Added Tax (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)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR place South Africa on the Priority Watch List in 2024.<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 withdrawing and 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. 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, which 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 Bill of Rights, and move South Africa even further away from international treaty obligations and best practices. 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, international treaty obligations, and best practices. As it stands, the bills in their present form fail to meet these standards and would have several unintended and harmful consequences, including to threaten and hamper the growth of and investment in the creative economy in South Africa and weaken South Africa's market for creative content, both for U.S. exports and the local creative sector.

## **PRIORITY ACTIONS REQUESTED IN 2024**

### **Legal Reforms**

- Ratify and fully implement the WIPO Internet Treaties.
- Withdraw and redraft the CAB and the PPAB to ensure compliance with South Africa's Bill of Rights and Constitution and with international treaty obligations and best practice, informed by an independent economic

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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/2024/01/Appendix-B-2024.pdf>.

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.

- Increase the term of protection for works and sound recordings from 50 years to at least 70 years, in line with the international standard.

### **Market Access**

- Remove market access restrictions that negatively impact the U.S. creative industries.

### **Enforcement**

- Improve enforcement against online piracy, including by providing effective mechanisms and statutory remedies to address services that infringe domestic and foreign content.

## **LEGAL REFORMS**

- **Ratify and fully implement the WIPO Internet Treaties.**

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.

- **Withdraw and redraft the CAB and the PPAB to ensure compliance with South Africa's Bill of Rights and Constitution and with international treaty obligations and best practice, informed by 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.**

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'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, then sent them to the National Council of Provinces (NCOP) for concurrence. The NCOP, as well as the legislatures of South Africa's nine provinces, staged public hearings on the bills. Unfortunately, the NCOP did not heed the serious reservations raised by the provincial governments during their deliberations on the bills nor fully assess the President's concerns expressed in his 2020 rejection of the bills. Despite the fact that the majority of the provinces (six out of nine) raised serious concerns about the proposed legislation, including the scope of the proposed new and invasive regime of copyright exceptions and limitations, the introduction of an expansive "fair use" exception to copyright protection, and the absence of a proper economic impact assessment study as is required under government's own SEIAS protocols, the Select Committee of the NCOP moved to adopt the bills, subject to some minor revisions. On September 26, 2023, the provinces voted in favor of adopting the revised texts (the so-called "F-versions" of the bills) and returned the bills to the National Assembly for concurrence. It is anticipated that the National Assembly will adopt the F-versions, because the changes proposed by the NCOP are mainly intended to

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<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.

correct certain legislative drafting errors and are not controversial. The next step is for the bills to return to the Portfolio Committee, which was scheduled to meet and discuss the bills in December 2023, but that meeting has been delayed.

South Africa's Parliament has not commissioned any independent legal opinion regarding whether the new copyright exceptions and limitations, including the expanded fair use doctrine, and the weak legal protections proposed for technological protection measures (TPMs) are compliant with South Africa's Constitution and Bill of Rights or international agreements, including the Berne Convention and the WTO TRIPS Agreement (to which South Africa is a member) and the WIPO Internet Treaties (accession to which South Africa approved in 2019). The most comprehensive legal analysis of the bills to date, co-authored by practicing copyright lawyers who are members of the Copyright Committee of the South African Institute of Intellectual Property Law (SAIPL), concluded that the bills require significant amendments before they would pass constitutional muster and meet the requirements of international treaties.<sup>4</sup>

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>5</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 South Africa's Department of Trade Industry and Competition), 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>6</sup>

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 current versions of the bills, 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 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.

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<sup>4</sup> See Myburgh et al, *Copyright Reform or Reframe?*, available at [https://juta.co.za/uploads/Copyright\\_Reform\\_or\\_Reframe/](https://juta.co.za/uploads/Copyright_Reform_or_Reframe/).

<sup>5</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 2024 African Growth and Opportunity Act (AGOA) Eligibility Review, available at <https://www.iipa.org/files/uploads/2023/07/2023.07.05-FINAL-IIPA-Comments-on-2024-AGOA-Eligibility-Review.pdf>.

<sup>6</sup> According to a study commissioned by the Department of Trade and Industry (the DTI) 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).

- The bills would unjustly interfere with and over-regulate the relationship between creative parties, including by introducing statutory royalty and remuneration entitlements and onerous reporting obligations coupled with disproportionate penalties for non-compliance, all of which would undermine producers' ability to finance content and introduce legal risks for the legitimate use of audiovisual works and sound recordings by rights holders and their licensees. 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 legal remedies for rights holders to take effective action to enforce their rights against infringers and to combat piracy, especially in the online environment, thus thwarting the development of legitimate markets for copyrighted works and sound recordings.
- The bills' provisions on TPMs are inadequate, falling short of the requirements of the WIPO Internet Treaties, and the overly 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>7</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 to set out the nature of copyright in sound recordings, which would be already enumerated in the Copyright Act, as amended by the CAB. Also, Section 8A of the CAB would introduce new rights and entitlements for performers, which should exclusively be dealt with under the Performers' Protection Act. 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**

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<sup>7</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.

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:** Section 22(3) of the CAB and Section 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. These provisions have their origin in an incorrect application of a recommendation made by the Copyright Review Commission that South Africa's Copyright Act should be amended to include a reversion right for composers of musical works that is modelled on the relevant provisions of the U.S. Copyright Act.<sup>8</sup>

In effect, these provisions would make it impossible to clear rights in many works (including audiovisual) 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 relationships) 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. For example, in the film and television industries, the 25-year limitation on assignments of literary works (which would include film and television scripts) and musical works (which would include musical scores for films and television

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<sup>8</sup> See Copyright Review Commission Report (2011), ¶15.1.9, p. 102, available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/crc-report.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf). While there is a provision in U.S. law on termination of transfers, that provision contains key differences that mitigate the harms that would be introduced by the South Africa proposal. 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.

shows) would render it practically impossible for producers to consolidate all rights for the life of copyright at the onset of new productions. This would harm the ability of producers to secure financing for new productions, as well as the commercial value of any content produced in South Africa, because undisturbed commercialization could be guaranteed only for a limited period of 25 years—just half the period of time for commercialization guaranteed under South Africa’s current law and only a third of the period of time for commercialization guaranteed in the United States.

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. Audiovisual works may inadvertently fall within 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 “standard elements,” 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.

While the F-versions slightly modified these sweeping Ministerial powers, the concerns identified above remain. The proposal restricting the Minister’s power to set royalty rates to only the “re-sale royalty right” is welcomed. However, the proposal replacing “compulsory and standard contract terms” with “standard elements for agreements” does not resolve concerns regarding the broad Ministerial power to limit contractual freedoms of private parties to prescribe the terms that copyright industry contracts should contain.

**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 and fully opened for

public consultation, which may have constitutional implications.<sup>9</sup> Section 8A(5) has since been found to bring about arbitrary deprivations of property rights, and the National Assembly's 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.

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>10</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 F-versions include a welcome proposal to introduce contractual flexibility into Section 8A by allowing for an election between "royalties or equitable remuneration." Also welcome is the proposal to exclude "extras" from the statutory royalty entitlement under Section 8A; however, the manner in which the proposal excludes extras is flawed. The amendment excludes all "extras, ancillary participants or incidental participants" from the definition of "performer" in the PPAB. This would result in excluding these performers not only from the application of the CAB's Section 8A, but also from the protections they may currently enjoy under the Performers' Protection Act, which cannot be the intent of the proposal. This flawed proposal illustrates the problem of legislating for performers' rights under the CAB, instead of exclusively dealing with this aspect in the PPAB.

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 a minimum of 10% of a company's annual turn-over are prescribed for a failure to comply with the new reporting obligations. Such fines are wildly inconsistent with the fines (which are not specified) that individuals who infringe on these provisions may incur. 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.

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<sup>9</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.

<sup>10</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.



**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. IIPA is not aware of any substantive contract override provision that has blanket application across all copyright contracts and rights of copyright in the copyright laws of any country in the world. Not only does the contractual override provision apply to all rights of copyright, but it would also apply to all copyright exceptions and limitations, which would entrench the effect of deprivation of rights of the overly broad new exceptions in the CAB and present serious challenges for the negotiation of settlement agreements in infringement cases in which one of the parties relies on a copyright exception.

## **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 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 extended to have application in the PPAB (without any impact assessment on how this would impact the rights of performers), 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, the proposed exceptions 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>11</sup> The fair use provision, which is supported and

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<sup>11</sup> See, e.g., Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention.

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, informed by legal precedents developed in jurisprudence stretching back for more than a century).<sup>12</sup> 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. 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>13</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 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"; "education"; "comment, 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>14</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>15</sup> The South Africa proposal also includes an affirmative requirement to consider "all relevant factors," which is not in the U.S. statute. Further, the CAB calls on judges to narrowly consider the "substitution effect" rather than the overall "effect" of the use on the potential market for the copyright protected work, as called for under the U.S. fair use statute. Even if a particular use of a copyrighted work would not amount to a direct "substitution" of the work in its current market, such use could still have a detrimental impact on the potential markets for a rights holder. Moreover, this departure from the language in U.S. law was not subjected to any

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<sup>12</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>13</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).

<sup>14</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>15</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 *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U. S. \_\_\_\_, 28 (2023) (clarifying that "*Campbell* cannot be read to mean that §107(1) weighs in favor of any use that adds some new expression, meaning, or message. Otherwise, 'transformative use' would swallow the copyright owner's exclusive right to prepare derivative works.")

impact or legal assessment. 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>16</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 rights 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, 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>17</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

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<sup>16</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.

<sup>17</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).

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>18</sup> Enactment of this exception would therefore disrupt the significant market for authors’ and publishers’ translation rights. As a result, this exception falls outside the bounds of the three-step test, because it fails to 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.

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<sup>18</sup> See Berne Convention Article 8, and WTO TRIPS Agreement Article 9, incorporating the Berne Convention, Article 8.

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. Furthermore, video game publishers, device makers, and online platforms rely on TPMs to safeguard the content played on platforms from illegal copying and distribution. Protecting the integrity of the video game ecosystem from infringing activities is necessary to ensure that consumers can enjoy rich and immersive video game experiences. Anti-circumvention provisions are instrumental in safeguarding the highly creative works produced by the video game industry across all platforms.

First, the definition of “technological protection measure” in Section 1(j) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies that are designed to have that effect or that 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. 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>19</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.

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<sup>19</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.

The F-versions include proposed changes to the TPMs provisions, including a revision of Section 28P(2), which do not resolve the concerns identified above. Section 28P(2), as revised, would be subject to abuse by enabling a user to engage the services of a third party for assistance to overcome or circumvent TPMs when the user holds the subjective view that the user is acting lawfully under an exception, even if that is not the case.

## **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 TPM, 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. Under current law, it is practically impossible for rights holders in South Africa to enforce their rights against non-domestic infringers and content pirates who locate infringing services in other countries while targeting South African audiences and consumers. Unfortunately, the CAB does not address this need in any meaningful way. As discussed below, South Africa should provide in its legal system mechanisms that ensure Internet service providers (ISPs) can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities.

IIPA also reiterates its recommendations to introduce additional 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.

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. Section 5 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, that may include state-owned enterprises, being vested with full rights of copyright in works of South African authors without agreement between the parties to this effect. The CAB further proposes to amend Section 22(1) to provide that “copyright owned by, vested in or under the custody of the state may not be assigned.” 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. *Certain Definitions Incompatible with International Treaties***

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

- 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.

While the definition of “broadcast” was removed in the F-version of the PPAB, it is important that any definition in South African law does not extend 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 the 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.”



- **Increase the term of protection for works and sound recordings from 50 years to at least 70 years, in line with the international standard.**

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.

## **MARKET ACCESS**

- **Remove market access restrictions that negatively impact the U.S. creative industries.**

**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.

**"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:** For several years, the Department of Communications and Digital Technologies (DCDT) has considered how to adapt South Africa's content regulatory framework to the online marketplace. The DCDT has issued a couple of Draft White Papers (DWP), the most recent in July 2023, that, among other things, recommends the imposition of local content quotas (up to 30% of the catalogue). The DCDT also envisions expanding the regulatory powers of ICASA to regulate On-Demand Content Services (OCS) and OTT services within the same regulatory framework as traditional broadcasters, to level the playing field. This creates the threat of competing regulatory oversight between the Films and Publication Board, which was also recently tasked to regulate OCS and ICASA. The DWP also recommends imposing a 2% turnover tax on digital platforms that would be payable into a fund dedicated to producing more local and original South African content production projects. The DWP also recommends a streamlined process for removal of infringing content and site blocking.

**Online Value-Added Tax (VAT):** South Africa currently levies a 15% VAT on the online selling of content, including films and television programming. As of April 2019, income on B2B services provided to South African businesses by foreign providers is also subject to VAT.

**Digital Services Tax (DST):** In July 2023 South Africa published a Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety that proposed a unilateral DST. The measure would impose a 2% turnover tax on digital platforms operating in the audiovisual sector or a levy to fund the production of South African audiovisual content. Such a unilateral DST conflicts with the Organization for Economic Cooperation and Development (OECD) multilateral tax convention.

## **ENFORCEMENT**

- **Improve enforcement against online piracy, including by providing effective mechanisms and statutory remedies to address services that infringe domestic and foreign content.**

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.

Although South African consumers have increasing options available to stream legitimate creative content, online piracy continues to grow in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. Statistics recently released by software security and media technology company Irdeto 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 ten identified piracy sites on the Internet.<sup>20</sup> Of the African countries that were tracked during this survey, South African Internet users made the second-most visits to the top ten tracked pirated sites (around 5 million, almost double that of Nigeria and Ghana, and only trailing Kenya where seven million users accessed these sites).<sup>21</sup> An Association of American Publishers (AAP) member publishing house reported that 2,348,973 books have been downloaded via P2P file-sharing platforms by South African Internet users since May 2021.

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>22</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.

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>23</sup> To combat online piracy, South Africa needs a legal framework that enables rights holders

<sup>20</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>21</sup> Id.

<sup>22</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>23</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

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.

**Online 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 should provide in its legal system mechanisms that ensure Internet service providers (ISPs) can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities. Government agencies and courts in over 42 countries—including Australia, Belgium, Brazil, Denmark, France, India, Ireland, Italy, Peru, Portugal, Singapore, South Korea, Spain, Sweden, the United Kingdom, and the United States—employ or have made legally available injunctive relief or administrative orders to compel ISPs to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities. 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. Rights holders welcome DCDT’s ongoing, collaborative, and constructive engagement with stakeholders on the Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety: A New Vision for South Africa (July 2023).<sup>24</sup> The DCDT expressly recognized in the Second Draft White Paper the need for effective legal protections to combat the scourge of online piracy, and in particular made the explicit recommendation for “the inclusion of the provisions for a streamlined and fast track process for removal and site blocking by ISPs upon notification by verified rights holders” that includes “search engine operators in the scope of site blocking.”<sup>25</sup>

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-

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little to no experience in IP infringement cases, further diminishing the utility of this remedy. As a result, in practice, the interdict remedy is not effective for rights holders in South Africa. Moreover, the proposed copyright reform legislation will further diminish the utility of this remedy because the ambiguous and overbroad exceptions could make it more difficult to establish a prima facie case of infringement on which to base an interdict order.

<sup>24</sup> See Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety: A New Vision for South Africa (July 2023) available at [https://www.gov.za/sites/default/files/gcis\\_document/202307/49052gen1934.pdf](https://www.gov.za/sites/default/files/gcis_document/202307/49052gen1934.pdf).

<sup>25</sup> See id at 23.

compliance with any provision of the Act. South Africa's government should fully implement and operationalize 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 responsible for implementation of the Cybercrimes Act, pronounced in March 2022 that the government is intent on increasing collaborations with the private sector to assist the fight against content piracy.<sup>26</sup> While there appears to be an interest within the Department to combat content piracy, no concrete actions have been taken yet.

**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 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.

**Capacity Building:** The Interpol Intellectual Property Crime Conference held in 2019 in Cape Town provided local law enforcement with information on best practices and resources for combatting IP theft, including access to the Interpol Intellectual Property Investigators Crime College (IPIC). Law enforcement should take advantage of these initiatives, including the IPIC training courses to assist with local and regional training of new and existing units. In April 2022, a creative industry stakeholder collaboration resulted in the launch of the "Partners Against Piracy" (PAP) initiative with a focus on combating the scourge of online content piracy and the objective of fostering improved private and public sector cooperation on this issue.

## **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>26</sup> See BusinessTech, *Government to clamp down on pirated movies and shows in South Africa*, available at <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)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2024.<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 leading global exporter of piracy services and Vietnamese operators have been associated with some of the world’s most pervasive piracy websites, causing 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. Amendments to the Intellectual Property (IP) Law, which entered into force on January 1, 2023, contain some improvements, including certain measures that may allow rights holders to seek civil or criminal relief against online infringers. The implementing regulations, published in April 2023, also include some positive provisions that could improve protection and enforcement. In 2022, the Government of Vietnam acceded to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties). Vietnam still needs to 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, as well as 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. Finally, Vietnam’s piracy problems would also be mitigated if its restrictive market access barriers were removed.

### **PRIORITY ACTIONS REQUESTED IN 2024**

#### **Enforcement**

- Establish a robust enforcement framework and ensure enforcement officials—including the Ministry of Public Security (MPS), the Ministry of Information and Communication (MIC), and the Ministry of Culture, Sports, and Tourism (MOCST)—investigate and criminally prosecute commercial-scale piracy sites and services as well as bring administrative actions.

#### **Legal Reforms**

- Make necessary changes to laws and implement Resolutions, Decrees, and Circulars to address several critical issues (e.g., term of protection, broadcasting and communication rights, “communication to the public” definition, Internet service provider (ISP) liability, denial of protections, exceptions and limitations, hierarchy of rights, seizure of infringing goods) to improve copyright protection and enforcement and 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.

<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/2024/01/Appendix-B-2024.pdf>.

- Adopt a Supreme People’s Court Resolution that clearly defines and interprets “commercial scale” consistent with Vietnam’s international obligations and enables more effective criminal referrals by providing essential guidance on the evidence required in cases of copyright infringement.
- Introduce mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities.
- Reform the CMO function of 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.
- Ensure 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.

### Market Access

- Remove severe market access restrictions that continue to negatively impact the U.S. creative industries.

## **ENFORCEMENT**

- **Establish a robust enforcement framework and ensure enforcement officials—including the Ministry of Public Security (MPS), the Ministry of Information and Communication (MIC), and the Ministry of Culture, Sports, and Tourism (MOCST)—investigate and criminally prosecute commercial-scale piracy sites and services as well as bring administrative actions.**

Vietnam currently hosts some of the most egregious and popular piracy sites and services in the world that target a global and English-speaking audience.<sup>2</sup> These piracy sites and services, including *Fmovies*, *AniWave*, *123movies*, *BestBuyIPTV*, piracy-as-a-service (PaaS) site *2embed*,<sup>3</sup> and *Chiasenhac*, 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 and, despite amendments to the Criminal Code in 2017, there has yet to be a single criminal conviction for a copyright offense. Illegal content generally can be accessed via online and mobile network 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. The video game industry reports that in 2023, Vietnam ranked sixth in the world for the number of connections by peers participating in the unauthorized file-sharing of ESA member mobile video game titles on public P2P networks. 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.

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<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.

According to data from the International Federation of the Phonographic Industry's (IFPI) Music Consumer Study 2023 (MCS), Vietnam has one of the highest levels of music piracy in the world.<sup>5</sup> The study found that two-thirds (66%) of respondents aged 16-44 regularly pirated music, compared to a global average of 29%. Stream ripping—unlicensed downloads of music from video sites like YouTube—was the major music piracy threat in the country: 63% said they used web sites like *Y2Mate* or unlicensed mobile apps like *SnapTube* to illegally download music through stream ripping. In addition, 35% used cyberlockers like *Mega* or *Rapidgator* for music piracy (often to obtain pre-release leaks). Twenty-nine percent used BitTorrent sites like *ThePirateBay* for music piracy. The MCS found that more than 17% of Vietnamese respondents used the stream-ripping site *Y2Mate*. This level of popularity is supported by independent data from SimilarWeb that recorded over 53 million visits from Vietnam to *Y2Mate* during 2023.

Importantly, *Y2Mate* is one of a network of seven globally popular stream-ripping sites believed to be operating from Vietnam. Although the operator of *Y2mate.com* voluntarily geo-blocked access from the United States, United Kingdom, France, and Germany, the site is once again accessible from these countries, and while the site was geo-blocked the operator set up alternative stream-ripping sites.

Streaming and Internet protocol television (IPTV) piracy remain the most common types of online piracy in Vietnam. *Fmovies*, with a global SimilarWeb ranking of 291 and average monthly visits of 161 million, is domiciled in Vietnam and has over 60 associated domains, many of which are known pirate brands such as *Bmovies*, *AniWave*, *Putlocker*, and *Solarmovies*, providing unauthorized access to popular movies and TV series.<sup>6</sup> 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 video-on-demand (VOD) titles in multiple languages. *BestBuyIPTV* is particularly popular in Europe.<sup>7</sup> Separate criminal complaints against *Fmovies* and *BestBuyIPTV* were officially referred to the MPS and despite the requisite evidential documentation being provided and high-level meetings being convened with the government, these cases have yet to be referred to the procuracy.

Vietnam also hosts infamous PaaS businesses such as *2embed.to*, a versatile PaaS that provided a library of over 300,000 movies and TV shows and was being used by more than 520 globally popular illicit streaming sites, which had a combined traffic of over 1.2 billion visits in Q4 2022. Vietnam also hosted *zoro.to*, described in some media publications as the largest piracy website in the world and which had an average of over 200 million visits per month. Both *2embed* and *zoro.to* were being operated by the same network of identified operators. In a Knock-and-Talk operation in July 2023 undertaken by the Alliance for Creativity and Entertainment (ACE) the operators of these sites handed over administrative control of the primary and associated domains. However, in a matter of weeks a new domain (*aniwatch.to*) replaced *zoro.to* and thereafter a new domain (*2mbed.me*) replaced *2embed.to*. Criminal enforcement action by the MPS is needed to close such expansive piracy networks.

Ineffective copyright enforcement in Vietnam is a serious concern, particularly in the face of this growing piracy problem. 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. It is critical for responsible enforcement authorities, including the relevant provincial police units, the MPS, the Supreme People's Procuracy (SPP), and the Supreme People's Court to follow through on infringement complaints, take meaningful and effective enforcement actions, and impose deterrent sanctions against infringing websites.

<sup>5</sup> See International Federation of the Phonographic Industry (IFPI), *Engaging With Music 2023*, available at [https://www.ifpi.org/wp-content/uploads/2023/12/IFPI-Engaging-With-Music-2023\\_full-report.pdf](https://www.ifpi.org/wp-content/uploads/2023/12/IFPI-Engaging-With-Music-2023_full-report.pdf).

<sup>6</sup> According to SimilarWeb, in November 2023 *Fmovies* had a global ranking of 291 and had 167.9 million global visits. The site has been blocked in several countries such as Ireland, UK and Denmark. Its former domain, *Fmovies.to*, was blocked in 15 countries. *Fmovies.se*, was blocked in nine countries.

<sup>7</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.

Vietnam has yet to criminally prosecute a single commercial-scale copyright infringing site or piracy service, even though the current Criminal Code, which explicitly provides for criminal copyright offenses, has been in effect since 2018. As IIPA previously reported, in 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>8</sup> Unfortunately, the MPS has not filed criminal charges nor provided rights holders with any transparency regarding this action. While the *Phimmoi* domains were taken offline, copycat sites soon appeared, some of which have become very popular in a short period of time, illustrating the need for more effective deterrence.<sup>9</sup> ACE has submitted criminal referrals against *Fmovies* and *BestbuyIPTV* to the MPS, but the referrals continue to undergo internal processing with the relevant MPS law enforcement unit (these are the same units whose failure to cooperate with U.S. law enforcement to address key targets like *Fmovies* has allowed those sites to continue to operate). Despite defined procedures for handling criminal cases written into the Penal Code and the Criminal Procedure Code, there remains a lack of transparency and clarity with the MPS continuing to request additional evidence without explanation or reasoning, potentially using the opaque process as a pretext to delay the investigation or not pursue a prosecution. Vietnam should pursue these cases and use the precedent to establish a robust criminal enforcement framework, including clear evidentiary processes and other criminal procedures and appropriate deterrent penalties.<sup>10</sup>

Administrative and criminal processes in Vietnam are cumbersome and eventual penalties provided for in the current legislation lack any deterrence. On a positive note, Article 198a of the new IP Law 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 by enforcement officials that actions against an unknown infringer (i.e., *John Doe* civil action) will not prevail, even where the domain name, Internet protocol (IP) address, and related email addresses are known. It is critical for responsible enforcement authorities, including the relevant police units, the MPS, and the Authority of Broadcasting and Electronic Information (ABEI) under the MIC, to follow through on infringement complaints, take meaningful and effective enforcement actions, and impose deterrent sanctions against infringing websites.

IIPA understands that, in addition to the Supreme People's Court working on a Resolution related to criminal liability (as discussed below), it was also drafting an "IP Manual for Vietnamese Judges." Unfortunately, it appears that this effort has stalled. These extensively drafted documents should be promptly updated to encompass the recent changes outlined in the newly issued regulations, specifically the IP Law and its accompanying regulations. Failure to expedite the finalization of these document has contributed significantly to the deceleration of the prosecution process of numerous criminal referrals in Vietnam. 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 remained 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.<sup>11</sup>

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<sup>8</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>9</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 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>10</sup> On January 9, 2024, local police from Quang Binh province arrested three persons suspected of operating three small piracy streaming sites: *Bilutvt.net*, *Tvhayh.org*, and *Animefull.net* (the largest of the three sites, *Tvhayh.org*, only had 722,000 visits between January and December 2023). This was an *ex officio* action in which three identified operators were arrested. This is the first case known to IIPA in which persons were arrested for intellectual property (IP) offenses. Despite this positive development much more work needs to be done on languishing criminal complaints (including regarding the globally infamous *Fmovies* which commands average monthly visits of over 160 million) to ensure that the known operators of piracy services are arrested and prosecuted.

<sup>11</sup> In July 2022 the Ministry of Information and Communication (MIC), in collaboration with the Alliance for Creativity and Entertainment (ACE) and local rights holder K+, organized a symposium focused on addressing online content issues related to copyright infringement. This conference brought together Vietnamese officials from relevant authorities and representatives of the local and international content industry to consider effective strategies to prevent and reduce online copyright infringement, while evaluating the efficiency of technological solutions (including site blocking processes).



## LEGAL REFORMS

- **Make necessary changes to laws and implement Resolutions, Decrees, and Circulars to address several critical issues (e.g., term of protection, broadcasting and communication rights, “communication to the public” definition, Internet service provider (ISP) liability, denial of protections, exceptions and limitations, hierarchy of rights, seizure of infringing goods) to improve copyright protection and enforcement and ensure Vietnam is in full compliance with the WIPO Internet Treaties, the Bilateral Trade Agreement (BTA), the WTO TRIPS Agreement, and other international obligations and evolving global norms.**

Copyright protection and enforcement in Vietnam is governed by the IP Law (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 copyright-related provisions in the IP Law entered into force on January 1, 2023. The 2022 amendments made several changes to the IP Law, including adding important protections required by the WIPO Internet Treaties. The implementing regulations to the IP Law were passed on April 26, 2023 (Decree 17). Decree 17 includes some positive provisions that improve protection and enforcement, but several concerns remain, as detailed below. 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 European Union (EU).<sup>12</sup> IIPA encourages Vietnam to take the necessary steps to fully implement these treaties.

The IP Law amendments contain some improvements for rights holders, including clarifying that the illegal uploading and streaming of a cinematographic work is a violation of the communication right; and the copying of part of a work is a violation of the reproduction right (thereby creating additional opportunities for rights holders to seek civil or criminal relief against online infringers). Nevertheless, the amendments and implementing regulations (Decree 17) leave 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. The following issues should be addressed in additional regulations or amendments:

- **Term of Protection:** The amended IP Law does not provide for an adequate term of protection for sound recordings, which should be updated to be in line with the international trend of a minimum of 70 years. The amended IP Law also retains an inadequate term of protection for all copyrighted works, including audiovisual works, and should be updated to be 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.<sup>13</sup>
- **Broadcasting and Communication Rights:** The IP Law 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 Article 33(1) of the IP Law in a manner consistent with Vietnam’s international obligations, for example along the lines of Article 15 of the WPPT. This includes making sure that implementing regulations do not limit remuneration rights by exempting certain users of music from payment, nor make interactive uses subject to a mere remuneration right.

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<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 European Union (EU) in August 2020.

<sup>13</sup> Article 4.4 of the Bilateral Trade Agreement (BTA) provides, “Each Party shall provide that, where the term of protection of a work is to be calculated on a basis other than the life of a natural person, the term shall be not less than 75 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 25 years from the creation of the work, not less than 100 years from the end of the calendar year of the creation of the work.”

- **Definition of Communication to the Public Departs from WPPT:** The definition of “communication to the public” in the IP Law 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, this definition should be revised.
- **ISP Liability:** Article 198b of the amended IP Law introduces an ISP liability regime, which is welcome, but IIPA is concerned that the scope of ISP liability limitations (i.e., safe harbors) may be too broad as currently provided. Decree 17 should be revised to ensure that copyright safe harbors should apply to only passive and 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 within a specific timeframe, 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. In addition, Vietnam should require marketplaces 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.
- **Denial of Protection for Certain Works:** Articles 7(2), 7(3), and 8 of the IP Law 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 Law 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 Law 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 (Article 26(1)(b)) applicable to all works except cinematographic works is not in line with international norms. In addition, Decree 17 should clarify that the exceptions apply only to copyrighted works and sound recordings that are lawfully acquired.
- **Overbreadth of Draft Private Copy Exception:** The amended Article 25(1)(a) (private copy exception) should be limited to one physical copy in accordance with international standards.
- **Recirculation of Seized Good/Tools into Channels of Commerce:** Articles 202(5) and 214(3) of the IP Law 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.
- **Adopt a Supreme People’s Court Resolution that clearly defines and interprets “commercial scale” consistent with Vietnam’s international obligations and enables more effective criminal referrals by providing essential guidance on the evidence required in cases of copyright infringement.**

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 point in the CPTPP). The Supreme People’s Court has indicated it is working on a draft Resolution to provide guidelines for interpreting “commercial scale” and how to calculate the monetary thresholds, but those efforts appear to have stalled.<sup>14</sup> A Supreme People’s Court Resolution should be issued without delay. The Resolution should also provide

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<sup>14</sup> A Resolution should: (i) clearly define and interpret “commercial scale” consistent with Vietnam’s international obligations; (ii) criminalize “significant acts not carried out for commercial advantage or financial gain that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace;” and (iii) take into account peer-reviewed studies to ensure that the monetary thresholds can realistically be met by applying an appropriate

essential guidance on the evidence required in cases of copyright infringement, thereby enabling rights holders to make criminal referrals more effectively. 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 Law and the Criminal Code (in other words, acts considered infringements, when carried out on a commercial scale, should be criminalized under the Criminal Code).<sup>15</sup> Unfortunately, as discussed above, the government has not followed through on these important changes and has not set in motion a more deterrent approach to rampant local piracy.

- **Introduce mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.**

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 MOCST. While this is a useful step forward, most of the sites that were "fully blocked" were live sports sites. Unfortunately, the authorities demand 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 MOCST and share current site blocking best practices in the Asia-Pacific region and Europe, ABEI and MOCST appear unwilling to adopt such effective site-blocking procedures. Moreover, disablement in Vietnam, without criminal investigation and prosecution of the site operators (as discussed above), does not stop these Vietnam-based services from harming overseas markets, including the U.S. market. Procedural difficulties also remain for U.S. rights holders.<sup>16</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, timeframes for site-blocking referrals to be actioned by government and complied with by ISPs, and measures available to ensure ISP compliance. While Decree 17 includes some provisions that may be helpful, Vietnam should introduce mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites (both those hosted in Vietnam and hosted or operated in other countries but available in Vietnam) on a no-fault basis, upon rights holders' applications to appropriate authorities.

- **Reform the CMO function of 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.**

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.

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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>15</sup> This would include, for example, criminalizing commercial scale infringements involving unauthorized making available or communication to the public of works or objects of related rights, as well as the act of circumvention of technical protection measures (TPMs) or trafficking in circumvention devices/services.

<sup>16</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 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.

- **Ensure 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.**

Amended Article 56 of the IP Law introduces positive elements for greater transparency and more clarity regarding CMO operations. 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. Unfortunately, while the new collective rights management framework included in the Decree 17 includes some positive provisions regarding good governance and transparency, Decree 17 fails to provide the needed clarity on these issues, nor does it guarantee rights holder involvement in decision making.

Additionally, the amended IP Law and Decree 17 fall short of international standards regarding distribution of monies collected by CMOs. For example, the amended IP Law 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.” Decree 17 fails to address this problem and further imposes: (1) tariffs for the broadcasting and public performance remuneration when no agreement is reached between right holders and users, and (2) a default distribution key between rights holders, both of which will 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, included in Appendices 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.

More importantly, the new framework may potentially result in: (a) mandatory collective management of exclusive rights, (b) 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, (c) 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 (d) the introduction of a decision-making process of CMOs in which non-discriminatory participation of rights holders is not guaranteed.

## **MARKET ACCESS**

- **Remove severe market access restrictions that continue to negatively impact the U.S. creative industries.**

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 cycle in which fewer legitimate products are 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:** Vietnam requires that foreign channels on pay-TV services be capped at 30% of the total number of channels the service carries. Vietnam also requires 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, and all commercial advertisements airing on such channels in Vietnam must be produced or otherwise “conducted” in Vietnam. All channels are subject to Vietnam’s censorship requirements and international channels are subject to “editing fees.” These measures are unduly restrictive and continue to severely impede the growth and development of Vietnam’s pay-TV industry.

**Decree Regulating Over-the-Top (OTT) Services:** In October 2022, amendments to Decree 06 were promulgated as Decree 71, expanding the scope of existing pay-TV regulations to include over-the-top (OTT)/VOD services. Most concerning is a non-transparent licensing scheme that is understood to require a local presence or joint venture in addition to onerous censorship provisions for any VOD service that offers content not considered to be “films” (which would be regulated under the Cinema Law). While industry welcomes the self-classification of “films” content on OTT services pursuant to the amended cinema law, this licensing scheme required by Decree 71 falls short of industry expectation and is likely to indirectly contribute to online infringement due to the removal or restriction of legitimate content services from the market.

**Screen Quotas:** Under Cinema Law/Decree 54, Vietnam required that at least 20% of total screen time be devoted to Vietnamese feature films. In June 2022, Vietnam passed Cinema Law amendments that entered into force in January 2023, replacing Decree 54. Instead of the 20% screen quota under Decree 54, which was never implemented, the amended Cinema Law introduces a gradual phasing-in of the screen time requirement, with 15% of annual screen time to be allocated for Vietnamese feature films from January 2023 to December 2025; and 20% from January 2026 onwards. While the policy of a gradual phasing-in offers some flexibility, Vietnam should nonetheless remove all screen quotas for the long-term development of the industry.

**Broadcast Quotas:** In the television sector, foreign content is limited to 50% of broadcast time, and foreign programming is not allowed during prime time. Broadcast stations must also allocate 30% airtime to Vietnamese feature films, which was affirmed by an initial draft decree of the Cinema Law. These restrictions limit U.S. exports of film and television content.

**Foreign Investment Restrictions:** The June 2022 Cinema Law reaffirmed that 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 distributors and should be eliminated.

**Recent Amendments to Decree No. 72 Restrict Video Game Rights Holders:** In 2023, Vietnam adopted Decree No. 72 on the management of Internet services and online information, which mandates that companies obtain an official license and certification from the government to distribute a video game in the Vietnamese market. Article 31(4) of the Decree classifies online games as a conditional investment sector for the purposes of foreign direct investment (FDI), which means that for a company to be an authorized “online gaming services” entity in Vietnam, it must have majority Vietnamese ownership via a joint venture or a business cooperation contract. 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. In 2023, the Vietnamese government revised the Decree, leading to increased enforcement against foreign video games that are not fully certified, removing them from the Vietnamese market. IIPA urges the Government of Vietnam to work towards globally accepted trade standards 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 IP rights 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 MOCST 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**

# BELARUS

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Belarus remain on the Watch List in 2024.<sup>1</sup>

**Executive Summary:** After years of Belarus working to improve its laws on intellectual property (IP) protection and enforcement, Belarus took a significant step backward in 2022 with the passage of Law No. 241-3, which legalized piracy against foreign states “committing unfriendly actions.” This law is a flagrant violation of Belarus’s international treaty obligations and a direct affront to American copyright industries. Making matters worse, the Government of Belarus is blatantly financially benefiting from this government-sponsored copyright infringement. IIPA urges Belarus to rescind this law and to comply with its international obligations, including with respect to copyright and related rights.

### **PRIORITY ACTIONS REQUESTED IN 2024**

#### **Enforcement**

- Repeal Law No. 241-3, which legalizes unlicensed use of copyrighted works.

#### **Rights Management**

- Repeal problematic provisions of Law No. 243-ÿ, which imposed a requirement that certain rights of performers and phonogram producers, including exclusive rights, be collectively managed by a state-owned collective management organization (CMO).

### **ENFORCEMENT**

- **Repeal Law No. 241-3, which legalizes unlicensed use of copyrighted works.**

With the passage in 2022 of Law No. 241-3, Belarus has legalized the unlicensed use of copyrighted works of all kinds, including computer programs, broadcasts of a broadcasting organization, audiovisual works, and musical works. The Government of Belarus has stated that the law is temporary, and it is currently set to expire on December 31, 2024. The law allows the importation of goods with copyrighted content into the territory of the Republic of Belarus, so-called “parallel import,” and allows the circulation of those goods without the consent of rights holders from foreign states “committing unfriendly actions,” if such goods are included in the lists of goods that are essential for the domestic market as approved by state bodies authorized by the Council of Ministers. Once such goods are included on the list of goods that are essential for the domestic market, they are removed from the customs register, which means the Government of Belarus ceases border enforcement against those infringing goods.

The law further directs Belarus’s National Center of Intellectual Property (NCIP) to collect royalties on this unlicensed use of copyrighted works on behalf of the individuals and entities from “unfriendly” states – with a right for NCIP to apply a 20% admin fee – and to retain this remuneration for three years on behalf of the rights holder or CMO. If the rights holder or CMO do not request the royalties during this period, the monies will be transferred to Belarus’s general budget within three months. The Government of Belarus is blatantly financially benefiting from government-sponsored copyright infringement.

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<sup>1</sup> For more details on Belarus’s Special 301 history, see previous years’ reports at <https://www.iipa.org/reports/reports-by-country/>. For the history of Belarus’s Special 301 placement, see <https://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf>.



Belarus is a member of several international IP treaties, such as the Berne Convention and the WIPO Internet Treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty), which provide for the protection of the works at issue in Law No. 241-3, as well as the enforcement of the rights protected under these treaties. Moreover, the law violates the obligation to grant national treatment to works protected under the Berne Convention. IIPA urges Belarus to repeal this law and to comply with its international obligations, including with respect to copyright and related rights.

## **RIGHTS MANAGEMENT**

- **Repeal problematic provisions of Law No. 243-ÿ, which imposed a requirement that certain rights of performers and phonogram producers be collectively managed by a state-owned collective management organization (CMO).**

Law No. 243-ÿ, adopted in January 2023, introduced further problematic amendments to the Belarusian Copyright Law, making certain performers' and phonogram producers' rights subject to compulsory collective management by a state-owned CMO. Additionally, the new CMO accreditation rules introduced by the same law require that only one CMO, which must be state-owned, is allowed to operate as such. This new framework severely undermines the ability of right holders to exercise their rights and ultimately to monetize the use of their content.

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2024.<sup>1</sup>

**Executive Summary:** IIPA members are extremely concerned over proposed legislation to update the Brazilian copyright law. Under the last version of the text publicly available, the proposed bill would create new royalty remuneration obligations for advertisement and news material, as well as new collective royalties remuneration for any on demand distributions, potentially impacting the full ecosystem of intermediaries and platforms that would be responsible for such payments directly. Brazil considered a proposal that could have been understood to introduce a remuneration right for performers in addition to the exclusive right that performers already enjoy. The proposal was put forward without proper consultation with stakeholders or meaningful impact assessment as to its effect on the local recorded music market. Further, the proposal, while not entirely clear, resembles the additional remuneration right for performers that exists in Spain. However, as the Spanish experience and independent findings in countries that have considered similar proposals show, these “solutions” benefit mainly the collective management organizations (CMOs) that manage this remuneration, but not performers themselves.

Despite this concerning proposal, IIPA commends Brazil’s excellent progress with a number of enforcement actions against online piracy, including the fifth and sixth waves of Operation 404, which combined took down more than 868 websites and applications with audiovisual content, games, music, and sports events online piracy in eight different Brazilian states through criminal remedies, including site-blocking injunctions, in addition to leading search and seizure raids against major pirate targets and arrests of related criminals.<sup>2</sup> However, several long-standing normative and legislative concerns warrant keeping Brazil on the Watch List. Recent positions vocalized by the Ministry of Culture and ANCINE’s officials concerning the protection of copyrights, became a cause for concern. 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.

On another positive note, the National Intellectual Property Strategy (ENPI) was approved by the *Grupo Interministerial de Propriedade Intelectual* (Interministerial group on Intellectual Property, GIPI) in 2023 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 IP 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 ANATEL and the Brazilian Film Agency (ANCINE) to implement an effective system to tackle online piracy within Internet applications and sites based on Bill of Law #3696/2023, which was signed by the President on January 15, 2024, and sets forth an administrative site-blocking provision. 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.

<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/2024/01/Appendix-B-2024.pdf>.

<sup>2</sup> See Daniella Almeida, *Agencia Brasil*, “Operation against piracy blocks around 270 websites and applications,” March 14, 2023, available at <https://agenciabrasil.ebc.com.br/geral/noticia/2023-03/operacao-contrapirataria-bloqueia-cerca-de-270-sites-e-aplicativos>; see also, Filipe Pontes, *Agencia Brasil*, “Operation 404 takes down 100 illegal access websites to the English Championship,” November 28, 2023, available at <https://agenciabrasil.ebc.com.br/geral/noticia/2023-11/operacao-404-derruba-100-sites-de-acesso-ilegal-ao-campeonato-ingles>.

Regarding market access barriers, unfortunately, taxes on video game consoles and accessories have been significant, and IIPA encourages Brazil to reduce the burden on this sector of the economy as it completes overall tax reform. IIPA continues to be concerned about potential new taxes and regulation for video-on-demand (VOD) services as well as digital services taxes (DSTs). Moreover, it is important that Brazil does not implement network fees. IIPA respectfully requests USTR to continue to encourage Brazil to pursue legislation, policies, and practices that enable a sustainable and thriving creative sector.

## **PRIORITY ACTIONS REQUESTED IN 2024**

### **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.
- Ensure that ANATEL continues working to implement administrative site blocking for pirate sites, as well as continue enforcing laws preventing the importation and distribution of illicit streaming devices (ISDs) in every channel.
- Ensure that ANCINE can confirm copyright infringement of local and foreign protected works and consequently implement an administrative site-blocking procedure against pirate Internet applications and sites for such works pursuant to the approval of the Bill of Law # 3696/2023.
- Encourage state courts nationwide to assign specialized courts or judges to uniformly handle IP cases and implement a long-term national program to train judges, prosecutors, and police officers on IP law, the WIPO Internet Treaties, and enforcement measures.
- Ensure that the *Conselho Nacional de Combate à Pirataria* (National Council to Combat Piracy, CNCP) and GIPI continue to have the political support and increased resources to engage in cross-industry efforts against infringement of copyrights and online piracy; ensure that CNCP's National Plan to Combat Piracy speeds up discussions on Copyright Act reform; and support and reinforce the importance of the overall National IP Strategy as part of the copyright protection system in Brazil.
- Implement better border controls against the importation of counterfeit video game hardware, piracy devices (PDs), modified consoles, and circumvention devices, including illicit streaming devices (ISDs).

### **Legal Reforms**

- Reject proposals to introduce new measures that would disrupt the growth of the Brazilian digital music market, such as the unnecessary and ineffective additional remuneration right for performers.
- With regard to interactive uses of works, reject the addendum to Bill 2370/19 that appears to *de facto* downgrade the exclusive right of communication to the public to a mere remuneration right.
- Ratify and implement the WIPO Internet Treaties, and in particular, clarify that the making available right cannot be subject to default, mandatory collective rights management.
- Ensure the Copyright Law, currently under review, or any legislation on copyright, fully implements the WIPO Internet Treaties, the anticircumvention of TPMs, and penalties for trafficking in circumvention devices and software; removes the default rule whereby communication to the public rights (broadcasting and public performance) are collectively managed by ECAD; criminalizes signal theft in the Pay-TV and VOD sectors; penalizes repeat infringers; ensures that any exceptions and limitations comply with the three-step test; and provides deterrent-level penalties for infringement and choice of method to calculate said damages; among other things.
- 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.
- Ensure proper implementation of cooperation between ANCINE and ANATEL on a mechanism that ensures ISPs can impose effective relief to remove infringement of works, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.

## Market Access

- Enable industry growth by reducing high tariffs and taxes placed on video game products.
- Mitigate imposition of the VOD tax on movies and TV programming delivered on demand and refrain from developing excessively burdensome VOD or digital platforms regulations.
- Reaffirm that 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 theatrical quotas, because their renewal artificially constrains access to the Brazilian market for U.S. content exports, limiting consumer choice, and prevents exhibitors and distributors from making market-driven agreements.
- In alignment with recommendations from the Organization for Economic Cooperation and Development (OECD), refrain from establishing a digital services tax, which would significantly increase operational costs and act as a market access barrier.
- Refrain from implementing network fees, which are harmful to competition, to network neutrality, and ultimately, to consumers' rights.

## 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.**

According to IFPI's 2023 Music Consumer Study, the music piracy rate in Brazil stood at 47% of all internet users in 2023 – one of the highest in the world. Forty-two percent of users engaged in stream ripping using websites or mobile apps (50% of 16-34-year-olds) while 29% used cyberlockers or BitTorrent to download pirated music. Stream ripping is particularly popular in Brazil, allowing users to illegally, but easily, download copyrighted music content from YouTube using web sites or unlicensed mobile apps. The most popular sites record millions of visits from Brazil. For instance, *ssyoutube.com* received 151 million visits from Brazil during 2022 and is regularly used by more than 8% of the population to illegally download recorded music. The *Snaptube* unlicensed mobile app is used by more than one-in-five (20.5%) 16-64 year olds. Online piracy (VOD and Pay-TV) available through devices, Internet applications, and sites are a major cause of concern. Reports show that Brazil is the fifth country in the world for visits to audiovisual piracy websites.<sup>3</sup> The use of cyberlockers and BitTorrents is decreasing over time in Brazil – 6% and 30% respectively year over year.

Digital piracy of video game files remains high in Brazil, most prevalently through linking sites, which received approximately 40 million visits in the first nine months of 2023, followed by websites for unauthorized digital goods (UDGs), receiving over eight million visits in the same period. While filesharing via cyberlockers and BitTorrent is on the decline (a decrease in audience of 6% and 30% respectively from 2022 to 2023), the overall picture relative to global piracy levels remains bleak. In 2023, Brazil ranked fourth in the world for the number of connections by peers participating in the unauthorized file-sharing of ESA member video game titles on public peer-to-peer (P2P) networks (ranking even higher, and first in Latin America, for certain video game titles). By the same metric, Brazil ranked first in the world for unauthorized file-sharing of mobile games, third in the world for console-based games, and fifth in the world for PC-based games.

Particularly damaging to the market for legitimate video game play in Brazil is the proliferation of unauthorized account resales, by which pirates offer access to digital copies of a single game title account to multiple different users, via websites dedicated to this illegal commercial activity. E-commerce platforms provide infrastructure for payment and product management.

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<sup>3</sup> Akamai, *State of the Internet, Security: Pirates in the Outfield*, Vol. 8, Issue 1, available at <https://www.akamai.com/resources/state-of-the-internet/soti-security-pirates-in-the-outfield>.

While the overall levels of piracy in Brazil remain high by global standards, enforcement efforts are having a notably positive impact, including Operation 404, 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 (ABTA, Alianza, and MPA), and international anti-piracy groups and law enforcement (U.S. Department of Justice, the UK Intellectual Property Office (IPO), and the City of London Police Department's Police Intellectual Property Crime Unit (PIPCU)). Two successful rounds of Operation 404 were launched in 2023, ultimately taking down more than 868 websites and applications with pirated audiovisual content, games, music, and sports events. The Peruvian Copyright Office, INDECOPI, engaged with Operation 404 for the first time since 2019, working with Brazilian authorities to block 157 domains dedicated to music piracy, including MP3 download and stream-ripping sites. In parallel, the Brazilian authorities took action against 12 major stream-ripping and MP3 download mobile apps by ordering their removal from major app stores and sites where the apps could be downloaded. This wave resulted in the disruption of the prominent *VidMate* stream-ripping app which had more than 870 million downloads worldwide and over 1.1 million active users in Brazil. PIPCU and Homeland Security Investigations (HIS) remain important strategic partners to Brazilian authorities for Operation 404.

More than 40 criminal cases were conducted against illegal video game sites by law enforcement authorities during the year. The majority of these targets were commercial digital piracy sites (around 75%) and the others were download sites dedicated to video game piracy. These actions include two phases of the well-known Operation 404. IIPA urges the Government of Brazil to 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. Furthermore, the Government of Brazil should educate authorities for increased engagement against Brazilian targets that offer hacking tools, circumvention devices, and mod installation services, and that develop game emulators and other tools that specifically support video game piracy and circumvention of TPMs.

- **Ensure that ANATEL continues working to implement administrative site blocking for pirate sites, as well as continue enforcing laws preventing the importation and distribution of illicit streaming devices (ISDs) in every channel.**

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 industry's anti-piracy body, *APDIF DO BRASIL* (*APDIF*). The decision was the first of its kind in Brazil against music piracy services and confirms 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 the Unit against Cyber Crimes of the State of São Paulo's Prosecutors Office (*CyberGaeco*). Following this decision, a series of further successful blocking applications have been filed by *APDIF* and *CyberGaeco* in 2022 and 2023 and consequently over 250 stream-ripping sites have now been blocked in Brazil.

Audiovisual content piracy continues to impact local and foreign rights holders in Brazil and represents a complex threat to be addressed by enforcement authorities and legislators within the country. The strong approach adopted by the telecommunications regulator ANATEL in 2023 regarding the seizure and site blocking against devices delivering pirate pay-tv channels, might pressure criminals and consumers to focus even more on other unauthorized sources of content, such as those available as VOD through pirate Internet applications and sites.

ANATEL's Tactical Management Plan for the 2023-2024 biennium has a specific goal for combating audiovisual piracy. In the new version, in accordance with tactical goal number 19, ANATEL must expand orders to block IP addresses or URLs used by unapproved TV box devices or in the irregular offering of audiovisual content until 2024.

- **Ensure that ANCINE can confirm copyright infringement of local and foreign protected audiovisual works and consequently implement an administrative site-blocking procedure against pirate Internet applications and sites for such works pursuant to the approval of the Bill of Law # 3696/2023.**

The lack of enforcement initiative by the audiovisual content regulator ANCINE, to address infringement outside of the Pay-TV framework, together with anti-copyright views vocalized by officials from the Ministry of Culture, pose a relevant risk to the creative industry and to the Brazilian economy and consumers, while online piracy options for VOD continue to evolve and deepen.

In December 2022, ANCINE's board of directors decided to completely redraft the agency's Anti-Piracy Program, which will now be called the Copyright Protection Program. In this context, the cooperation agreements that the agency had with the Motion Picture Association (MPA) and with other players, such as the Brazilian Pay-TV Association (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. Brazil should ensure proper implementation of cooperation between ANCINE and ANATEL of a mechanism that ensures ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities pursuant to the approval of the Bill of Law # 3696/2023, which was signed by the President on January 15, 2024.

- **Encourage state courts nationwide to assign specialized courts or judges to uniformly handle IP cases and implement a long-term national program to train judges, prosecutors, and police officers on IP law, the WIPO Internet Treaties, and enforcement measures.**

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 was 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*. Additionally, a successful inter-agency and public-private cooperation led by the Ministry of Justice, cyber-crime laboratory *CiberLab*, in collaboration with *APDIF* and prosecutors from *CyberGaeco*, developed an investigative protocol and blocking framework against illegal mobile apps dedicated to distributing music content without authorization to Brazilian users.

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 and Rio de Janeiro. IIPA urges Brazil to commit sufficient resources and political will to assign well-trained tribunals throughout the country, (beyond just a few specialized courts or units in certain regions) and 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, and to encourage state courts to assign specialized courts or judges to handle IP cases.

To have copyright infringement perceived as a relevant matter to courts, more work needs to be done with state and federal prosecutors and judges. Authorities should amplify the already implemented framework in use with *CyberGaeco* (state of Sao Paulo) and other prosecutors that are part of other cybercrime units in different states. The video game industry reports that seeking and obtaining support from Brazilian authorities varies greatly state by state, especially relating to complex claims regarding TPM circumvention. While there is some support in the region against local circumvention-related targets, the process is slow. At the same time, there is a need for a more consistent approach to judges, through the *Conselho Nacional de Justiça* (National Council of Justice, CNJ) and other state magistrate academies with support of multiple stakeholders and government. Economic related crimes such as IP violations are too fragmented and when individual cases are brought to courts, it is difficult to obtain the full attention

of the justice system. More detailed analysis by judges and prosecutors on precedents and leading cases, as well as a better understanding of the online infringement ecosystem, will support better decisions. Better public policy will also help authorities to recognize IP and copyright as a matter of interest to the society and national economy. The National Strategy on Intellectual Property (see below), overseen by the Ministry of Development, Industry, Commerce and Services and the CNCP, overseen by the Ministry of Justice and Public Security, are two important platforms to develop better public policy focusing on IP that may lead and support other national authorities.

- **Ensure that the *Conselho Nacional de Combate à Pirataria* (National Council to Combat Piracy, CNCP) and GIPI continue to have the political support and increased resources to engage in cross-industry efforts against infringement of copyrights and online piracy; ensure that CNCP's National Plan to Combat Piracy speeds up discussions on Copyright Act reform; and support and reinforce the importance of the overall National Strategy on Intellectual Property (ENPI) as part of the copyright protection system in Brazil.**

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. In June 2020, the Brazilian government launched a consultation amongst private sector institutions and rights holder organizations to design a National Strategy on Intellectual Property (ENPI). The stated goal of such a strategy is “to reach an intellectual property system balanced and effective, widely used and that incentivizes creativity, investment and innovation and access to knowledge, with a purpose to increase competitiveness and the social and economic development of Brazil.” Apart from having calls and meetings with representatives from all creative sectors in the country, the government distributed a questionnaire seeking to receive the opinions and positions on the most important topics related to the protection of IP rights in Brazil.

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.

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 Brazilian Pay-TV Association (ABTA). MPA was also 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.

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.

- **Implement better border controls against the importation of counterfeit video game hardware, piracy devices (PDs), modified consoles, and circumvention devices, including illicit streaming devices (ISDs).**

Brazil needs to implement better border controls to stop the influx of counterfeit video game hardware, PDs, modified consoles, and circumvention devices, as well as ISDs. In one positive development, Brazilian Customs authorities recently seized 15,000 preloaded pirate video game consoles in a single enforcement action. However, despite evidence that modification (mod) chips, circumvention devices, and mod installation services exist in Brazil, and multiple industry training sessions in 2023 for customs authorities, the video game industry reports a lack of raids or customs seizures related to modified consoles or involving mod chips or circumvention devices. Authorities currently

focus efforts on simpler targets, such as preloaded game consoles or counterfeit merchandise. One video game console maker reported eight customs seizures and 18 criminal raids in 2023, with the majority of seizures involving consoles preloaded with unauthorized video game software (68k seized in 2023). Moreover, the Government of Brazil should encourage regional Federal Revenue enforcement units (DIREPs) to maintain anti-counterfeiting raid actions in the so-called secondary zones (in the local market).

## **LEGAL REFORMS**

- **Reject proposals to introduce new measures that would disrupt the growth of the Brazilian digital music market, such as the unnecessary and ineffective additional remuneration right for performers.**

The Brazilian Congress is currently discussing Bill PL 2370/2019 that intends to create a new additional remuneration layer for the original rights holders (actors, directors, producers, screenwriters, musicians, etc.) of audiovisual works for the streaming of their performances fixed in audiovisual works or sound recordings. Moreover, pursuant to the draft's language, it is uncertain whether previous agreements would be sustained and the nature of the collective management of these rights (voluntary or mandatory). Additionally, ISPs possibly would be required to disclose information about their revenues and about the frequency of reproduction of works.

The wording of these provisions, notably when read in conjunction with the explanatory notes, is confusing. However, it could be understood to introduce a remuneration right for performers in addition to the greater exclusive right that performers already enjoy. The proposal is likely inspired by the additional remuneration right for performers that exists in Spain. However, as the Spanish experience shows, these “solutions” benefit mainly the performers’ CMOs that manage this remuneration, but not performers themselves. Even in Spain, where the local CMO is subject to the strict EU collective rights management framework, approximately 50% of collections are not distributed to performers due to deductions to account for management costs and the funding of social, cultural, or educational programs, and, more importantly, to the inability of the CMO to correctly identify or locate the rights holders for whom the amounts are collected.

This initiative, as well as similar ones in the region, need to be strongly opposed as they have a greatly disruptive effect on the digital market, investment in the region, and do not serve the purpose of improving performers’ remuneration (in fact, studies and data suggest the contrary). It is concerning that the Group of Latin American and Caribbean Countries (GRULAC) at WIPO has been quite supportive of these initiatives. IIPA suggests that a more effective way for the countries in this region to improve performers’ remuneration would be to provide for an adequate copyright framework, including adequate scoping of exceptions and limitations, a strict collective rights management framework, and, more importantly, effective enforcement mechanisms to combat piracy.

- **With regard to interactive uses of works, reject the addendum to Bill 2370/19 that appears to *de facto* downgrade the exclusive right of communication to the public to a mere remuneration right.**

Bill PL 2370/19 also includes unclear provisions on the scope of communication to the public and public performance that could be understood to mean that interactive exploitations are considered an act of public performance and, as a consequence, subject to default collective management by ECAD, and thus *de facto* downgrading the exclusive right to a mere remuneration one. IIPA urges Brazil to reject this addendum. In fact, if anything the Brazilian Copyright Act needs to be amended to clarify that any and all interactive uses of sound recordings are an exclusive distribution right not covered by the public performance right and thus not subject to the default collective management by ECAD.

- **Ratify and implement the WIPO Internet Treaties, and in particular, clarify that the making available right cannot be subject to default, mandatory collective rights management.**



In 2019, the Government of Brazil announced its decision to accede to the WIPO Internet Treaties. Acceding to the WPPT would naturally have a positive impact on producers' rights – in particular, in relation to the making available right in the wake of the decision in *ECAD v. Oi FM*, regarding certain online uses of recordings. In 2017, the *Superior Tribunal de Justiça* (Superior Tribunal Court, STJ) issued a decision in *ECAD v Oi FM* and held that interactive and non-interactive streaming (including simulcasts) are separate acts, each requiring the separate consent of the right holder. In this regard, the decision is correct; it confirms that online simulcasting is a separate act of exploitation from the terrestrial broadcast, and as such requires a separate license. Oi FM appealed the decision and the application was unanimously denied by the 1<sup>st</sup> Group of Judges (1<sup>a</sup> Turma) of the Supreme Court (STF).

Despite being correct that interactive and non-interactive streaming are separate acts, the decision was problematic in that the Court held that both interactive and non-interactive streaming involve the public performance right, and therefore fall under ECAD's rights management mandate. The decision undermines the music industry's practice (which is in accordance with the international treaties on the subject matter), and the accepted interpretation of existing law: that the exclusive rights implicated in interactive streaming are licensed directly by record companies.

As indicated above, if interactive uses of sound recordings are deemed to fall under the public performance right (as opposed to the right of distribution, enshrined in Articles 93(II) and (V) of the Law, which has been the practice for many years), the licensing of such uses would fall under the default statutory mandate granted to ECAD (in accordance with Article 98 of the Copyright Law). In today's industry, streaming services are at the core of the business of recording companies. Although rights holders can opt-out of the default mandate granted to ECAD, collective management interference in a core area of the music business is unjustified and a substantial limitation to the ability of record companies to conduct their operations in a free market environment. It is also incompatible with WPPT. Other cases on the same issue are pending.

On July 20, 2022, the Executive submitted to Congress a bill to ratify the WPPT (but not WCT). IIPA urges the Government of Brazil to pass this bill and then ratify the WCT.

- **Ensure the Copyright Law, currently under review, or any legislation on copyright, fully implements the WIPO Internet Treaties, the anticircumvention of TPMs, and penalties for trafficking in circumvention devices and software; removes the default rule whereby communication to the public rights (broadcasting and public performance) are collectively managed by ECAD; criminalizes signal theft in the Pay-TV and VOD sectors; penalizes repeat infringers; ensures that any exceptions and limitations comply with the three-step test; and provides deterrent-level penalties for infringement; among other things.**

The most recent substantive copyright reform Bill 2370/2019, proposed to modify several articles from the Copyright Act (9610/98). The final text of the bill has not been made public and should involve adequate public discussions with rights holders. Under the last version of the text publicly available, the Bill would create new royalty remuneration obligations for advertisement and news material, as well as collective royalty remuneration for any on demand distributions, potentially impacting the entire ecosystem of intermediaries and platforms, which would be responsible for such payments directly.

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 ensure 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 the exclusive rights in interactive streaming are excluded from ECAD's default mandate. As previously reported, this issue has concerned the music industry since the 2017 decision in *ECAD v. Oi FM* where the STJ 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 VOD 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. Brazil's e-commerce platforms rank among the world's most prolific, topping the markets in Latin America, for total URLs requiring enforcement for piracy-related products, such as circumvention devices and preloaded consoles with built-in games.
- 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.

IIPA urges the Government of Brazil to focus on needed amendments to strengthen protection and enforcement for rights holders.

- **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 order to be confirmed.**

The Government of Brazil should revise the Customs Law to clarify that customs authorities do not need a court order to be confirmed to retain counterfeit or other illegal products that they have seized.

## **MARKET ACCESS**

- **Enable industry growth by reducing high tariffs and taxes placed on video game products.**

Brazil's high tariffs and taxes on video game products and entertainment software are a long-standing concern and remain so moving into 2024. 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%. As of July 2022, under the authority of the Foreign Trade Chamber (CAMEX) of the Economy Ministry, import (II) taxes for consoles that do not have embedded screens as well as peripherals and accessories remain at 12%.

The combination of IPI and II taxes targeting the video game console ecosystem continues to act as an incentive for the proliferation of infringing games in Brazil, which remains third in the world for the number of connections by peers participating in the unauthorized file-sharing of ESA member console-based video game titles on public P2P networks. These barriers also inhibit the growth of a legitimate video game industry in Brazil.

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.

With broad tax reform underway, the video game industry hopes legislative efforts will soon result in an overall simplification of the tax regime, ending its cumulative character, and provide for an overall rate reduction for video game products that face an unjustifiably high tax burden given the unnecessarily adverse effect on consumers.

- **Mitigate imposition of the VOD tax on movies and TV programming delivered on demand and refrain from developing excessively burdensome VOD or digital platforms regulations.**

The Brazilian Congress is currently discussing several bills of law on VOD regulation (Bill 2331/2022, Bill 1994/2023, among others). If the most detrimental bills on VOD regulation are approved, VOD platforms would have to comply with several new obligations, such as mandatory investment, catalogue quotas, CONDECINE tax of up to 6% of the annual gross revenues, prominence obligations, general duties to provide the regulatory body with information about their activities, etc. Considering that the discussions on this subject have been advancing rapidly, it is likely that a proposal on VOD regulation will be approved in the coming months.

Since the end of 2022, ANCINE's board has been publicly positioning itself in favor of greater regulation for the VOD segment and included in its Strategic Agenda the publishing of new regulatory instruments that would require players on this market to provide the Agency with more information about their businesses. The Agency intends to require a lot of information on the segment, including, for example, on the number of platforms' subscribers, users, and transactions, on the platforms' direct investments in works, and on exclusive licensing agreements. So far, no new regulations were issued, but it is likely that they will be in the short or medium term. IIPA urges the Government of Brazil to refrain from developing excessively burdensome VOD or digital platforms regulations, which would harm the entry of new competitors in the Brazilian market. If such regulations are to be implemented, it is essential that they respect contractual and economic freedom and trade secrets.

- **Reaffirm that 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.**

The Government of Brazil should reaffirm that CMOs can assert rights to collect royalties for acts of communication to the public only in cases where authors and performers in audiovisual works have specifically mandated the CMOs do so, and only where the relevant rights have not already been assigned to producers of audiovisual works.

- **To not renew theatrical quotas, because their renewal artificially constrains access to the Brazilian market for U.S. content exports, limits consumer choice, and prevents exhibitors and distributors from making market-driven agreements.**

While theatrical quotas expired in September 2021, there are draft bills seeking to extinguish any deadline applied to the theatrical quotas or to expand them for up to 20 more years. Local content quotas limit consumer choice, can push consumers toward illegitimate content sources, and prevent exhibitors and distributors from making market-driven agreements. However, if they are to be implemented, it is important that the regulation does not include additional rules that would increase this burden, such as rules on the permanence of works in theaters, on session times, etc.

- **In alignment with recommendations from the Organization for Economic Cooperation and Development (OECD), refrain from establishing a digital services tax, which would significantly increase operational costs and act as a market access barrier.**

Bill 2.358/2020, Bill 131/2020, and Bill 218/2020 aim to create new taxes specifically for digital platforms and services. These bills are of great concern because, if approved, they could substantially increase the tax burden on digital platforms operating in the country. The likelihood of their passing is not very high given that Brazil seeks membership in the OECD and, in October 2021, signed the OECD Declaration-BEPS Project pledging not to impose taxes on digital services.

- **Refrain from implementing network fees, which are harmful to competition, to network neutrality, and ultimately, to consumers' rights.**

In 2023, ANATEL released a call for contributions that discussed, among other issues, the possibility of creating network fees, to be paid by application providers to connection providers, to fund telecommunications infrastructure. If network fees are implemented, they would have a detrimental effect on digital platforms activities, not only from a financial standpoint, but also because such fees are harmful to competition and to network neutrality, and ultimately, to consumers' rights.

## **TECHNICAL ASSISTANCE AND COOPERATION**

The creative industries have provided technical assistance and cooperation in Brazil. Two online events dedicated to discussing with state prosecutors and police forces the application of disruptive actions against online piracy and cybercrime in general included a three-day training and meetings with a Brazilian Delegation of four authorities in Washington, D.C., to understand current video game industry IP protection matters and to meet with their U.S. counterparts. Events planned for the coming year include a hard-goods piracy training for customs authorities in collaboration with the IACC and an International Event hosted by state prosecutor of São Paulo with Italian and British authorities to discuss disruptive operations on IP protection. In addition, ESA participated in the U.S. Department of Justice's offices of Computer Crime and Intellectual Property Section (CCIPS) and Overseas Prosecutorial Development, Assistance and Training (OPDAT) in Pittsburgh, Pennsylvania, for Brazilian and Latin American authorities on advanced online investigations.

The Motion Picture Association Latin America and the Alliance for Creativity and Entertainment (ACE) hosted a training and education event in Los Angeles for Latin American enforcement authorities in May 2023. Associations

and officials gathered to share their expertise and to support further contribution aimed at addressing online content piracy in the region.

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada remain on the Watch List in 2024.<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, highlighting the fact that inter-industry cooperation must be a priority. Government at all levels continues to allocate insufficient resources and strategic priority to the 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. Prior IIPA submissions have detailed the many urgent problems, including the decline of the educational publishing market because 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. However, the shortcomings in Canada's current copyright regime remain unaddressed. 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. 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 2024, including on market access issues, such as Canada's implementation of the Online Streaming Act, to ensure Canada does not impose undue burdens or obligations on non-Canadian digital services.

## **PRIORITY ACTIONS REQUESTED IN 2024**

### **Enforcement**

- Prioritize enforcement against online piracy (including stream ripping), the operation and sale of subscription piracy services, and the trafficking in PDs, apps, and circumvention software tools and modification services.
- Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement with the resources and training required to implement enforcement priorities.

### **Legal Reforms**

- 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.

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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/special-301-reports/>. For the history of Canada's Special301 placement, see <https://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf>.

- 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.
- Ensure that recorded music producers and performers are fully compensated for all forms of radio broadcasting of their recordings, including by eliminating the radio royalty exemption.
- Eliminate, or at least clarify, the UGC exception, in accordance with parliamentary recommendations and Canada's international obligations.
- Swiftly take up recommendations IIPA has noted in several submissions, including avoiding introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing.
- Reject Bills C-244 and C-294 that allow circumvention of a technological protection measure (TPM) in certain circumstances.
- Provide full rights for communication to the public and public performance of sound recordings.

### **Market Access**

- Ease long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada's United States-Mexico-Canada Agreement (USMCA) commitments.
- Ensure that the CRTC's implementation of the Online Streaming Act does not impose undue burdens or obligations on non-Canadian digital services.

## **ENFORCEMENT**

- **Prioritize enforcement against online piracy (including stream ripping), the operation and sale of subscription piracy services, and the trafficking in PDs, apps, and circumvention software tools and modification services.**

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 music services.<sup>2</sup> Stream-ripping services, now the leading form of music piracy in Canada, are a major contributor to this problem.<sup>3</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>4</sup> Stream-ripping services undermine the legitimate markets both for streaming and licensed music downloads.

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 Center (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, and notes how the displacement of legitimate economic activity by piracy has a negative impact on economic growth.<sup>5</sup> Research by Carnegie Mellon University found that if pre-release piracy could be eliminated from the theatrical window, U.S. and Canada box office revenue would increase by 14-15% (equivalent to approximately US\$1.5 billion per year).<sup>6</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 or streamed or accessed) illegal online content in the previous three-month period, and movies (36%) and TV shows

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<sup>2</sup> IFPI, 2022 Music Consumer Study.

<sup>3</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>4</sup> The music industry reports that some 93% of Canadians who visited YouTube used the site to access music in 2021.

<sup>5</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>6</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).

(34%) were among the forms of content most likely to be illegally “consumed.”<sup>7</sup> Canadians made 2.6 billion visits to piracy sites in 2018, and the nature of this piracy continues to evolve.<sup>8</sup> In 2020, 76% of Canadians’ visits to sites used for online piracy were to non-peer-to-peer (P2P) sites, including streaming sites and cyberlocker (host) sites, up from 39% in 2015.<sup>9</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.

The film and television industry in Canada continues to battle an influx of operators, sellers, and resellers of infringing paid subscription IPTV/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 pictures 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. Many of these illegal services in Canada have generated millions of dollars in revenue, often 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, advertisers, and networks that facilitate electronic transfers. Recidivists often have no other comparable source of lucrative income.

The circumvention of 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 is damaging and pervasive. 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.

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 devices and software that enable circumvention of TPMs, particularly following the Heritage Report’s recommendation to increase enforcement efforts.<sup>10</sup> 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 piracy services (and of PDs or 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 TPM 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.

- **Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement with the resources and training required to implement enforcement priorities.**

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, often lack the human and financial resources, as well as the strategic mandate, to properly investigate IP crimes

<sup>7</sup> Shifting Paradigms Report of the Standing Committee on Canadian Heritage” (“Heritage Report”), 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>8</sup> Ibid.

<sup>9</sup> Sandvine, Video Piracy in Canada, April 2018, available at <https://www.sandvine.com/hubsfs/downloads/reports/internet-phenomena/sandvine-spotlight-video-piracy-in-canada.pdf>; Sandvine, The State of Affairs: A Spotlight on Video and Television Piracy Worldwide, available at <https://www.sandvine.com/blog/the-state-of-affairs-a-spotlight-on-video-and-television-piracy-worldwide>.

<sup>10</sup> See Julie Dabrusen, Chair, Standing Committee on Canadian Heritage, *Shifting Paradigms: Report of the Standing Committee on Canadian Heritage* (Heritage Report), 42<sup>nd</sup> Parliament, 1<sup>st</sup> Session, May 2019, Recommendation 6, p. 19, 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).



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. 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>11</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 by stakeholders 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.

## **LEGAL REFORMS**

- **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.**

The bulk of the 2012 Copyright Modernization Act (CMA) consisted of several 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 extensively analyzed how the CMA amendments, in combination with broad judicial interpretations of the pre-CMA fair-dealing provisions, led to the weakening of the well-established collective licensing regime to license and administer permissions to copy excerpts of books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada.<sup>12</sup> This pre-CMA structure 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 displayed by Canada’s educational establishment not only has significantly reduced copyright owners’ licensing revenue, leading to the Canadian CMO Access Copyright’s total distributions to rights holders dropping by 79%,<sup>13</sup> but also has contributed to an overall attrition of revenues from the sale of textbooks and other educational works in Canada.

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<sup>11</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\\_INDURpt08/391\\_INDURpt08-e.pdf](https://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391_INDURpt08/391_INDURpt08-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).

<sup>12</sup> See IIPA’s 2018 Special 301 Submission, available at [https://www.iipa.org/files/uploads/2018/02/2018\\_SPECIAL\\_301.pdf](https://www.iipa.org/files/uploads/2018/02/2018_SPECIAL_301.pdf).

<sup>13</sup> Access Copyright, *Canadian writers, visual artists and publishers lose the ability to have their rights and interests protected as federal government fails to deliver on its promise to fix Canada’s publishing marketplace*, July 13, 2023, available at <https://www.accesscopyright.ca/media/announcements/canadian-writers-visual->

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.<sup>14</sup> This would bring needed clarity to Canada's law regarding the circumstances under which the use of certain works may not require a license. Until the legal framework is clarified, the crisis in the educational publishing sector remains unredressed. Because "education" is not defined in the statute and is 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 Supreme Court of Canada (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, which to date has not taken any actions since the 2021 ruling to address this issue. The SCC ruled that certified tariffs are not mandatory, and as such, "not enforceable against York," but 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 well aware of the dire state of its educational publishing market. Even the flawed Industry Report acknowledged a problem with the current state of affairs, although it stopped short of recommending an adequate solution and instead took a wait-and-see approach.<sup>15</sup> The Government of Canada's Budget 2022 underlined the government's commitment to ensuring that the Copyright Act "protects all creators and copyright holders," and noted that "the government will work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users."<sup>16</sup> Yet, rights holders appear to be waiting in vain for any meaningful change.<sup>17</sup>

Canadian federal authorities and the country's Parliament should be encouraged to act with speed to redress this crisis by implementing the corrective measures recommended in the Heritage Report,<sup>18</sup> 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.

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[artists-and-publishers-lose-the-ability-to-have-their-rights-and-interests-protected-as-federal-government-fails-to-deliver-on-its-promise-to-fix-canada-s-publishing-marketplace/](#).

<sup>14</sup> See Heritage Report, Recommendation 18, p. 43.

<sup>15</sup> Dan Ruimy, Chair, Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology* (Industry Report), 42<sup>nd</sup> Parliament, 1<sup>st</sup> Session, June 2019, Recommendation 16, p. 65, available at <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>.

<sup>16</sup> Government of Canada, 2023 Budget, available at <https://budget.canada.ca/2023/report-rapport/toc-tdm-en.html>.

<sup>17</sup> Id. at 7.

<sup>18</sup> See Heritage Report, Recommendation 18, p. 43.

- **Harmonize remedies for collective management organizations (CMOs) under the Copyright Act.**

Amendments to the Copyright Board took effect in April 2019.<sup>19</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>20</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.<sup>21</sup>

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 Federal Court of Appeals (FCA) in *York 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>22</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.

- **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.**

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. IIPA urges the Government of Canada to counter online piracy in Canada by strengthening legal incentives for ISPs, hosting providers, and all other intermediaries to cooperate with copyright owners, in accordance with best practices, including by: reforming the currently inadequate and globally anomalous “notice-and-notice” regime in favor of measures demonstrated effective in preventing or restraining infringement; and 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.

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 PDs 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

<sup>19</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>20</sup> Under the old framework, the Board’s assertion of unlimited discretion to set tariff rates leads to results that are not only unpredictable, but often wildly out of step with the evidence presented at hearings, including rates agreed to in freely negotiated agreements and in comparable markets.

<sup>21</sup> See, Industry Report, Recommendation 11, pp. 45-46.

<sup>22</sup> *York v. Access Copyright*, 2020 FCA 77.

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.<sup>23</sup> The system creates little meaningful incentive for service providers to rid their services of infringing 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. 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>24</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<sup>25</sup> and Industry<sup>26</sup> 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.

While the introduction of the “enablement” provision has been a helpful tool for addressing online piracy in terms of piracy 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

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<sup>23</sup> 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.

<sup>24</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>.

<sup>25</sup> See Heritage Report, Recommendation 5, p. 19.

<sup>26</sup> See Industry Report, Recommendation 21, p. 83.

an intolerance for copyright infringing activities, and to cooperate with rights holders, thereby deterring piracy from taking place via their services.

Moreover, recent case law in Canada 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 July 18, 2023, on the basis of the decisions of the Federal Court of Appeals (FCA) in *Teksavvy Solutions Inc. v. Bell Media Inc.* (“GoldTV”)<sup>27</sup> and of the Federal Court in *Rogers Media Inc. v. John Doe 1*,<sup>28</sup> courts have granted both static and dynamic site-blocking orders for the “live” blocking of NHL games (“NHL Case”) and Major League Baseball (MLB) games in Canada.<sup>29</sup> 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.

- **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.**

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 under 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<sup>30</sup> and the Industry Report<sup>31</sup> called for narrowing this exemption so that it does not apply to the vast majority of commercial radio stations. IIPA urges the Government of Canada to eliminate the radio royalty exemption.

- **Eliminate or at least clarify the UGC exception, in accordance with parliamentary recommendations and Canada’s international obligations.**

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 TRIPS Agreement, the Berne Convention, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT), and its breadth raises serious questions of compliance with the three-step test for permissible limitations and exceptions. 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.<sup>32</sup>

<sup>27</sup> *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100, May 26, 2021, available at <https://decisions.fca-cf.gc.ca/fca-caf/decisions/en/item/497659/index.do> (appeal dismissed by Supreme Court of Canada, available at <https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/19257/index.do>).

<sup>28</sup> *Rogers Media Inc. v. John Doe 1*, May 27, 2022, available at <https://www.canlii.org/en/ca/fct/doc/2022/2022fc775/2022fc775.html?resultIndex=1>.

<sup>29</sup> *Rogers Media Inc. v. John Doe 1*, July 18, 2023, available at <https://torrentfreak.com/images/MLB-Blocking-Order.pdf>.

<sup>30</sup> See Heritage Report, Recommendation 10, p. 26.

<sup>31</sup> Industry Report, Recommendation 31, p. 109.

<sup>32</sup> See Heritage Report, Recommendation 12, p. 30.

- **Swiftly take up recommendations IIPA has noted in several submissions, including avoiding introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing.**

In December 2017, Canada’s Parliament launched the copyright law review mandated by the 2012 CMA.<sup>33</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) and the June 2019 Industry Committee Report (Industry Report).

The Heritage Report recognized the negative impact the 2012 amendments have had on the publishing industry from the introduction of an undefined “education” as fair-dealing exception,, 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”).<sup>34</sup> The Heritage Report included several positive recommendations intended to address these concerns, as well as other significant shortcomings of Canada’s legal framework. Among other things, the Heritage Report<sup>35</sup> 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 for the Protection of Literary and Artistic Works, the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), and WIPO Copyright Treaty (WCT)).

The Industry Report also included some notable recommendations.<sup>36</sup> 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) ensure that ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites or when the intermediary has actual or constructive knowledge of infringing content or links on their services or networks, on a no-fault basis, upon rights holders’ applications to appropriate authorities (as reflected in 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

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<sup>33</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>34</sup> See Heritage Report, p. 6.

<sup>35</sup> See Heritage Report, List of Recommendations, pp. 1-3.

<sup>36</sup> See, Industry Report, pp. 3-10.

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).

- **Reject Bills C-244 and C-294 that allow circumvention of a technological protection measure (TPM) in certain circumstances.**

Bill C-244, an Act to amend the Copyright Act (diagnosis, maintenance, or 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. Bill C-244 completed Third Reading in the House of Commons on October 6, 2023, and completed First Reading in the Senate on October 19, 2023.

Bill C-294, an Act to amend the Copyright Act (interoperability), proposes to amend the Copyright Act to allow a person, in certain circumstances, to circumvent a TPM to make a computer program or a device in which it is embedded interoperable with any other computer program, device, or component. Bill C-294 completed Third Reading in the House of Commons on June 14, 2023, and completed First Reading in the Senate on June 15, 2023.

IIPA urges the Government of Canada to reject these bills, but at the very least, each bill should be narrowed to prevent abuses that could undermine digital platforms and services. Any such exceptions should be narrowly tailored for specific, necessary purposes that do not open a backdoor to infringing devices or services that could undermine legitimate digital services and devices.

- **Provide full rights for communication to the public and public performance 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. 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.

## **MARKET ACCESS**

- **Ease long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada’s United States-Mexico-Canada Agreement (USMCA) commitments.**

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>37</sup> including:

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<sup>37</sup> IIPA expects that if Canada resorts to the “cultural carve out” under Article 32.6 to avoid implementing any of its obligations under the USMCA, USTR will use the robust retaliation provision under that provision to ensure that Canada meets its commitments.

**Television Content Quotas** – The CRTC imposes 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 not less than 50% Canadian programming from 6 p.m. to midnight. Private English-language discretionary services (specialty and Pay-TV) must exhibit not 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.

First, BDUs must offer a “skinny basic” tier for not more than \$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.

Second, except as permitted in a BDU's license from the CRTC, all other non-Canadian signals and services may be carried only on a discretionary basis and must be selected from the list of non-Canadian programming services authorized for distribution (the Authorized List) approved by the CRTC and updated periodically. A service will not be added to the Authorized List if a competitive Canadian pay or specialty service (other than a national news service) has been licensed. 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.

**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 theatrical film distributors to do business directly in Québec. Since 1986, legacy MPA member companies have been 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.

**Online Harmful Content:** From April to June 2022, an expert advisory group on online safety held eight sessions to advise on developing a legislative and regulatory framework to address harmful online content. This followed a July through September 2021 consultation on “*The Government’s proposed approach to address harmful content online.*” The government then held 19 roundtables from July to November 2022 and released a summary report of what was discussed in January 2023. While the government has discussed this potential legislation for some time, the policy has proven difficult because of its relationship to public protection, censorship, freedom of speech, and misinformation, with parties holding conflicting positions on many of those topics. IIPA urges the U.S. government to continue to monitor the government’s work and any effects it may have on the broader online ecosystem.

- **Ensure that the CRTC’s implementation of the Online Streaming Act does not impose undue burdens or obligations on non-Canadian digital services.**

With the Online Streaming Act receiving Royal Assent on April 27, 2023, the CRTC now has the explicit power to regulate non-Canadian digital media services, including the power to prescribe regulations for streaming services regarding discoverability, contribution, and other measures intended to support Canadian cultural industries and to make regulations that would impose financial, discoverability, and reporting obligations to support the Canadian broadcasting system. On May 8, 2023, the CRTC launched a series of public consultations over three phases to implement the Online Streaming Act as part of its regulatory plan that targets late 2024 as the timeframe for implementing its policy decisions stemming from the public consultations. The Government of Canada should ensure that the CRTC’s implementation of the Online Streaming Act does not impose undue burdens or obligations on non-Canadian digital services.

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

Canada’s international agreements with the United States most relevant to copyright obligations include TRIPS 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 the country’s 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)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2024.<sup>1</sup>

**Executive Summary:** With the recent growth of Colombia’s creative economy, there is a critical need for the Colombian government to direct resources towards the enforcement of intellectual property rights (IPR). Unfortunately, Colombia’s enforcement framework is not up to the challenge of the country’s online piracy problems. 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. 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 Trade Promotion Agreement (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 2024**

##### **Enforcement**

- Implement a specialized training program for judges and law enforcement on copyright and industrial property protection and enforcement.
- Devote law enforcement and specialized prosecutorial resources to combatting online and physical piracy, with coordinated operations and actions to adequately protect intellectual property (IP).
- Ensure Internet service providers (ISPs) are incentivized to cooperate with rights holders to address online piracy.
- Encourage the Colombian Copyright Office (DNDA) to take effective action against notorious piracy and stream-ripping sites.

##### **Legal Reforms**

- Reject proposed Bill #PL-189-2022C (Ley de la Música).
- Repeal Articles 3 and 183 of the Colombian Copyright Law.
- Draft legislation that allows rights holders to file actions against unidentified infringers.
- Clarify that TPM circumvention is not permissible for any exception or limitation under the copyright law.
- Reconsider profit requirements for retransmission, annual revisions of exceptions and limitations, and statutory damages through public hearings in the Colombian Congress.

#### **ENFORCEMENT**

- **Implement a specialized training program for judges and law enforcement on copyright and industrial property protection and enforcement.**

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>2</sup> It is essential for Colombia to implement comprehensive copyright training for all relevant judicial and law enforcement personnel at

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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/2024/01/Appendix-B-2024.pdf>.

<sup>2</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.

the local and regional levels, as well as training of customs officials at the border to identify and seize illegal streaming devices (ISDs).

- **Devote law enforcement and specialized prosecutorial resources to combatting online and physical piracy, with coordinated operations and actions to adequately protect intellectual property (IP).**

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. For example, in 2023, Colombia ranked 30th in the world for the number of connections by peers participating in the unauthorized file-sharing of Entertainment Software Association (ESA) member video game titles on public peer-to-peer (P2P) networks. By the same metric, Colombia ranked 11th in the world for unauthorized file-sharing of mobile games.

The lack of coordination between criminal, civil, and administrative enforcement authorities throughout the country leads to inefficiencies in Colombia's enforcement of copyright. The National Police and prosecutors need increased dedicated resources, because IP cases are not currently a priority. The special cybercrime unit, *Dirección de Investigación Criminal e Interpol* (Department of Criminal Investigations and Interpol, DIJIN), focuses its enforcement actions mostly on narrow areas such as online fraud (ransomware and phishing) without pursuing broader protections for the digital economy such as IPR cases. The police and its dedicated cybercrime department, *Centro Cibernético Virtual* (CAI Virtual),<sup>3</sup> should have a specific channel to assist rights holders or 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 empowers DNDA's mission less than if it were situated under the Minister of Science, Technology, and Innovation, or another Cabinet position. 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 improved organization of government authorities to combat digital piracy and enforce Colombia's IP laws.

- **Ensure ISPs are incentivized to cooperate with rights holders to address online piracy.**

Since the COVID-19 pandemic, online piracy has grown significantly. 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 memorandum of understanding (MOU) or government pressure on ISPs to improve cooperation.<sup>4</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 Colombia – rather than introducing safe harbors – ensure

<sup>3</sup> See *Centro Cibernético Policial*, available at <https://caivirtual.policia.gov.co> (in Spanish).

<sup>4</sup> In 2022, the Motion Picture Association (MPA) began conversations with the main Colombian ISPs in hopes of implementing site-blocking measures.

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 its own site-blocking measures. Furthermore, any proposals should provide adequate incentives for ISPs to cooperate with rights holders to combat piracy. Any safe harbors should also be available only to passive and neutral intermediaries that do not contribute to infringing activities. Moreover, Colombia should provide measures demonstrated effective in preventing or restraining infringement and require marketplaces and other online platforms to 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. 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.

IIPA specifically commends Amazon and Mercado Libre for their cooperation in minimizing the advertisement and sale of counterfeited goods through their networks in the Colombian marketplace.

- **Encourage the Colombian Copyright Office (DNDA) to take effective action against notorious piracy and stream-ripping sites.**

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 pursue any additional actions or initiatives to combat Colombia's digital piracy problem. Despite DNDA's legal authority to order injunctions against 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>5</sup> which illegally broadcasted pay-tv signals. The order, which was renewed in 2023, was the first blocking order imposed against online piracy in DNDA's history. IIPA urges the new administration to ensure that the National Development Plan includes a powerful component to engage authorities to protect IP more actively in the digital environment, including a leadership role for the DNDA to coordinate the protection of the creative sector ecosystem.

In the second quarter of 2023 alone, SimilarWeb recorded 24.4 million visits to *Y2mate.com*, 5.5 million visits to *ssyoutube.com*, and 10.6 million visits to *Mega.nz* from Colombian users. DNDA should implement an effective campaign against digital piracy, including issuing blocking orders against major stream-ripping services, piracy streaming sites, and cyberlockers that specifically target the Colombian marketplace. This type of recourse via administrative enforcement mechanisms is fully consistent with Article 16.11.14 of the TPA.

## **LEGAL REFORMS**

- **Reject proposed Bill #PL-189-2022C (Ley de la Música).**

On September 7, 2022, Bill # PL-189-2022C, "*La Ley de la Musica*" (The Music Law) was submitted to the House of Representatives. This 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, which has since been removed, and (iii) funds pending at all collective management organizations (CMOs) for non-identified works and unclaimed distributions. The scope of these fiscal contributions has changed as The Music Law has evolved through the legislative process, including the removal of the contribution requirement from DSPs.

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<sup>5</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-primera-medida-cautelar-contra-pirateria-online-en-la-historia-de-colombia-3136271> (in Spanish).

The Colombian government should reject The Music Law 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.

- **Repeal Articles 3 and 183 of the Colombian Copyright Law.**

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>6</sup> This provision mandates 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>7</sup> Thus, Colombia should amend Article 3(d) of the Copyright Law to eliminate the 60% remuneration floor for authors.

This rule amounts to a limitation of producers' and performers' public performance right that does not meet obligations of the longstanding three-step test, incorporated in Article 16.7.8 of the TPA, governing the scope of exceptions and limitations to copyright protection. Due to the 40% limitation on producers' and performers' remuneration rights, normal exploitation of a phonogram or performance is unreasonably prejudiced, thus violating the test.

Article 183 of the Copyright Law is also highly problematic as it provides a set of limitations to contractual assignments of copyright and neighboring rights, which may have a negative impact on the ability of phonogram producers to manage their business and produce new local talent. While a constitutional challenge filed against Article 183 was dismissed by the Supreme Court on formal grounds, further actions against the provision are being considered. This limitation should be repealed as it is out of step with Article 16.7.3(a) of the U.S.-Colombia TPA, which clearly establishes that, “... for copyright and related rights, any person acquiring or holding any economic right in a work, performance, or phonogram... may freely and separately transfer that right by contract.”<sup>8</sup>

- **Draft legislation that allows rights holders to file actions against unidentified infringers.**

Currently, Colombia requires identification of the infringer by name and domicile in order to successfully petition the courts in cases of copyright infringement. This undermines effective enforcement in the digital age because pirates can easily obfuscate their identities. Colombia should amend Article 82(2) of the General Procedural Code to allow intellectual property rights holders to bring actions against anonymous or unidentifiable sources of infringement. Providing adequate enforcement against anonymous online infringers will improve Colombia's legitimate digital marketplace.

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<sup>6</sup> See Article 3(d) of Law 23 of 1982, available at <https://www.wipo.int/wipolex/en/text/584747> (in Spanish).

<sup>7</sup> U.S.-Colombia TPA, Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-iplr.pdf>.

<sup>8</sup> See *id.*

- **Clarify that TPM circumvention is not permissible for any exception or limitation under the copyright law.**

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 the Government of 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>9</sup> and (2) a TPM may not be circumvented to exercise any exception or limitation.<sup>10</sup>

- **Reconsider profit requirements for retransmission, annual revisions of exceptions and limitations, and statutory damages through public hearings in the Colombian Congress.**

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>11</sup> Colombia also still must adopt statutory damages for copyright infringement, which is a key TPA obligation. Statutory damages were the subject of a 2019 draft Bill from the DNDA, but this legislation shows no signs of progress.

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<sup>9</sup> See U.S.-Colombia Trade Promotion Agreement (TPA)(2012), Article 16.7(4)(f) available at <https://ustr.gov/sites/default/files/col-ijr.pdf>.

<sup>10</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>11</sup> DNDA is again this year considering holding a public hearing to determine whether more exceptions and limitations should be added to the law.

# MOROCCO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Morocco be placed on the Watch List in 2024.<sup>1</sup>

**Executive Summary:** Morocco has extremely high rates of piracy for film and music. Enforcement against copyright piracy is limited due to shortcomings of the existing customs recordation system and a weak legal framework that does not adequately empower authorities to address digital piracy. Moreover, administrative authorities have not acted against many instances of piracy, despite their authority to do so. Education of the public on the harms of infringement and the rights of copyright holders could significantly decrease the piracy rate in Morocco because local rights holders and the public at large lack a basic understanding of copyright principles. IIPA urges Morocco to improve enforcement efforts, educate the public on general copyright principles, and revise its legal framework to reduce its piracy problem.

#### **PRIORITY ACTIONS REQUESTED IN 2024**

##### **Enforcement**

- Implement effective administrative enforcement against those involved in illegal distribution of copyrighted materials, specifically streaming and IPTV services through the enforcement of harsher penalties.
- Educate the public and government officials about the damaging effects of copyright piracy.

##### **Legal Reforms**

- Modify the current customs recordation system to allow rights holders longer than ten working days to initiate legal proceedings.
- Encourage adoption of a legal framework to improve and expedite administrative actions against illegal IPTV and streaming services in a rapid manner.
- Amend the powers of the *Bureau Marocain des Droits d'Auteur et Droits Voisins* (The Moroccan Office of Copyright and Related Rights, BMDAV) to allow rights holders autonomy in the management of their rights.
- Affirmatively declare that copyright protection extends beyond Moroccan citizens and residents.

#### **ENFORCEMENT**

- **Implement effective administrative enforcement against those involved in illegal distribution of copyrighted materials, specifically streaming and IPTV services through the enforcement of harsher penalties.**

Enforcement in Morocco is currently not adequate to make a meaningful impact on copyright piracy. Illegal Internet protocol television (IPTV) is rampant in Morocco. Many illegal IPTV services have professionalized, with some offering business cards and after-sale technical assistance to legitimize their reputation and increase sales. These IPTV services are operated out of Morocco and/or by Moroccan nationals. The yearly subscriptions to these illegal services are typically inexpensive, between 150 and 500 dirhams (~US\$50-\$150) per year. These types of subscription

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<sup>1</sup> For more details on Morocco's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Morocco's Special 301 placement, see <https://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf>.

services no longer require a receiver or physical equipment, which makes purchasing easier and selling less risky. IPTV subscriptions are especially popular in Morocco because of the cultural interest in soccer games.<sup>2</sup>

A flea market in Casablanca, *Derb Ghallef souk*, is a hub for pirated content with over 1,500 storefronts.<sup>3</sup> Infringing copies of copyrighted works are sold within this neighborhood for redistribution nationally. Consumers are attracted to pirated copies of works because of their lack of awareness of the law and the cheap cost of infringing works in these marketplaces. Due to the size and the longevity of markets like *Derb Ghallef* (which has existed since the beginning of the 1900s<sup>4</sup>), the availability of pirated goods is rampant in the large cities of Morocco.

Rights holders are often frustrated by the process of enforcing their rights, which leads to a decline in complaints filed overall. The BMDAV is the Moroccan copyright office and also functions as a collective management organization (CMO) created through public law and granted financial autonomy. The BMDAV is thus responsible for the protection and exploitation of copyright and related rights in Morocco.<sup>5</sup> Rights holders have lodged complaints against many known sellers of infringing content, but the BMDAV has not initiated enforcement actions.

- **Educate the public and government officials about the damaging effects of copyright piracy.**

A lack of understanding regarding basic copyright principles creates significant resistance to compliance by infringers. Morocco has an extremely high rate of piracy for films and music. A staggering 93% of consumers in Morocco are engaged in piracy of films and music.<sup>6</sup> Social acceptance of the purchase and sale of pirated content contributes greatly to the spread of infringing activity. In June of 2023, cafes and restaurants were charged for licenses to utilize copyrighted works in their businesses (e.g., playing music in a café). The owners of these establishments filed a complaint with the Court of First Instance in Rabat against the Moroccan Copyright Office alleging that it was acting without a basis in law.<sup>7</sup> These business owners claimed that the radio stations or television stations performing the works to the public were the only entities responsible for licensing the material.

Steps to educate local citizens on the illegality of illegal IPTV services could greatly reduce the pervasiveness of these illegal streams. This lack of awareness, the ease with which Moroccans are able to subscribe to illegal IPTV services, the low cost of these illegal services, and the professionalism of the sellers all contribute to rampant infringement, as discussed above.

Improving the education of Moroccan enforcement officials and local rights holders would result in faster and better results in enforcement actions. In February of 2023, the United States Patent and Trademark Office organized a workshop in Casablanca to educate prosecutors and judges on digital copyright infringement, illegal services, and methods of identification of the anonymous operators of these illegal entities. Also in February of 2023, the Court of Algiers organized a day for industry members to learn about the protection of intellectual property (IP) on the Internet. Both events are examples of productive educational efforts.

## **LEGAL REFORMS**

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<sup>2</sup> See Mehdi Hitane, HESPRESS English, *World Cup 2022: Copyright watchdog prides itself for taking down Morocco piracy ring, but to no avail*, November 21, 2022, available at <https://en.hespress.com/53418-world-cup-2022-copyright-watchdog-prides-itself-for-taking-down-morocco-piracy-ring-but-to-no-avail.html> (In 2022 the Alliance for Creativity and Entertainment shut down two of the most popular sports piracy sites in Morocco just before the World Cup. These two sites had recorded 20.6 million collective visits in October of 2022 alone.)

<sup>3</sup> See Aziza Belouas, La Vie Eco, *In Derb Ghallef, activity is not about to resume, shopkeepers are worried*, October 5, 2020, available at <https://www.lavieeco.com/influences/societe/a-derb-ghallef-lactivite-nest-pas-pres-de-reprendre-les-commercants-sinquietent/>.

<sup>4</sup> See Abouammar Tafnout, H24Info, *From the skin trade to microchips, the surprising story of Derb Ghallef*, September 30, 2018, available at <https://www.h24info.ma/du-commerce-de-peaux-aux-puces-electroniques-la-surprenante-histoire-de-derb-ghallef/>.

<sup>5</sup> See BMDAV, *Who Are We?*, available at <https://bmda.ma/>.

<sup>6</sup> See MINISTÈRE DE L'ÉCONOMIE, DES FINANCES ET DE LA SOUVERAINETÉ INDUSTRIELLE ET NUMÉRIQUE, *Morocco Intellectual Property*, available at <https://www.tresor.economie.gouv.fr/Pays/MA/propriete-intellectuelle>.

<sup>7</sup> See Morocco Latest News, *Cafes and Restaurants Take Legal Action*, June 20, 2023, available at <https://moroccolatestnews.com/cafes-and-restaurants-take-legal-action/>.



- **Modify the current customs recordation system to allow rights holders longer than ten working days to initiate legal proceedings.**

Under Morocco's current customs recordation system, rights holders or their representatives may file requests with the Central Administration of Customs to seize or suspend pirated goods at the ports of entry in Morocco.<sup>8</sup> The BMDAV may also file these requests in the case of copyrighted goods. Once customs has detained goods as requested, the rights holder has a maximum of ten days from the date of notification to request a formal order for a seizure to continue until a bailiff can visit the port to inspect the goods. If this order is not filed, the goods are released after ten days. Ten days is an extremely short time period and rights holders need more time to investigate these issues and prepare before initiating proceedings. This is especially necessary in the case of foreign rights holders or those who are not physically located in Morocco, for whom this narrow time frame is especially restrictive. IIPA urges Morocco to update the customs recordation system to increase the time for rights holders have to initiate legal proceedings.

- **Encourage adoption of a legal framework to improve and expedite administrative actions against illegal IPTV and streaming services in a rapid manner.**

The BMDAV does not initiate action against known infringers, or investigate complaints lodged by rights holders. Law No. 25-19 on the Moroccan Copyright and Neighboring Rights Office has clarified the status of the BMDAV as a legal entity under public law with financial autonomy to investigate reports of infringement.<sup>9</sup> Legislative or regulatory framework requiring the BMDAV to initiate action or affirmatively decline action requested by a complaint is necessary to keep the BMDAV accountable to rights holders.

Under Article 65.2 of Morocco's Copyright Law, copyright infringement may be subject to proceedings ordered by the Public Prosecutor's Office without a complaint from a private party or rights holder.<sup>10</sup> However, an expert report is required to initiate the action; thus, rights holders must file a request to the national court to appoint an expert. It can take between two and three months to receive an expert appointment. While these appointments are technically subject to a deadline between ten days and one month, the deadline is almost never met given the limited number of available experts. Even then, some experts reject appointments because of their lack of technical knowledge on digital piracy. This can extend the proceedings greatly, which ultimately results in prolonged infringing activity. While this process is a step in the right direction, education of experts, expansion of the expert pool, and expedition of this process are necessary to effectively implement reform.

- **Amend the powers of the *Bureau Marocain des Droits d'Auteur et Droits Voisins* (BMDAV) to allow rights holders autonomy in the management of their rights.**

The current collective rights management system and enforcement mechanisms in Morocco grant BMDAV a legal monopoly for the management and enforcement of all forms of copyright exploitations. This system must change to allow rights holders autonomy in exploiting their rights and choosing collective management methods.

Article 4 of Law 25-19 requires rights holders to become members of the BMDAV, a state-run CMO. BMDAV provides all collective rights management services per Law 25-19, which precludes rights holders from establishing their own CMOs.<sup>11</sup> The provisions in Law 25-19 ultimately restrict rights holders from deciding whether to manage their rights individually or collectively.

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<sup>8</sup> See Law No. 17-97 on the Protection of Industrial Property, Article 176.4.

<sup>9</sup> See Law No. 25-19 on the Moroccan Copyright and Neighbouring Rights Office, WIPO LEX, available at <https://www.wipo.int/wipolex/en/legislation/details/21930> (2022).

<sup>10</sup> See Law No. 2-00 on Copyright and Related Rights, WIPO LEX, available at <https://www.wipo.int/wipolex/en/text/567196> (2000).

<sup>11</sup> See Law No. 25-19 *Relative au Bureau Marocain des Droits D'Auteur et Droits Voisins*, WIPO LEX, available in French at <https://www.wipo.int/wipolex/en/text/587394> (2022).

Further, the effects of the requirement for rights holders to join the BMDAV CMO are not limited to Morocco. This is because the newly adopted Article 49.1 of the Copyright Law could be interpreted to extend the scope of BMDAV licenses, including licenses covering related rights, outside of Morocco. Morocco should provide sound recording producers with exclusive rights for broadcasting and communication to the public. Exclusive rights enable record companies to negotiate commercial terms for the public performance and broadcast of sound recordings.<sup>12</sup>

Article 59.6 of the Copyright Law contains a distribution key, which unfairly prejudices phonogram producers for collections of the private copying levy. Phonogram producers are allocated only 10% of these collections, versus 35% for authors and performers respectively.<sup>13</sup> This distribution key is arbitrary and does not accurately reflect the economic value of the rights at issue. Given that the BMDAV manages exclusive rights, there is concern that this distribution key may be the basis of distributions of monies collected from other exploitations. Article 59.6 should be reevaluated and if necessary revised to ensure an economically proportionate and fair distribution to rights holders.

- **Affirmatively declare that copyright protection extends beyond Moroccan citizens and residents.**

Article 67 of Morocco's Copyright Law establishes the scope of copyright protection. Phonograms specifically are limited to (i) those, the producer of which is a national of Morocco, (ii) those, the first fixation of which took place in Morocco, and (iii) those produced for the first time in Morocco.<sup>14</sup> Article 68 of Morocco's Copyright Law gives international treaties (such as the WIPO Performances and Phonograms Treaty) to which Morocco is party precedence over the national law in the case of a conflict. To eliminate all doubt, Article 67 should affirmatively declare that foreign nationals of nations that are parties to treaties to which Morocco is also party are entitled to the same scope of copyright protection under Morocco's Copyright Law as Moroccan nationals.

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<sup>12</sup> See *id.*

<sup>13</sup> See Law No. 79-12 Complétant la loi no. 2-00 Relative aux Droits D'Auteur et Droits Voisin, WIPO LEX, available in French at <https://www.wipo.int/wipolex/en/text/570011> (2014).

<sup>14</sup> See Law No. 2-00 on Copyright and Related Rights, WIPO LEX, available at <https://www.wipo.int/wipolex/en/text/567196> (2000).

# NIGERIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Nigeria be placed on the Watch List in 2024.<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 for the creative industries; unfortunately, in the absence of an effective copyright enforcement regime, Nigeria has experienced a growing online piracy problem. The increasing number of websites that make movies and music available illegally continues to ravage the country's creative sector, undermining revenues from legitimate channels, including streaming platforms and movie theaters, for disseminating licensed content. To address its online piracy problem Nigeria enacted a new Copyright Act, 2022 (Act No. 8 of 2022) in March 2023 that includes several positive aspects, including a clearer making available right, an administrative website blocking procedure, and improvements to Nigeria's enforcement framework. However, these are undercut by certain problematic provisions—including a vague extended collective licensing regime that does not yet have sufficient safeguards to ensure that it does not prejudice rights holders, an unclear open-ended fair dealing exception, and an overbroad compulsory licensing regime in the public interest by the Nigerian Copyright Commission (NCC)—that should be revised not only to foster investment in Nigeria, but also to bring Nigeria's legal framework in line with international copyright norms and best practices. In addition, Nigeria's enforcement authorities should maximize the new enforcement provisions in the new Copyright Act and take more enforcement actions, and the government should increase public awareness about the harms caused by piracy. Finally, the Government of Nigeria should reform the collective management framework in Nigeria to ensure a clear, fair, market-based, and transparent system, including by engaging with sound recording producers to allow for the existence of a collective management organization that represents local and foreign producers effectively and meets international best practices.

## **PRIORITY ACTIONS REQUESTED IN 2024**

### **Legal Reforms**

- Make additional legal reforms, including revising the new Copyright Act, to address several critical concerns (e.g., compulsory licensing, extended collective licensing, exceptions, exclusive rights of distribution and broadcast, term of protection) to ensure Nigeria fully implements the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) and meets its international obligations and evolving global norms.

### **Enforcement**

- Maximize the new Copyright Act to improve enforcement, including resourcing and training NCC staff to enable them to use their new powers effectively and increasing enforcement actions against online piracy services that are harming the creative industries.
- Raise awareness among Internet service providers (ISPs) around effective policies to prevent piracy, and use the new powers granted to NCC under Section 61 of the Copyright Act to block access to pirate sites, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.
- Increase public awareness regarding the illegality of and harm caused by piracy.
- Reform the collective management framework in Nigeria to ensure a clear, fair, market-based, and transparent system, including by engaging with sound recording producers to allow for the existence of a collective

<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/2024/01/Appendix-B-2024.pdf>.

management organization (CMO) that represents local and foreign producers effectively and meets international best practices.

## **LEGAL REFORMS**

- **Make additional legal reforms, including revising the new Copyright Act, to address several critical concerns (e.g., compulsory licensing, extended collective licensing, exceptions, exclusive rights of distribution and broadcast, term of protection) to ensure Nigeria fully implements the WIPO Internet Treaties and meets its international obligations and evolving global norms.**

In March 2023, the President of Nigeria assented to the new Nigerian Copyright Bill, 2022 (Copyright Act), resulting in the enactment of the Nigeria Copyright Act, 2022 (Act No. 8 of 2022). The new Copyright Act includes several important reforms, including: an exclusive right of making available; improvements to the enforcement framework, including procedures for the blocking of websites and criminal penalties for online infringements; improved protections for technological protection measures (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. These elements are strongly welcomed and a positive step forward; unfortunately, there are several significant deficiencies in the Copyright Act 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 Copyright Act introduces a compulsory license scheme that risks being incompatible with Nigeria’s international obligations. 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 WIPO Internet Treaties. This 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, Section 35 reduces the scope of the exclusive right of making available, thereby undermining implementation of the WIPO Internet Treaties by compromising their milestone right.
- The Copyright Act also introduces 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 and the new ECL framework should be withdrawn. At the very least, adequate safeguards should be introduced, e.g. via the CMO Regulation proposals (discussed below), using best practice examples such as Article 12 of the European Union (EU) Digital Single Market (DSM) Directive.
- The Copyright Act appears to provide for a hybrid fair use-fair dealing provision that may be implemented substantially broader than the U.S. fair use doctrine to the detriment of the creative industries 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 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 Act as part of their ordinary activities” without limitation, and it would also permit lending such copies to users.
- The Copyright Act provides 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 it currently is not.
- While the Copyright Act 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 for sound recordings 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 rights holders can negotiate commercial terms that reflect the economic value of uses of recorded music to broadcasters.
- The Copyright Act introduces draconian criminal sanctions, including imprisonment, for rights holders who fail to keep proper records of the disposition of their rights. This provision is unprecedented and disproportionate to any intended purpose and should be deleted.
- 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 all works and sound recordings should be extended to 70 years from fixation or publication (and the same for juridical entities), and, for all works, to the life of the author(s) plus 70 years.

## **ENFORCEMENT**

- **Maximize the new Copyright Act to improve enforcement, including resourcing and training NCC staff to enable them to use their new powers effectively and increasing enforcement actions against online piracy services that are harming the creative industries.**

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. These sites also frequently make use of .NG country code Top Level Domains (ccTLDs) to provide access to websites that make available infringing content.<sup>2</sup> Social media is used to further drive

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<sup>2</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 act 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.

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. Nigeria has also witnessed the proliferation of Internet protocol TV (IPTV)-based piracy. Chinese-manufactured set top boxes are shipped to Nigeria in large quantities and an illicit distributor loads those devices with applications that are designed to access pirated content and sells them to consumers, often involving a monthly subscription to access the pirated content.

Many of these piracy sites and services fail to remove infringing content upon notification by rights holders. Moreover, removal on notice should not be sufficient where the content is uploaded by the site operators, because such operators should not be eligible for safe harbor protections. For music and audiovisual piracy, the unauthorized content includes a mix of domestic and international content. Such sites are exceedingly 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) and movie theaters. The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2023 (MCS) found that the music piracy rate in Nigeria was the highest in any of the 26 countries included in the study.<sup>3</sup> Across a nationally representative sample of 16-44-year-olds, 76% of respondents said that they had used unlicensed means to obtain music in the previous month, nearly three times the global average of 29%. Nearly three-quarters (74%) of these users of pirated music used illegal stream-ripping sites and apps to download music content, mainly on mobile devices (the most common way of accessing the Internet in Nigeria). The most popular stream-ripping site was *SSYouTube*, which received 17.5 million visits from Nigeria during calendar year 2023. *Y2Mate*, another internationally popular site, received 14.3 million visits from Nigeria during the same period. The MCS also found that two-thirds (65%) of respondents admitted to using direct download piracy sites such as *TrendyBeatz* to obtain music.

Nigeria has taken some positive steps recently to address its piracy problems, including some administrative enforcement actions undertaken by the NCC.<sup>4</sup> Nevertheless, more must be done by law enforcement, local domain registries and registrars, and ISPs to shut down pirate online services. For example, local intermediaries, including hosting providers, domain registries and registrars should take effective measures to prevent the use of their services in connection with infringing sites, including by enforcing provisions of their Terms of Service that allow them to terminate and suspend services in the case of infringement of intellectual property rights (IPR).

Several enforcement deficiencies and limitations negatively impact intellectual property (IP) protection and enforcement in Nigeria, including:

- high levels of government corruption;
- bureaucracy within government agencies—including Nigerian police, IP Registries, and other related agencies—that impedes access to justice and undermines protection of IP rights by obstructing rights holders' ability to make criminal complaints against piracy and other forms of infringement or to seek to protect their IP rights;
- protracted litigation and case backlog in courts that impede speedy access to justice and result in non-deterrent outcomes, all of which create little disincentive against piracy, enabling locally operated pirate sites to thrive and proliferate;
- insufficient resourcing and technical capacity of IP officials;
- lack of funding for IP Registries in the country resulting in an ineffective IP protection system; and
- poor utilization of technology by the IP Registries leading to inefficient administrative systems.

<sup>3</sup> See International Federation of the Phonographic Industry (IFPI), *Engaging With Music 2023*, available at [https://www.ifpi.org/wp-content/uploads/2023/12/IFPI-Engaging-With-Music-2023\\_full-report.pdf](https://www.ifpi.org/wp-content/uploads/2023/12/IFPI-Engaging-With-Music-2023_full-report.pdf).

<sup>4</sup> For example, on May 11, 2023, the Nigerian Copyright Commission (NCC) arrested a suspect in the Somolu area of Lagos for illegal reproduction of various schoolbooks belonging to Learn Africa. 3,377 pirated copies were found, and it is expected the suspect will be charged and arraigned before the courts. In addition, a team of Copyright Officers made an unscheduled visit in July 2023 to some bookshops around Bata roundabout in Kano.

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. Now that the Copyright Act has entered into force (as discussed above), NCC staff should be trained to fully use the new criminal provisions in the Copyright Law as the basis for improved 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 new Copyright Act 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 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.
- **Raise awareness among Internet service providers (ISPs) around effective policies to prevent piracy, and use the new powers granted to the Nigerian Copyright Commission (NCC) under Section 61 of the new Copyright Act to block access to pirate sites, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.**

There is no formal framework for cooperation between ISPs and rights holders in Nigeria. The Nigeria Communications Commission issued a Guideline for the Provision of Internet Service, 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 IP rights.<sup>5</sup> The Government of Nigeria should raise awareness among ISPs around effective policies to prevent piracy, including the site blocking provision (Section 61) of the new Copyright Act, which NCC should use to block access to pirate sites, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.

- **Increase public awareness regarding the illegality of and harm caused by piracy.**

In Nigeria, many people are unaware that piracy is illegal and that pirate websites are operating illegally. For many, piracy is seen as common and widespread, and they have not seen those engaged in piracy suffer any negative consequences. The Government of Nigeria should implement a policy to increase public awareness regarding the illegality of and harm caused by piracy.

- **Reform the collective management framework in Nigeria to ensure a clear, fair, market-based, and**

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<sup>5</sup> See Nigeria Communications Commission, Guidelines for the Provision of Internet Service, available at <https://www.ncc.gov.ng/docman-main/legal-regulatory/guidelines/62-guidelines-for-the-provision-of-internet-service/file>.

**transparent system, including by engaging with sound recording producers to allow for the existence of a collective management organization (CMO) that represents local and foreign producers effectively and meets international best practices.**

An additional concern in Nigeria is the failure by the NCC to meaningfully engage recording industry stakeholders on the accreditation of a related rights CMO following protracted dispute between the NCC and The Copyright Society of Nigeria (COSON, the CMO that was responsible for managing performance rights in musical works and sound recordings but whose operating license was withdrawn by the NCC). While rights holders and the NCC took steps to improve COSON's transparency and governance, in 2023 the NCC in consultation with select rights holders validated an Action Plan for CMO in the Music Industry that included recognition of the Musical Copyright Society of Nigeria (MCSN) as the only accredited music industry CMO. Several leading domestic stakeholders and international companies in the industry controlling significant repertoire have expressed concern regarding the ability of MCSN to effectively manage their rights. To resolve this, the Government of Nigeria should reform the collective management framework in Nigeria, in partnership with key stakeholders including the recording industry body, RELPI, to ensure a clear, fair, market-based, and transparent system. This should include engaging with sound recording producers to allow for the existence of a CMO that represents local and foreign producers effectively, has the relevant expertise and technical capability to perform collective management functions, is owned or controlled by its member rights holders, and is a non-profit organization. Accordingly, IIPA recommends that through the Nigerian recording industry body, RELPI, a new CMO should be established with the support of the NCC to ensure there is adequate and effective representation of both local and international rights holders. With these provisions in place, as well as improved enforcement as noted above, CMOs would be able to license effectively in Nigeria.

The NCC published the Copyright (Collective Management Organizations) Regulations 2023 (CMO Regulations), which is intended to repeal the Copyright (Collective Management Organizations) Regulations 2007 and update Nigeria's collective management regulations in keeping with international and good practices. At a fundamental level, the CMO Regulations should reflect essential characteristics and ensure that CMOs are operating according to good standards of transparency, accountability, and governance, including that the definition of a "collective management organization" should be amended such that entities falling within the definition are owned or controlled by their member right holders as well as to confirm the non-profit nature of the organization; and the regulation addressing ECL should be amended to include essential safeguards in keeping with best practice that must be met before an ECL system is put into operation in Nigeria.

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

As noted above, certain provisions of the new Copyright Act, notably the overbroad compulsory licensing provision of Section 35, are likely inconsistent with Nigeria's obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Internet Treaties.



# PARAGUAY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Paraguay remain on the Watch List in 2024.<sup>1</sup>

**Executive Summary:** Pending legislation that would weaken copyright protection and enforcement in Paraguay threatens to damage Paraguay's fledgling creative digital marketplace. On August 1, 2022, several members of the *Camara de Diputados*, the lower house of Paraguay's legislature, introduced a problematic proposal to amend Article 123 of Paraguay's Copyright Law, and a similar bill was introduced in May of 2023. Both bills include a proposed unwaivable additional remuneration right for performers for the making available of phonograms and audiovisual works on online platforms, possibly subject to mandatory collective management. Further, passage of these amendments would limit the negotiating power of rights holders and distort the marketplace for consumers. The Paraguayan Copyright Office (DINAPI) does not support these amendments, and two of the original authors of the first bill have subsequently withdrawn their support as well. IIPA urges the Government of Paraguay to reject these amendments.

#### **PRIORITY ACTIONS REQUESTED IN 2024**

##### **Legal Reforms**

- Reject the proposed legislation to amend Article 123 of the Paraguayan Copyright Law.

#### **LEGAL REFORMS**

- **Reject the proposed legislation to amend Article 123 of the Paraguayan Copyright Law.**

On August 1, 2022, a problematic proposal to amend Article 123 of Paraguay's Copyright Law (the 2022 Bill) was introduced in the *Camara de Diputados* and on May 31, 2023 a simplified, but still highly problematic, version of this bill (the 2023 Bill) was introduced without a sponsor by the performers' collective management organization (CMO) (AIE-PARAGUAY). The proposed remuneration right contained in these bills 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. The sponsor of the 2022 Bill was not reelected, and the 2022 bill is currently dormant, although it could be revived, while the 2023 Bill remains active.

Article 123 of Paraguay's Copyright Law gives performers the right to authorize or prohibit reproductions of their performances, and to authorize or prohibit unauthorized public performances of their works (unless previously made public or the performance constitutes a broadcast work).<sup>2</sup> Based on this provision, performers typically negotiate with producers or recording studios to assign the management of these rights and to freely contract related to the issue of remuneration.

This proposed legislation would create an unwaivable additional remuneration right for performers that may be subject to mandatory collective management enforced against third-party users of audiovisual works without any contractual relationship with authors or performers. If enacted, the proposed legislation would undermine the entire

<sup>1</sup>For more details on Paraguay's Special 301 history, see previous years' reports at <https://www.iipa.org/reports/reports-by-country/>. For the history of Paraguay's Special 301 placement, see <https://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf>.

<sup>2</sup> See Law on Copyright and Related Rights (Law No. 1328/1998) (Para.), available at <https://www.wipo.int/wipolex/en/text/129427>.

value chain by adding unquantifiable backend costs and also would negatively affect contractual relationships between all creators in the ecosystem.

The 2022 Bill sets an arbitrary 10% default statutory rate to be collected by CMOs directly from financial institutions. The bill's authors appear to have chosen the 10% remuneration arbitrarily, without any study, justification, or consideration of the typical operations of the creative industries. Moreover, this bill requires that banks and other financial institutions collect this default remuneration from Digital Streaming Platforms (DSPs) and pay amounts collected to the performers' CMO. Direct licensing of copyrighted works and sound recordings by individual rights holders of their exclusive rights should always remain the baseline.

These problems with the legislation were compounded when the 2022 Bill was amended to add that the right of remuneration for performers of copyrighted works is unwaivable, which interferes with rights holders' freedom to contract. Although the 2023 bill removes the set 10% remuneration, the proposal is still highly problematic for the other reasons discussed above, including that the remuneration right in the 2023 Bill remains unwaivable. Ratification of either of these proposals would undermine the entire value chain by adding unquantifiable backend costs. Enacting this legislation would undermine producers' ability to license.

The creation of such an unwaivable right is a cause for concern for several reasons. International norms, as set forth in the Berne Convention, the WTO TRIPS Agreement, the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Beijing Treaty, support the individual exercise of exclusive rights. Moreover, Article 123(4)(a) and (b) from both bills go too far. Not only are these Articles inconsistent with international copyright agreements and fundamentally out of step with law and practice in markets around the world, including the United States, they are essentially a limitation on an exclusive right, and as such, must be compatible with the three-step test. However, these provisions are not limited to certain special cases, they conflict with a normal exploitation of the work, and they unreasonably prejudice the legitimate interests of the right holder. These proposals put pre-existing contracts and collective bargaining agreements at risk and have the potential to destabilize the marketplace.

A range of stakeholders have voiced concerns with the proposed amendments, citing a lack of consultation and comparative studies.<sup>3</sup> In addition, credit card operators and banks have stated that it is impossible for them to withhold percentages of sales related to copyright purchases and subscriptions, thus rendering the proposals as they stand unimplementable.<sup>4</sup> Furthermore, two of the Deputies who wrote the text of the 2022 Bill have formally withdrawn their support of the amendment.<sup>5</sup>

Spain has implemented a similar remuneration right regarding music streaming services, which, according to data from Spanish performers' CMO AIE, has not been successful. In particular, AIE reported that it was unable to distribute significant portions of revenues. Based on AIE's 2022 Transparency Report, only 54% of the amounts collected in relation to the making available of phonograms exclusively were distributed in 2021.<sup>6</sup>

The Paraguayan digital market operates with very tight margins because of its size and characteristics. This proposal creates an additional cost and administrative burden for the distribution of audiovisual and musical works that would undoubtedly impact the final price to consumers of copyright protected content. Remuneration obligations such

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<sup>3</sup> See, e.g., Letter from Paraguay Performers' Organization to Chairman Deputy Carlos Maria Lopez (May 31, 2023). This letter includes objections to the bill by stakeholders including but not limited to Association of Intellectual Property Agents, Phonographic Producers Management Society of Paraguay, International Federation of the Phonographic Industry, and the Paraguayan National Intellectual Property Directorate (DINAPI). These stakeholders oppose the bill due to the lack of consultation with stakeholders, the seemingly arbitrary decision-making process that resulted in the 10% fee, the risk of destabilizing the industry by adding on an additional 10% fee, the lack of studies conducted, and the unprecedented nature of such an act. See also Raul Santopietro, *Spotify warns of leaving the country if two articles of the version that make its business "unviable" are not corrected*, EL PAIS (August 22, 2023) available at <https://www.elpais.com.uy/informacion/politica/spotify-alerta-con-dejar-el-pais-si-no-se-corrigen-dos-articulos-de-la-rendicion-que-hacen-inviable-su-negocio>.

<sup>4</sup> See *id.*

<sup>5</sup> See Document 102071, under additional background related to Bill D-2268191, available at <http://silpy.congreso.gov.py/expediente/126303>; see also Document 102072, under additional background related to Bill D-2268191, available at <http://silpy.congreso.gov.py/expediente/126303>.

<sup>6</sup> See *Informe Annual de Transparencia 2022*, AIE, at 34, available at <https://www.aie.es/wp-content/uploads/Informe-de-Transparencia-AIE-2022.pdf>.

as those proposed in Paraguay could create a disincentive for the production of local content. These consequences would penalize local artists and consumers alike. IIPA urges the Paraguayan legislature to reject passage of these amendments as they stand due to impossibility of implementation, lack of comparative studies, lack of consultation with relevant stakeholders, and contradiction with internationally held principles of copyright law.

# PERU

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Peru remains on the Watch List in 2024.<sup>1</sup>

**Executive Summary:** Notwithstanding a major private enforcement action in 2023 in Peru that took down *Cuevana3*, the largest pirate streaming provider in Spanish-speaking Latin America, 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. Unfortunately, the overall piracy situation in Peru is worsening. Peruvian authorities, especially the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (National Institute for the Defense of Competition and the Protection of Intellectual Property, INDECOPI) and the courts, have made highly commendable efforts to improve enforcement against several major infringers through mechanisms that ensure Internet Service Providers (ISPs) can impose effective relief to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities. 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 INDECOPI of this power. 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. Moreover, the Peruvian government should give INDECOPI 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.

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. Moreover, the Government of Peru should reject legislation that weakens copyright protection, and instead pass legislation that strengthens copyright protection and enforcement, such as legislation to criminalize the unauthorized camcording of films without the need to prove an intent to profit. 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, Peru should serve as an example of the importance of respecting copyright.

### **PRIORITY ACTIONS REQUESTED IN 2024**

#### **Enforcement**

- Devote significantly more resources and political support to combat digital piracy, and specifically, increase INDECOPI's funding so that it can build upon the recent positive examples of IP enforcement.
- INDECOPI should cease to interpret that synchronization licenses include the right to communicate the licensed works to the public.

#### **Legal Reforms**

- Reject problematic provisions in the General Internet Bill (*Proyecto de Ley 878/2021-CR*).
- Reject the proposed amendments presented by OSIPTEL to the Net Neutrality Regulation, which would undermine INDECOPI's enforcement efforts.

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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/2024/01/Appendix-B-2024.pdf>.

- Reject erroneous interpretations of Article 41(b) of the Copyright Act and ensure state-owned or state-funded operators set a clear example by obtaining necessary copyright or related rights licenses.
- Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.
- Delete Articles 18 and 45 of the Performer's Law, or at the very least reject the rewording of the articles proposed by Bills 3310/2022-CR and 6293/2023-CR.
- Reject Bill No. 2900/2022-CR that allows the Peruvian government to engage in collective rights management and control all collections and distributions and undermines the possibility to set tariffs that reflect the economic value of rights in trade.
- Clarify that Peru provides sound recording producers with exclusive rights for broadcasting and communication to the public.
- Reject Bill 4627/2022 that proposes that copies made in the cloud be subject to the private copying exception.

### Market Access

- Repeal Article 45 of the Performer's Law, or at the very least reject the rewording of the article proposed by Bills 3310/2022-CR and 6293/2023-CR.
- Reject Bill 807/2021-CR (*Ley del Música*).

## ENFORCEMENT

- **Devote significantly more resources and political support to combat digital piracy, and specifically, increase INDECOPi's funding so that it can build upon the recent positive examples of IP enforcement.**

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. Unfortunately, the overall piracy situation in Peru is worsening. Individuals based in Peru operate many websites that profit from selling advertising and user data and offer vast unlicensed 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 up to millions of visitors. The most relevant form of piracy in Peru is stream ripping. Stream-ripping sites allow users to permanently download music licensed only for streaming and then listen to it offline. The proliferation of illegal Internet Protocol Television (IPTV) services in the region is also a concern.

INDECOPi and the courts have made evident efforts to improve enforcement against several major local sites infringing copyrights, but the Government of Peru generally needs to devote significantly more resources and political support to the fight to combat digital piracy. INDECOPi has engaged in effective enforcement efforts, which is one of the few positive developments related to enforcement in Peru. In June 2022, INDECOPi ordered ISPs to block their customers' access to 147 illicit websites that illegally provided copyrighted content.<sup>2</sup> It is also clear that mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities, work in Peru. Since 2019, INDECOPi has also developed an agreement with *La Liga* to identify infringing websites and to prevent the illegal transmission of sports events.<sup>3</sup>

Latin America's most notorious illegal streaming service *Cuevana3* was shut down as the result of private enforcement efforts after its operator was identified in the Piura District of Peru. *Cuevana3*, formerly known as *cuevana3.io*, is the largest Spanish-language piracy streaming service in the Latin American region and ranked number one for website traffic over the past four years, according to data analytics company SimilarWeb. *Cuevana* gained notoriety as an online piracy brand, spawning numerous copycat operations. Its network of more than 20 domains

<sup>2</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-protegidas-por-el-derecho-de-autor>.

<sup>3</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-grupo-internacional-renuevan-convenio-para-luchar-contra-la-pirateria-digital>.

attracted more than 800 million visits in two years and made a vast library of infringing film and television content available in multiple formats.

IIPA urges the Government of 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 IP rights, 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. Additionally, the Special Prosecutor's Unit for IP on online and digital related cases needs to be more engaged in enforcement actions, including joint operations with INDECOPI to tackle local infringing sites.

- **INDECOPI should cease to interpret that synchronization licenses include the right to communicate the licensed works to the public.**

The authors' collective management organization (CMO) APDAYC initiated two pending appeals against resolutions published by INDECOPI on musical works synchronized into movies and other audiovisual productions. These resolutions are based on a controversial legal theory developed by INDECOPI in 2018 that once a musical work is synchronized into a movie, then all rights – including the music performance rights – are *ipso facto* presumed to have been assigned to the movie producer. INDECOPI has applied this theory to conclude that CMOs representing copyright owners in pre-existing musical works and incidental music would have no right to license public performance uses. Substantial evidence of industry practice (especially regarding synchronization into movies produced in the United States) was submitted in both cases but was ignored. This included statements and affidavits submitted by the composers and movie studios clarifying that public performance rights on music created or used in a movie are not transferred to the movie producer as part of a synchronization contract. The situation is not only affecting authors' collections in Peru, but there is a potential "domino effect" to other CMOs such as UNIMPRO.

INDECOPI's interpretation is contrary to the Berne Convention, of which Peru is a member, and with which the U.S.-Peru TPA requires Peru to comply. The Berne Convention clearly identifies the right of reproduction and right of communication to the public as independent rights.<sup>4</sup> These cases are still pending for resolution before an Administrative Appeals Court in Lima.

## **LEGAL REFORMS**

- **Reject problematic provisions in the General Internet Bill (*Proyecto de Ley 878/2021-CR*).**

The General Internet Bill introduces damaging changes to the current legal framework in Peru. 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<sup>5</sup> 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, online service providers (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 enforcement 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 due process to any involved party via the ability to appeal to its internal commission and to a civil court. IIPA urges the Government of Peru to retain the current legal basis for mechanisms that ensure ISPs can impose effective relief to remove infringement, including,

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<sup>4</sup> See Berne Convention for the Protection of Literary and Artistic Works, Articles 9 and 11.

<sup>5</sup> Note that on June 9, 2022, the Parliamentary Committee on Transport and Communications published an opinion proposing amendments and a different numbering of the articles of the bill. Here, we refer to the original text and article numbering of the bill.

where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.

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.

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 disable access to it. 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. The creative industries send millions of notices per year to remove user-generated content (UGC).

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 IP rights, 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" take down 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>6</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>7</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>6</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%20June%2007.pdf>.

<sup>7</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.

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, access to the Internet is currently not recognized as a fundamental right in the Political Constitution of Peru, but 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, as well as the sheer volume of notices that rights holders send for takedown of UGC content. Such an approach 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 that Peru retain the current legal basis for mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities. 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.

- **Reject the proposed amendments presented by OSIPTEL to the Net Neutrality Regulation, which would undermine INDECOPi's enforcement efforts.**

OSIPTEL has also presented amendments to the Net Neutrality Regulation with the same goal: preventing mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities, 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. IIPA urges the Government of Peru to reject these proposed amendments and any efforts that would undermine INDECOPi's enforcement efforts.

- **Reject erroneous interpretations of Article 41(b) of the Copyright Act and ensure state-owned or state-funded operators set a clear example by obtaining necessary copyright or related rights licenses.**



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 nation-wide television 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, and the Peruvian government should reject erroneous interpretations of Article 41(b) of the Copyright Act and ensure state-owned or state-funded operators set a clear example by obtaining necessary copyright or related rights licenses.

- **Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.**

Unauthorized camcording is a persistent challenge for rights holders in Latin America. 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.

- **Delete Articles 18 and 45 of the Performer's Law, or at the very least reject the rewording of the articles proposed by Bills 3310/2022-CR and 6293/2023-CR.**

Peru currently regulates performers' rights through two overlapping laws: the Copyright Law (*Ley sobre el Derecho de Autor*<sup>8</sup>) and the Performer's Law (*Ley del Artista Intérprete y Ejecutante*<sup>9</sup>). Article 18 of the Performer's Act provides for unwaivable author and performer remuneration rights and imposes mandatory collective management for those rights. Mandatory collective rights management has profoundly negative impacts on U.S. exports in the audiovisual sector, with knock-on effects on collectively bargained compensation payable to creative talent in U.S. audiovisual works, through the imposition of additional, unjustified increases in distribution and licensing costs. This results in confusion in the marketplace for rights clearance as well as erosion of market value for all stakeholders. IIPA urges the Government of Peru to repeal this measure.

Article 18 of the Performer's Law provides for a remuneration right to the benefit of performers for the broadcasting or communication to the public of their performances, to be shared with the phonogram or videogram producer, as the case may be. This right overlaps with the ones provided for by Articles 133 (for performers) and 137 (for phonogram producers) of the Copyright Act, generating legal uncertainty. This uncertainty would be increased if two similar bills (Bills 3310/2022-CR and 6293/2023-CR), proposed in October 2022 and November 2023, amending the Performer's Law are enacted. Both include similar problematic provisions rewording Article 18.1 of the Performer's Law and establishing the act of communication to the public in a way that may be inconsistent with the definition provided by Article 2(5) of the Copyright Act.

Finally, these two Bills propose deleting the current Article 18.2 of the Performer's Law, which includes the obligation that the remuneration be shared with the phonogram or videogram producer. Article 15(1) of the WIPO Performances and Phonograms Treaty provides that “[p]erformers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for

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<sup>8</sup> Decreto Legislativo N°822.

<sup>9</sup> Ley N° 28131.

broadcasting or for any communication to the public.”<sup>10</sup> IIPA recommends that Article 18 of the Performer’s Law be deleted altogether to provide certainty and compatibility with the Copyright Act, but at the very least, the rewording of the article proposed by Bills 3310/2022-CR and 6293/2023-CR should be rejected.

- **Reject Bill No. 2900/2022-CR that allows the Peruvian government to engage in collective rights management and control all collections and distributions and undermines the possibility to set tariffs that reflect the economic value of rights in trade.**

On August 24, 2022, Bill No. 2900/2022-CR was submitted to Congress. The Bill establishes a mandate to create a one-stop-shop agency for the collection of performance rights of all rights holders’ CMOs. Moreover, the Bill empowers the Executive to manage the agency and to assume control of collections and distributions. Such a practice is inconsistent with international best practices as it effectively deprives CMOs, established and controlled by rights holders, of their main roles. It also raises concerns about good governance and transparency, and how it may ultimately affect rights holders’ revenue. In addition, the voluntary nature of CMO membership is essential to the proper functioning of collective rights management and is enshrined in Article 16.7.7 of the U.S.-Peru TPA. IIPA urges the Government of Peru to reject the Bill or, at the very least, it should ensure that collective rights management remains under the control of rights holders.

Additionally, the Bill proposes a provision that would not allow for tariffs to be based on the income generated by the user of the repertoire, as is the international standard, and imposes deductions on tariffs for uses made by legal persons for non-profit purposes and to the benefit of not-for-profit cultural organizations. Such provisions are not in keeping with international standards, and they also prevent the tariffs from reflecting the economic value of rights in trade.

- **Clarify that Peru provides sound recording producers with exclusive rights for broadcasting and communication to the public.**

Peru should clarify that it provides sound recording producers with exclusive rights for broadcasting and communication to the public. Exclusive rights enable record companies to negotiate commercial terms for the public performance and broadcast of sound recordings.

- **Reject Bill 4627/2022 that proposes that copies made in the cloud be subject to the private copying exception.**

Bill 4627/2022 proposes that copies made in the cloud be subject to the private copying exception. Such a proposal is unfortunate because these services can be licensed by rights holders, and this exception would open the door to abuses by pirates. IIPA urges that the bill be rejected.

## **MARKET ACCESS**

- **Repeal Article 45 of the Performer’s Law, or at the very least reject the rewording of the article proposed by Bills 3310/2022-CR and 6293/2023-CR.**

Article 45 of the Performer’s Law provides for an obligation for broadcasters to dedicate 10% of their daily programming to local content. Bills 3310/2022-CR and 6293/2023 propose increasing that percentage to up to 50%. Article 45 is a clear market barrier, which these bills worsen. IIPA urges that Article 45 of the Performer’s Law be deleted, or at the very least that the quota is not increased.

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<sup>10</sup> WIPO Performances and Phonograms Treaty (WPPT), Article 15(1), available at <https://www.wipo.int/wipolex/en/text/295578>; see also, Mihály Ficsor, WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, November 2003, available at [https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo\\_pub\\_891.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf).

- **Reject Bill 807/2021-CR (*Ley del Música*).**

As indicated above, there are serious overlaps between the Copyright Law and the Performer's Law. Bill 807/2021-CR would introduce a new separate law – the Musician's Law – that would introduce additional overlaps, increasing the legal uncertainty. Also, the wording of the law is confusing as it would seem to impose that record deals be subject to labor law, that the transfer of the making available right be subject to collective bargaining, and that a minimum percentage of performers' compensation be paid to local performers. This would introduce unnecessary market access barriers and make the Peruvian market less attractive. Therefore, IIPA urges that the bill be rejected.

# POLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Poland be placed on the Watch List in 2024.<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. Recent studies, including a July 2023 Deloitte report examining Internet piracy in Poland, the International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2023 (MCS), and APP Global's Piracy Landscape Report from December 2019, demonstrate the magnitude of the growing Internet piracy problem in Poland. 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 finally implementing Article 8(3) of the EU 2001 Copyright Directive (2001/29/EC) into its national law. 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 draft legislation prepared during the previous Polish government includes several concerning provisions that deviate to some extent from the Directives. Finally, Poland's enforcement officials do not take sufficiently effective actions against online piracy under the existing law, and Poland maintains several market access barriers that limit consumers' access to legitimate content.

#### **PRIORITY ACTIONS REQUESTED IN 2024**

##### **Enforcement**

- Ensure adequate and effective enforcement against online piracy including by following through on more criminal investigations and issuing deterrent sentences against infringers.

##### **Legal Reforms**

- Correctly implement Article 8(3) of the EU Copyright Directive and take effective enforcement actions against unlicensed services, including sites that link to pirated content, in accordance with EU case law.
- Ensure Poland's ISP liability regime is consistent with global best practices.
- Fully implement the DSM Copyright Directive.

##### **Market Access**

- Remove market access restrictions that negatively impact the U.S. creative industries.

#### **ENFORCEMENT**

- **Ensure adequate and effective enforcement against online piracy including by following through on more criminal investigations and issuing deterrent sentences against infringers.**

Online piracy is a serious problem in Poland. In July 2023, Deloitte published a report on Internet piracy of video-on-demand (VOD) and live streaming audiovisual content that found that as of July 2023 the losses of the

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<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/2024/01/Appendix-B-2024.pdf>.

audiovisual market due to Internet piracy in Poland may reach approximately three billion PLN (US\$752 million) annually, costing approximately 1.8 billion PLN (US\$451 million) of lost revenues of the State Treasury.<sup>2</sup> According to the report, approximately 40% of Internet users in Poland used websites offering illegal access to content, and in 2023 approximately 7.3 million Internet users in Poland used websites offering illegal access to content. The value of consumption of pirate audiovisual content in Poland amounts to approximately 7.36 billion PLN (US\$1.84 billion) annually. While this represents a decrease of about 11% over the past six years, the Deloitte report predicted a growth in piracy levels between 2023 and 2030 due to the emergence of new pirate online content services that use new payment technologies (such as cryptocurrencies) that are more difficult to track and global piracy services targeting Polish users. Among other things, the report recommended amending Poland's copyright enforcement laws to provide a legal basis for injunctive relief and to improve its ISP liability framework.

Some operators of known infringing sites, such as *Filman.cc*, operate in the open and enjoy a positive perception by the public. Many piracy sites are even 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>3</sup> The content landscape is populated by piracy streaming services that hinder the growth of legitimate streaming services in the country. A review of SimilarWeb traffic data shows that 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>4</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 2023 Poland ranked eleventh 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.

According to IFPI's 2023 MCS, Poland, for the third year running, had the highest music piracy rate out of eight EU countries included in the study: 37% of Internet users from Poland (and 50.9% of 16-24-year-olds) had pirated music at least once in the previous month.<sup>5</sup> The MCS highlighted that stream ripping remained the key music piracy threat in Poland. 28% of Internet users said they had used stream ripping to illegally download music, while 17% had obtained pirated music from cyberlockers like *Chomikuj* and *Ulub*, and 12% 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 *notube.net* (3.4 million visits from Poland in Q4 2023), *savefrom.net* (3.2 million visits from Poland in Q4 2023), *y2down.cc* (2.3 million visits from Poland in Q4 2023), and Polish language site *Pobieracz.net* (1.2 million visits from Poland in Q4 2023).

Poland also suffers from other forms of piracy, including instances of illegal camcording (with two 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. Criminal and civil actions against pirate services are generally ineffective due to the slowness of the legal process in Poland. Criminal investigations languish

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<sup>2</sup> See Deloitte 2023 piracy study, available in Polish at <https://sygnal.org.pl/wp-content/uploads/2023/07/2023RaportKradziezInternetWideoDeloitte.pdf>.

<sup>3</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 *Chomikuj* was taking an active role in sharing illegal content from its users 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. 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>4</sup> See id.

<sup>5</sup> See International Federation of the Phonographic Industry (IFPI), *Engaging With Music 2023*, available at <https://www.ifpi.org/wp-content/uploads/2023/12/IFPI-Engaging-With-Music-2023-full-report.pdf>.

and do not result in deterrent sentences. Polish courts are seriously backlogged. The operators of websites that post infringing hyperlinks, whether text links or embedded streaming links, attempt 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 has reported that the IP courts have refused to allow plaintiffs to demand names of physical persons (private 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. Thus, justification of this decision has yet to be obtained. Finally, as discussed below, Poland's legal framework is inadequate, leaving copyright owners unable to effectively enforce their rights online and piracy services free to continue operating and growing unencumbered. In particular, 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.

## **LEGAL REFORMS**

- **Correctly implement Article 8(3) of the EU Copyright Directive and take effective enforcement actions against unlicensed services, including sites that link to pirated content, in accordance with EU case law.**

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.”<sup>6</sup> 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. EU law allows Member States to rely on existing law, but the fact remains that Article 8(3) injunctive relief—a mature remedy in most other Member States—is not established in Poland. The lack of effective 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 the injunctive relief required by Article 8(3). Implementation of Article 8(3) was not central to the holding of the 2017 Warsaw Court of Appeals decision regarding the infringing service *Chomikuj.pl*. 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 injunctive relief in line with Article 8(3) is available under Polish law.

In sum, there is confusion because the Polish government and the Courts disagree on the state of the law. The Government of Poland should 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.

- **Ensure Poland's Internet service provider (ISP) liability regime is consistent with global best practices.**

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<sup>6</sup> See Article 8(3) of the EU Copyright Directive 2001/29 (Copyright Directive). Recital 59 of the Copyright Directive explains, “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.”

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, but discussions were put on hold. The process to amend Poland's e-commerce legislation began in January 2024, as the Polish Ministry of Digitalization announced public consultations regarding a bill implementing the Digital Services Act.

- **Fully implement the DSM Copyright Directive.**

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>7</sup> Subsequent versions of the bill, after public consultations and inter-governmental consultations, were published in November 2022 and January 2023. Due to objections raised by various stakeholders, the draft legislative proposal was not approved by the government and was not sent to Parliament before the October 2023 legislative elections.

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 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 digital services and streaming platforms would need to negotiate separately with the various collective management organizations (CMOs) representing performers and authors. The remuneration right, coupled with the requirement of the intervention of CMOs add 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

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<sup>7</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.

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>8</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 ten 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 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.

## **MARKET ACCESS**

- **Remove market access restrictions that negatively impact the U.S. creative industries.**

Poland has several unreasonable market access barriers that should be removed, or at least limited, to increase consumers’ access to legitimate content. These include:

**Broadcast Quotas:** Domestic broadcasters must dedicate over 33% of their quarterly broadcasting time to programming produced originally in Polish and at least 50% of their quarterly broadcasting time to European programming, excluding time allotted to news, sports events, games, advertising, teletext services, and teleshopping, and 10% of this must be by independent producers. In addition, half of this 10% must have been produced in the last five years.

**Mandatory Financial Contributions:** Starting in 2022, non-domestic EU broadcasters must contribute 1.5% of revenues from the Polish market to the Polish Film Fund.

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<sup>8</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/>.



**Video-on demand (VOD) Quotas:** As prescribed under EU law, domestic on-demand services must allocate at least 30% of their catalogues to European works and ensure the prominence of those works.

**Foreign Ownership Restrictions:** Poland limits non-European Economic Area (EEA) ownership in a broadcasting company to 49%. A broadcasting license may be granted to a foreign person, or a subsidiary controlled by a foreign person, whose registered office or permanent place of residence is located in EEA.

**Tax Treatment of U.S. Audiovisual Works:** The Cinematography Law includes levies on box office, broadcasters and cable operators' revenue, revenue of providers of VOD services, and DVD sales to finance subsidies for Polish and European films.

## **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 (General Obligations) and 61 (Criminal Procedures).

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendations:** IIPA recommends that Switzerland be placed on the Watch List in 2024.<sup>1</sup>

**Executive Summary:** The last revision of Switzerland’s copyright law dates back to 2020, and those amendments failed to address substantial concerns related to copyright enforcement. IIPA urges the U.S. government to convey to the Government of Switzerland that its copyright law 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 the use of unlawful sources, cross-border infringement, and intermediary liability. The enforcement deficit remains 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 strengthen enforcement tools for rights holders and bring the copyright law in line with its international treaty obligations, current best practices in Europe, and international norms.

#### **PRIORITY ACTIONS REQUESTED IN 2024**

##### **Legal Reforms**

- Further amend the Copyright Act to provide sufficient tools to combat all types of piracy, including cross-border piracy, regardless of technical details, including by providing mechanisms that ensure Internet service providers (ISPs) can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities.
- Require marketplaces and strongly encourage all relevant intermediaries, including data centers and ISPs, to implement and enforce better “know-your-business-customer” (KYBC) protocols.
- Further 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, and restrict the permission for third parties to provide services for private use to prevent unlicensed, commercial services affecting, or competing with, rights holders’ exploitations.
- Ensure narrow practical application of the extended collective licensing (ECL) regime.
- Amend the Copyright Act to redress the unreasonable and commercially damaging statutory restrictions on rights holders’ freedom to negotiate licensing terms for the use of their respective rights.
- 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.
- Revise additional provisions of the Copyright Act to ensure Switzerland provides adequate and effective copyright protection and enforcement and meets its international obligations.
- Amend the Copyright Act to enable rights holders to collect evidence to enforce rights (e.g., collection or processing of Internet protocol (IP) addresses to bring *direct* civil claims without a related criminal proceeding).

##### **Market Access**

- Abolish or ease provisions of the Swiss Film Act that negatively affect the distribution and making available of audiovisual works in Switzerland and remove streaming and broadcasting quotas.
- Materially simplify all filing and reporting obligations imposed on the audiovisual industry, including under the Copyright Act and under the Film Act.

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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/2024/01/Appendix-B-2024.pdf>.

## **LEGAL REFORMS**

- **Further amend the Copyright Act to provide sufficient tools to combat all types of piracy, including cross-border piracy, regardless of technical details, including by providing mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.**

Past experience shows that rights holders lacked efficient legal instruments to enforce their rights, against both domestic and, especially, cross-border infringement, and against involved intermediaries. While the operation of notorious cyberlockers based in Switzerland has ceased, the country is becoming an attractive base of operations for some Internet service providers (ISPs) dedicated to piracy on a global scale. Moreover, cyberlockers continue to be widely used by the Swiss audience. Notorious cyberlockers like *rapidgator.net*, which received close to 900,000 visits during Q2 2023 according to SimilarWeb, attract a significant number of visits from Switzerland.

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.

Rights holders do not currently have effective remedies against a wide range of copyright infringements, both civil and criminal. As discussed below, Switzerland does not allow for collection or processing of personal information solely to bring civil claims. In addition, where a copyright infringing online service operates anonymously and from undisclosed locations, a rights holder cannot bring a direct legal action against the infringing service without knowing whom to sue and where they should be served with court papers. In criminal enforcement cases, law enforcement authorities face the same challenges when dealing with a copyright infringing online service operating anonymously and from an undisclosed location. Switzerland should therefore provide mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities. It is notable that Switzerland had a referendum in June 2018 on a gambling law amendment, which would allow blocking of unauthorized gambling sites. The referendum approved the amendment by a good majority.<sup>2</sup> Therefore, it is evident that there are no bars in principle to the extension of this form of injunctive relief to copyright cases, but political will to do so is absent (a remedy of this kind was rejected by the federal government in the ongoing copyright amendment process).

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 21 million visits to stream-ripping sites from Switzerland from June 2022 to June 2023. Fourteen stream-ripping websites had over 100,000 visits each from Switzerland during Q3 2023, according to SimilarWeb, with *YTMP3.nu* receiving over 350,000 visits, *Savefrom.net* more than 250,000 visits, and *x2download.app* over 200,000 visits.

Illegal streaming platforms operated from remote or unknown jurisdictions continue to be 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 permitted if no uploading occurs, as held in a 2019 federal court decision, which has poignantly shaped consumers' expectations and attitudes. Several BitTorrent indexing sites, including *Yggtorrent*, *thepiratebay.org* and *1337x.to*, are

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<sup>2</sup> 72.9 percent of voters. See <https://www.bbc.co.uk/news/world-europe-44430267>.

also very popular in Switzerland. *Yggtorrent* is a French-language BitTorrent group of sites that regularly change top-level domains to avoid attempts by French courts to block access to the site in France. According to Q2 2023 SimilarWeb data, the *Yggtorrent* group of sites recorded 1.4 million visits, making them some of the most popular pirate sites in Switzerland.

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.

As discussed above, Switzerland lacks meaningful remedies and effective enforcement against online copyright infringement, and rights holders in Switzerland often have very little recourse against piracy sites, particularly those operated or hosted outside Switzerland. In addition to the introduction of more effective remedies, better cooperation from intermediaries is crucial to effectively tackle the problem of illegal content in Switzerland. Switzerland has never introduced reliable rules for considering ISP liability, which should be aligned with international standards, and the broad private use exception, discussed further below, also impairs cooperation.

Article 39d of the Copyright Act provides a “stay down” provision for certain hosting providers that create a “particular danger” of copyright infringement. It has not been enforced since its inception in 2020, after the last notorious Swiss cyberlocker, *Uploaded*, ceased operation. Going forward, Article 39d may serve as a deterrent against similar services. However, it will require potentially intricate and lengthy pilot proceedings to become enforceable, given its vague and unclear legal requirements. The provision addresses an isolated phenomenon but does not provide an efficiently enforceable overall framework for intermediary liability.

It remains critical that the Swiss government come into compliance with the Berne Convention, WTO TRIPS Agreement, the WIPO Copyright Treaty (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.

- **Require marketplaces and strongly encourage all relevant intermediaries, including data centers and ISPs, to implement and enforce better “know-your-business-customer” (KYBC) protocols.**

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 Reseaux IP Europeens (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 Seychelles, in fact, have data centers in Switzerland.

Swiss authorities should act to ensure that these ISPs and data centers operate meaningful KYBC policies and take action to have these policies enforced. Switzerland has not adopted such practices, which have become standard elsewhere in Europe. KYBC policies for ISP hosting services are needed to prevent ISPs from providing hosting services on online platforms that facilitate infringing activity. The government should amend the Copyright Act or pass other implementing legislation to require marketplaces and strongly encourage other intermediaries, including

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<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.

host and data centers, to adopt and enforce such policies, which reflect the basic duty of care applicable to these businesses.

- **Further 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, and restrict the permission for third parties to provide services for private use to prevent unlicensed, commercial services affecting, or competing with, rights holders’ exploitations.**

A long-standing priority of the creative industries is to narrow Switzerland’s 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 technological protection measures (TPMs, discussed below), constitute significant hurdles for protection against stream-ripping services that dominate the list of top music pirate services as well as other infringing services. This is because there is no remedy against private copying from illegal sources or unlicensed services, and rights holders do not have a legal basis to challenge services offering stream-ripping functionality to create such private copies. The Swiss Federal Supreme Court, in a 2019 decision, rejected an application to order one of the country’s largest Internet access providers to block pirate sites, stating that although it is clear that operators of illegal streaming websites are violating the law, there is no way of connecting a Swiss Internet access provider to that infringement because the Article 19 “private use” exception to copyright (which covers any streamed or downloaded content regardless of whether or not it comes from an unlicensed source) means that there is no copyright infringement by the access provider’s customers.<sup>4</sup>

Furthermore, the Copyright Act permits third parties to provide a broad range of commercial services to facilitate private use, including copying or reproduction, recording, and in some cases making available, with limits that are not adapted to the digital environment and have become mostly obsolete. This opens the door to unlicensed commercial services, offering works, performances, and recordings on a commercial scale, competing against regular exploitation, and undercutting licensing opportunities. For instance, 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 for 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. As noted above, it has also been an impediment to the assertion of rights against intermediaries, which rely on their users’ private use permission.

- **Ensure narrow practical application of the extended collective licensing (ECL) regime.**

Article 43a of the 2020 Copyright Act provides for ECL, a collective licensing scheme including non-affiliated rights owners, with a case-by-case opting-out provision. Although the provision was purportedly motivated by the desire to make difficult-to-license content, such as large archive stock, more accessible, and has been applied in that area so far, the provision’s scope is overly broad. 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. Therefore, there is a substantial risk that ECLs applied in the online space would devalue 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 could constitute a formality prohibited by

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<sup>4</sup> FSCD 4A\_433/2018 ([4A\\_433/2018 08.02.2019](https://www.bger.ch/urteile/4A_433/2018_08.02.2019) - Schweizerisches Bundesgericht (bger.ch))

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.

The Swiss government should ensure that the ECL regime in practice applies: (1) only to uses that are onerous to license on an individual basis; (2) without impacting any other exploitations of those works; and (3) where collecting societies already represent a significant number of rights owners. In addition, opting out must be a simple and efficient process. Furthermore, the Government of Switzerland should not permit ECL-based licensing for uses of copyrighted works from unauthorized sources. In particular, a problematic private streaming service for schools and educational institutions is being created, which would make use of thousands of DVD/Blu-Ray copies of copyrighted works, including many works owned or distributed by U.S. rights holders, from schools and libraries without authorization from rights holders. While the operators of the streaming service have engaged in a dialogue with rights holders, the operators could ultimately try to secure an ECL or lobby for a new educational exception to avoid properly licensing these uses. The Government of Switzerland should not permit ECL-based licensing for these uses and should reject any new educational exception that would enable uses without a proper license.

- **Amend the Copyright Act to redress the unreasonable and commercially damaging statutory restrictions on rights holders' freedom to negotiate licensing terms for the use of their respective rights.**

Article 47 of the Swiss Copyright Law severely restricts the ability of music rights holders to exercise their rights to license their music for use in broadcasting and public performance. The rights in question must be exercised collectively, and the relevant collective management organizations (CMOs) are required by statute to first agree to a joint tariff that would then be presented to users. This means that authors of musical works and sound recording rights holders (i.e., producers and performers) are compelled to agree to a joint tariff. This situation is similar in practice to a statutory imposition of a single-window licensing requirement. As such, it puts Switzerland at odds with the international standard, because the vast majority of countries do not compel such cooperation but instead leave it to the rights holders to voluntarily agree on the extent of cooperation. Even in these cases, music authors on the one hand, and music producers and performers on the other, maintain separate licensing tariffs. This unreasonable requirement leads to protracted, difficult, and costly negotiations and impairs the functioning of collective management in Switzerland. Moreover, rights holders have no option to opt out of this system as the exercise of these rights in Switzerland is subject to mandatory collective management.

In addition, Swiss law requires that representatives of users (e.g., broadcasters) be members of the CMO (Swissperform), which is entitled to license sound recording related rights for broadcasting and public performance. Accordingly, there is a conflict of interest, because both rights holders and users are members of the same CMO. This statutory requirement impairs the ability of music producers and performers to negotiate terms reflecting the economic value of their content and further compounds the restrictions on the ability of the recorded music industry rights holders to exercise their commercial rights freely.

- **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.**

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. First, it is problematic that remuneration is limited by statute to a given percentage of business revenues and set at such a low level. Second, the caps operate in a discriminatory way by providing 10% for authors and 3% for sound recording rights holders (the provision is worded as granting the remuneration to performers, with income to be shared with producers). This discrimination against related rights holders leads to low revenue levels for artists and record companies. It also differs from the international norm (which does not involve such caps). Remuneration that is capped by legislation at a given percentage of business revenue is not compatible with the concept of securing licensing terms reflecting the ever-changing economic value of

the content in trade. This provision also undercuts any scope for bargaining and free-market commercial negotiations. 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>5</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.

- **Revise additional provisions of the Copyright Act to ensure Switzerland provides adequate and effective copyright protection and enforcement and meets its international obligations.**

The Swiss government should revise the following additional provisions of the Copyright Act to ensure Switzerland provides adequate and effective copyright protection and enforcement and meets its international obligations.

**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>6</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.

**Orphan works provision (Article 22b):** This provision allows for compulsory licensing of orphan works, where works are 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 European Union (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.

**Free reproduction license for scientific research (Article 24d) and related exceptions:** The license under this provision, which is meant to cover “text-and-data mining,” could 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.

Likewise, the potentially large scope of the statutory license for businesses and organizations to copy or reproduce (and in some cases, make available) works for “internal information or documentation” (Article 19(1)(c) of the Copyright Act) needs clarification and a narrow interpretation. The statutory license should exclude all uses in which such works serve as material for commercial or other offers outside the business or organization. It should also be

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<sup>5</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.

<sup>6</sup> See Article 11 of the WIPO Copyright Treaty (WCT) and Article 18 of the WIPO Performances and Phonograms Treaty (WPPT).

made clear that a reproduction made under a specific statutory license may not be diverted to further use by another business or organization, which would effectively circumvent the restrictions on each such license.

**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.

- **Amend the Copyright Act to enable rights holders to collect evidence to enforce rights (e.g., collection or processing of Internet protocol (IP) addresses to bring *direct* civil claims without a related criminal proceeding).**

The application of Swiss privacy law to prevent, in general, the use of IP addresses in court proceedings is disproportionate and conflicts with Article 41 of the TRIPS Agreement, which requires an effective remedy to be available against acts of copyright infringement. The ruling of the Federal Court in the *Logistep* case (1C\_285/2009 and 1C\_295/2009) made it practically impossible to collect IP addresses, even though such evidence is often essential for copyright enforcement purposes (in both civil and criminal cases). The Court prohibited rights holders in Switzerland from collecting IP addresses of suspected copyright infringers in order to file complaints with the police, if the procedure would involve identification of the suspect by the police and the possibility of seeking a settlement from them in advance of any criminal conviction. While this decision has been partially limited by the reforms brought about by the 2020 Copyright Act amendments, the current law still does not allow for collection or processing of this information solely to bring *direct* civil claims without a criminal proceeding.<sup>7</sup>

The amended Copyright Act brought a new legal basis allowing rights holders to use personal information (including IP addresses) for the purposes of filing criminal complaints. The amended law also allows the use of personal information for the purposes of civil claims, but only if such claims are raised in a criminal proceeding or afterwards. However, Swiss law still does not allow for collection or processing of this information solely to bring *direct* civil claims without a criminal proceeding. In this regard, the legal situation remains, in effect, unchanged and incompatible with international legal norms. This needlessly limits rights holders’ ability to enforce their rights, essentially forces rights holders to rely exclusively on criminal enforcement, and puts copyright holders at a disadvantage against other claimants.<sup>8</sup> Additionally, criminal enforcement alone is grossly inadequate because prosecutors rarely bring criminal cases against piracy due to resource constraints and a general reluctance.<sup>9</sup>

## **MARKET ACCESS**

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<sup>7</sup> The 2020 Copyright Act amendments unfortunately fell short of implementing the full Working Group on Copyright (AGUR12) compromise recommendations agreed to by rights holders. For a full description of the AGUR12 process, see prior years’ IIPA Special 301 reports, at <https://iipa.org/reports/reports-by-country/>.

<sup>8</sup> In 2021 amendments to the ordinances of the Telecommunications Act entered into force that 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-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.

<sup>9</sup> The Swiss government has not shown adequate ability or will to engage in effective copyright enforcement. For example, a criminal trial against the notorious cyberlocker *Cyando/Uploaded*, which facilitates rampant infringement, ended in March 2019 with the prosecutor’s announcement that it found “no real ties” to Switzerland, despite the parent company Cyando AG’s apparently blatant ties to Switzerland. Criminal prosecution in the canton Vaud against a seller and provider of Kodi Boxes connected with an unauthorized streaming and streaming link service, initiated in 2016, has not made progress for several years.



- **Abolish or ease provisions of the Swiss Film Act that currently negatively affect the distribution of audiovisual works in Switzerland and remove broadcasting quotas.**

**Film Act:** 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 video-on-demand (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.

Another amendment to the Swiss Film Act, adopted in May 2022, introduced an investment obligation for non-domestic VOD services targeting the Swiss market. The 4% investment obligation is based on Swiss revenues and must be invested in Swiss filmmaking. In September 2023, the Federal Council adopted these amendments, as well as those that require compliance with a 30% European works quota. These obligations will enter into force in 2024. The revised Film Act also sets a 30% quota for European works for non-domestic VOD services targeting Switzerland beginning January 2024.

**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.

- **Materially simplify all filing and reporting obligations imposed on the audiovisual industry, including under the Copyright Act and under the Film Act.**

The Copyright Act includes a compulsory collective right to remuneration for authors and performers for exploitation of their audiovisual works on 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>10</sup> This provision, which became operative under the corresponding tariff (CT13), has resulted in highly complex, time-consuming reporting obligations for foreign operators that is out of proportion with the volume of remuneration actually owed. There is also a significant risk of over-payment and liability due to this complexity. The Swiss government should materially simplify all filing and reporting obligations imposed on the audiovisual industry under this provision, as well as the provisions regarding the content quota, investment duty, and statistics required under the Film Act, discussed above.

## **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)), Switzerland 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

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<sup>10</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.

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.

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Taiwan be placed on the Special 301 Watch List.<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 taking enforcement actions against violators over the past few years. Recent raids against the distributors of *Ubox* and *SviCloud* are positive signs that the government is taking its commitment to address unlawful PDs more seriously. However, sentences against pirate operators in legacy cases remain too low to deter piracy. It is hoped that ongoing investigations and cases will lead to more deterrent outcomes.

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 in the areas of over-the-top (OTT) services and intermediary platform regulations. 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 a minimum, Taiwan should ensure its enforcement framework and its copyright legislation comply with its obligations under the WTO TRIPS Agreement (TRIPS), 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.

## PRIORITY ACTIONS REQUESTED IN 2024

### Enforcement

- Ensure that criminal authorities 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 through existing laws to provide a mechanism that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.
- Take effective action to deter unauthorized theatrical camcording incidents, including issuing deterrent penalties.

### Legal Reforms

- Enact legislation to address the gaps under the amended Copyright Act to provide effective relief for copyright infringement, including mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities; provide proper incentives for ISPs; and other matters not addressed in the amendments.
- Ensure the adequacy of civil remedies by enhancing Article 88 of the Copyright Act to remove the restrictive language on calculating damages.
- Issue implementing regulations or guidance ensuring new or proposed exceptions meet the three-step test.

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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/2024/01/Appendix-B-2024.pdf>.

- Address shortcomings in amendments to the Collective Management Organization (CMO) Act.
- Comply with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty irrespective of formal accession.
- Ensure that any potential over-the-top (OTT) regulations or any regulations on intermediary platforms do not disincentivize foreign investment.

### Market Access

- Eliminate market access barriers to U.S. audiovisual content, including investment, the basic cable rate cap, and discriminatory television content quotas.

## ENFORCEMENT

- **Ensure that criminal authorities 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.**

Online and mobile device piracy in Taiwan continued at a concerning level in 2023. Both domestic and foreign websites that provide illegal content remain a significant problem and undermine the ability of rights holders and legitimate services to distribute copyrighted content. These sites 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. Social media platforms have also become a popular way to share pirated content.

Apps, PDs, and mobile devices, such as *Mixerbox 3*,<sup>2</sup> are a significant platform for disseminating illegal content. Notwithstanding specific legislative reforms, the proliferation of PDs remains a problem in Taiwan, and enforcement against PD operators is insufficient.<sup>3</sup> Streaming devices that run with proprietary infringing apps enable unauthorized access to live channels and video-on-demand (VOD) content and are readily available online and in physical marketplaces. Sellers of streaming devices try to distance themselves from the installation of infringing apps by claiming that the manufacture or sale of the boxes themselves is not illegal and that, instead, resellers 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. 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 that 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 the Criminal Investigation Bureau (CIB), Telecommunication Police Brigade (TPB), and Criminal Investigation Brigade (CIBr)) on PD cases, and IIPA is hopeful that enforcement authorities will continue to pursue such cases, using the amended law to its maximum extent.

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<sup>2</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 provides unauthorized music video content streamed from YouTube, stripped of advertisements.

<sup>3</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 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*, *EV PAD*, and *SVI Cloud*.

In September 2023, the Taiwan Police announced that they had completed a successful raid against the distributors of SVICLOUD PDs, seizing more than 1,000 PDs and equipment including mobile devices and computers. Seven suspects were arrested. At the event, officials also urged the public to refrain from using PDs, reminding them of the security risks associated with streaming content illegally. Such enforcement action and consumer messaging are welcome and encouraging, but sustained action and messaging remains necessary to address the problem of PDs in Taiwan.

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<sup>4</sup> 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 stream ripping (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.

Taiwan’s Internet users often obtain unauthorized content primarily from websites located overseas. Unfortunately, Taiwan’s legal framework to address overseas infringements remains inadequate. Taiwan’s legal system does appear to offer mechanisms that ensure ISPs can, on a no-fault basis, impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites, upon rights holders’ applications to appropriate authorities. An unpublished Taipei District Court case, as well as the *Gimy* criminal action (see below), may pave the way for an approach by the Taiwan Network Information Center (the entity in Taiwan responsible for domain name registration and IP address allocation) to disable access to sites engaged in illegal activity. However, pirate operators can evade these temporary orders. The current remedy available to disable access to such sites (i) can only be initiated via a criminal process; (ii) is entirely discretionary and the duration for which access is disabled is dependent on subsequent prosecution of the operators of the identified infringing sites; and (iii) even when implemented, access is disabled only in relation to the specific defendant domains identified, i.e. there is no dynamic impact. 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. The Taoyuan District Court delivered a verdict in April 2023 involving the *8maple* website (domains including *8drama.com*; *8maple.ru*; *fenglin.to*; *eyny.tv*). The two defendants were found guilty, and each sentenced to prison for one year and six months. In addition, the court announced confiscation of the defendant’s illicit gains, which amounted to more than TWD 58,000,000 (approx. US\$1,946,000). The case is currently on appeal.

A criminal referral was made in Taiwan related to the piracy service *Gimy* in December 2020, and there was a raid in early 2021. A criminal trial against four criminal defendants is currently ongoing before the Taipei District Court, with a first instance decision expected in early 2024. Although eight *Gimy* domains were seized at the outset of the matter, no mechanism appears to be in place to ensure that new domains or redirects are seized or disabled while the criminal trial remains ongoing. As such, *Gimy* continues to evade these seizures by creating new domains, including *Gimy.ai* (the main domain), *Gimy.tube*, *gimy.is*, *Gimy.video*, and *gimy.cc*. These domains continue to be the most popular piracy domains within Taiwan.

Although the recent criminal actions (and in the *8maple* case) deterrent penalties issued on first instance are welcome developments, there remain areas for improvement in the criminal referral process in Taiwan. First, the criminal referral process continues to take a significant amount of time. The delay between the filing of the referral and

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<sup>4</sup> For example, *Backupmp3.com* received 11.0m visits from Taiwan in Q1 2023, *Y2mate* received 1.4m visits, and *Yout.com* more than 0.7m visits.

conviction, coupled with the absence of mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities, means that piracy operators can continue operating their websites while the case goes through the courts (including appeals).

Second, procedural requirements continue to introduce unnecessary complexity and delay to an already lengthy criminal referral process. Notarized and legalized powers of attorney continue to be required for the filing of each individual criminal referral and before each level of Court. For example, the same power of attorney used for the first instance trial would not be sufficient when the same case goes on appeal.

The Government of Taiwan should ensure that the CIB, TPB, and 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. 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 or cyber-bullying. Government involvement and support is essential to expand to content that infringes copyrights. Without a similarly definite and impactful remedy to address piracy sites and services, Taiwan is becoming an outlier in Asia, as many other governments in the region (and elsewhere in the world) are taking active steps to address rampant online and mobile piracy.

The need for such enforcement measures has become even more crucial following the emergence of new means of infringement, such as mobile apps with built-in karaoke capability imported from China or manufactured in Taiwan. These apps allow consumers to access and download content from a cloud database located overseas, with the app providing access to a vast amount of unauthorized karaoke audiovisual (AV) content. Several proceedings have been launched in Taiwan in the last two years, including against karaoke AV content cloud databases legally licensed only for use in the mainland China territory but that were nonetheless 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 such karaoke AV content in Taiwan have consequently suffered significant losses as a result of this issue. The rights holders took legal actions against those distributors of the machine in Taiwan according to Article 87(1)-(7) & (8) and Article 93, but most of them were either not indicted or not found guilty because the prosecutors and judges (1) deny the infringing evidence collected by rights holders; or (2) are unable to verify the authorization document issued by the machine manufacturers that in fact applied only to the mainland.

The long-standing forum site *Eyny.com* remained a key piracy concern in Taiwan. There were more than 25.3m visits to *Eyny* from Taiwan in Q2 2023 (according to Similarweb) from users seeking to download music, film, television episodes, software, and video games with 83.5% of all visits to the site from Taiwan. Forum sites like *Eyny* often link to downloads hosted on cyberlockers, and these sites were also widely used in Taiwan. For instance, there were 7.8m visits from Taiwan to *Mega.nz* during Q2 2023, 5.0m visits to *Katfile.com*, and 1.7m visits to *Rapidgator.net*.

- **Take effective action through existing laws to provide a mechanism that ensures ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.**

Taiwan should use existing laws to provide in its legal system mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.

- **Take effective action to deter unauthorized theatrical camcording incidents, including issuing deterrent penalties.**

In addition to improving the legal framework (discussed below), the government should enact actions under current law, including issuing deterrent-level penalties.<sup>5</sup> The resumption of normalcy in movie-going attendance provides an important opportunity to “reset” on this key issue.

## **LEGAL REFORMS**

- **Enact legislation to address the gaps under the amended Copyright Act to provide effective relief for copyright infringement, including mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities; provide proper incentives for ISPs; and other matters not addressed in the amendments.**

Taiwan has in recent years introduced only relatively minor amendments to its Copyright Act.<sup>6</sup> As previously reported, in 2019, Taiwan enacted amendments to Articles 87 and 93 of the Copyright Act. This legislation followed 2018 guidance from the Taiwan Intellectual Property Office (TIPO) that illicit streaming devices are prohibited under the Copyright Act and an August 2018 IP Court decision confirming this interpretation. However, 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 infringed copyright 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 located outside of Taiwan, and no mechanism exists for rights holders to bring action in Taiwan against such services.

Prior IIPA submissions have detailed the flaws in the 2019 amendments.<sup>7</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. IIPA believes the Taiwanese government should propose legislation to provide in its legal system mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities. 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, and Thailand have adopted or refined approaches that provide a remedy requiring ISPs to disable access to infringing sites.<sup>8</sup> Moreover, the amendments fail to address several deficiencies in Taiwan’s existing legal regime. Taiwan should:

- Clarify the ISP liability framework to ensure that intermediaries are incentivized to act against online piracy and that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities; such intermediaries should fulfill certain conditions, including adoption of a repeat infringer policy,

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<sup>5</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 would be desirable for Taiwan to adopt *sui generis* provisions specifically covering the act of camcording.

<sup>6</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 is 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.

<sup>7</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>8</sup> Europe has addressed this problem through Article 8.3 of the European Information Society Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content.

with a requirement for marketplaces and encouragement for all ISPs to institute “know your business customer” (KYBC) policies; and that, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries should 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 and audiovisual works, 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;
- Make it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters or of live musical performances;<sup>9</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>10</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, draft amendments released in 2021 contain 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>11</sup> which would call into question Taiwan’s compliance with its TRIPS obligations;<sup>12</sup>
  - A reduction of criminal liability standards (e.g., requiring participation in 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>13</sup>
  - 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; and
  - Failing to treat producers of sound recordings fairly by denying them exclusive rights for public performance (including where this has been “simultaneously further communicated to the public”).
- **Ensure the adequacy of civil remedies by enhancing Article 88 of the Copyright Act to remove the restrictive language on calculating damages.**

<sup>9</sup> The music industry reports that infringement through camcording live concerts is increasing.

<sup>10</sup> Corrections should include allowing the setting of fair market-based rates for collectively managed rights (instead of tariffs determined by TIPO); establishing judicial dispute resolution mechanisms in lieu of the requirement to have CMO 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>11</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 Article 13) to ensure compliance with Taiwan’s international obligations.

<sup>12</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>13</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.



Civil damages in Taiwan for copyright infringement are currently inadequate. Article 88 of the Copyright Act includes restrictive language on calculating damages and limits damages to NTD1 million (roughly US\$31,787) in cases where actual damages cannot be clearly determined. Due to the nature of much copyright piracy, and the lack of available data for 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 the limits and restrictive language. The 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. Without overall effective remedies, beyond civil damages and the needs for improvement in efforts such as mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities, online piracy investigations suffer, and piracy proliferates. In recent reports, the music industry cites 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, a cooperative tool developed by enterprises, businesses, and public associations, has led to some temporary disabling of access of domains associated with criminal online copyright infringement). 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, training 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.

- **Issue implementing regulations or guidance ensuring new or proposed exceptions meet the three-step test.**

Other longstanding draft copyright amendments proposed by the Taiwan Intellectual Property Office (TIPO), which are now before the Legislative Yuan, propose many unfortunate changes that would weaken copyright protection. The draft amendments contain problematic provisions for rights holders, including a broadly drafted (i.e., poorly defined) 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 October 2023, most of the draft amendments remain under active consideration by the Legislative Yuan. However, in May 2022, the Legislative Yuan passed a small portion of the draft amendments focused on broader education exceptions in the Copyright Act that may result in weakened protection for copyright.

- **Address shortcomings in amendments to the Collective Management Organization (CMO) Act.**

In 2022, Taiwan amended its CMO Act. The Act still presents shortcomings, however, that affect the establishment of new CMOs and their governance. For example, the Act includes 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. Moreover, the Act introduces term limits for management-level positions and internal control that are difficult to apply to CMOs in which a reduced number of rights holders hold significant shares of the market.

- **Comply with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty irrespective of formal accession.**

While it may be politically impossible for the Government of Taiwan to officially join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively the WIPO Internet Treaties), it should nonetheless comply with the treaties, which provide the global minimum standard of protection for copyrighted works online.

- **Ensure that any potential over-the-top (OTT) regulations or any regulations on intermediary platforms do not disincentivize foreign investment.**

The National Communications Commission (NCC) continues to actively consider a draft “legal framework” for the revised Internet Audiovisual Services Act (IAVSA), which has been undergoing drafting since 2020 and is understood to still be under active consideration as of 2023. The “framework” for the IAVSA would obligate foreign OTT and VOD service providers to register with the NCC, appoint a local agent, comply with a content regulation system that is potentially inconsistent with international standards, and potentially disclose sensitive commercial information. The draft also proposes local content obligations and associated penalties for noncompliance. The full revised draft of the IAVSA (based on the framework) 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. Local registration requirements would discriminate against legitimate services and be ineffective against the problem of illicit piracy services located outside of Taiwan that target the Taiwanese market. As noted above, there are other remedies that would effectively address this problem.

Additionally, a Digital Intermediary Services Act (DISA) put forward by the NCC, which focuses on regulating platform accountability, illegal content, transparency, and disclosing business information and service terms to protect users’ rights, 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 (particularly with respect to online content regulation) and possible disclosure of sensitive commercial information. As of December 2023, the draft remains shelved, although we understand the DISA remains under active consideration and may be revived following Taiwan’s presidential elections in January 2024.

## **MARKET ACCESS**

- **Eliminate market access barriers to U.S. audiovisual content, including investment, the basic cable rate cap, and discriminatory television content quotas.**

The Cable Radio and Television law limits foreign direct investment (FDI) in a domestic cable television service to 20% of the operator’s total issued shares. FDI 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 with at least one major channel provider announcing their exit from the market in 2023.

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>14</sup> These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, restrict U.S. exports, and should be repealed.

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

The deficiencies in Taiwan’s enforcement framework outlined above—including inadequate civil remedies that do not result in deterrence and a judicial system that does not take criminal piracy cases seriously, resulting in non-deterrent criminal sentences—are inconsistent with Taiwan’s obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61. Furthermore, as noted above, should Taiwan adopt certain proposed draft amendments to the Copyright Act without significant revisions, Taiwan’s copyright laws will run afoul of a number of its TRIPS obligations including, in particular, those under TRIPS Article 13 on exceptions and limitations.

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<sup>14</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.

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Watch List in 2024.<sup>1</sup>

**Executive Summary:** The Royal Thai government continues to struggle as it combats piracy, and recent changes in the government raise further questions about the long-term stability of its intellectual property (IP) policies. Though amendments to the Computer Crime Act (CCA) establishing a 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. Overall, existing enforcement against piracy remains largely non-deterrent. Thai-language piracy sites and services continue to dominate the online ecosystem, unfairly competing with legitimate rights holders. After officially acceding to the WIPO Copyright Treaty (WCT) in 2022, the government is now reviewing the Copyright Act to meet the requirements of the WIPO Performances and Phonograms Treaty (WPPT) with the goal of joining the treaty in 2026. IIPA urges the Government of Thailand to take advantage of this opportunity and the opportunity presented by the European Union (EU)-Thai Free Trade Agreement (FTA) negotiations to make necessary improvements to Thailand's legislative and enforcement framework, including an injunctive relief provision to address online infringement more effectively. The Royal Thai government should also remove market access barriers that negatively impact the creative industries.

#### **PRIORITY ACTIONS REQUESTED IN 2024**

##### **Enforcement**

- Ensure enforcement officials increase the number of enforcement actions against commercial-scale digital piracy services, and critically bring criminal prosecutions through to convictions.
- Clarify the criminal prosecution process, which remains excessively lengthy and lacks transparency, against commercial-scale piracy websites.
- Ensure proper implementation and application of CCA Section 20(3) regarding actions to combat pirate websites, including by ensuring Internet service providers (ISPs) comply with such measures and training enforcement officials on prominent digital piracy methods.
- Implement effective measures by e-commerce platforms to prevent distribution of infringing physical goods, including by repeat infringers.
- Act against rogue collective management organizations (CMOs) and combine this enforcement action with regulatory reforms to change the criteria for CMO registration.

##### **Legal Reforms**

- Introduce legal reforms, including further amendments to the Copyright Act, to address several critical issues (e.g., injunctive relief, making IP infringement non-compoundable, service provider liability, technological protection measures (TPMs), rights management information (RMI), theatrical camcording, collective management, exceptions, and term of protection) to improve Thailand's copyright protection and enforcement framework.

##### **Market Access**

- Remove market access restrictions negatively impacting the creative industries, such as foreign ownership and censorship restrictions, screen quotas, television must-carry requirements, and over-the-top (OTT)/video-on-demand (VOD) regulations.

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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/2024/01/Appendix-B-2024.pdf>.

## **ENFORCEMENT**

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>

- **Ensure enforcement officials increase the number of enforcement actions against commercial-scale digital piracy services, and critically bring criminal prosecutions through to convictions.**

Both U.S. producers and distributors, as well as local Thai producers and services, are profoundly harmed by online piracy services, which specifically target Thai users with Thai-language sites.<sup>3</sup> 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* (between January to November 2023 183.4 million visits from Thailand and 206.9 million global visitors according to SimilarWeb) and *037hdmovie.com* (154.5 million visits from Thailand and 159.8 million global visitors 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 a concern. Many of the top piracy sites in Thailand are domestic BitTorrent sites: *Siambit.me* (59.2 million visits from Thailand and 59.8 million global visitors between January to November 2023 according to SimilarWeb), *dedbit.com* (14.2 million visits from Thailand and 14.4 million global visitors during the same period), and *tt-torrent.com* (26 million visitors between January to September 2023) until the site was taken down in October 2023.

Popular stream-ripping services include *mp3fromlink.com* (11.0 million visits from Thailand in Q3 2023 according to SimilarWeb), *ssyoutube.com* (4.6 million visits from Thailand in the same period), *y2mate.com* (2.2 million visits in the same period), and *savefrom.net* (2.5 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* (5.8 million visits from Thailand in Q3 2023) and *4shared.com* (1.8 million visits in the same period). Illegal apps on smartphones 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, making identification of website operators and server locations very difficult.

Enforcement against online piracy sites and services remains largely insufficient and non-deterrent, although cooperation over the past few years between 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 notable enforcement actions against several large piracy sites. Unfortunately, these enforcement actions have resulted in insufficient and non-deterrent outcomes against the pirate operators or have yet to be prosecuted despite the enforcement action taking place in 2018 or 2019 (see next section on the criminal prosecution process for additional details). As a result, there have not been significant reductions in piracy or needed deterrence and Thai-language piracy sites and services continue to operate largely with impunity, unfairly competing with legitimate rights holders.

- **Clarify the criminal prosecution process, which remains excessively lengthy and lacks transparency, against commercial-scale piracy websites.**

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<sup>2</sup> See, e.g., IIPA, Thailand, 2023 Special 301 Report, January 31, 2022, at <https://www.iipa.org/files/uploads/2023/01/2023THAILANDSPEC301.pdf>.

<sup>3</sup> Notwithstanding the expanding availability of legitimate services for music and audiovisual materials, 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 in Thailand for content include iTunes, Google Play Store, Netflix, Disney+, Hotstar, Amazon Prime Video, HBO Go, Viu, WeTV, iQIYI, TrueID, Deezer, KKBox, Spotify, YouTube, and AIS, among others.

Legitimate online services are harmed by the increasing threat from copyright infringing websites. It is imperative that Thai authorities prioritize and expedite the prosecution process, ensuring that pirate website operators face timely and appropriate legal ramifications. In particular, the Royal Thai government should prosecute commercial-scale streaming piracy sites and services, including *Movies2Free* and *Sakarinsai8*, that have yet to be referred to the procuracy. 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 US\$160,000 per month in advertising revenue alone.<sup>5</sup> This delay highlights the challenges in the current system, in which forensic procedures and the prosecution process can extend over several years, hindering the effectiveness of legal action against such piracy operations. A commitment to robust enforcement, timely prosecutions, and appropriate deterrent penalties are essential to curtail current levels of piracy in the country.

- **Ensure proper implementation and application of CCA Section 20(3) regarding actions to combat pirate websites, including by ensuring Internet service providers (ISPs) comply with such measures and training enforcement officials on prominent digital piracy methods.**

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. While this was a promising reform, results with use in practice have been mixed. In recent years, cases seeking full disabling of access to pirate websites have not succeeded, notwithstanding hundreds of URL-specific blocking orders. ISPs are capable of blocking the entire website, and industry seeks a process whereby the applicants may obtain full website blocking. In appropriate cases involving egregious infringers, 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.

Further steps should also be taken to ensure that ISPs comply with such website blocking processes. Compliance remains an issue as many ISPs do not comply with court orders, and the penalty provision for non-compliant ISPs is not enforced. Under Section 27 of the CCA, ISPs can be subject to fines (Baht 200,000 / US\$6,400 and a further daily fine of Baht 5,000 / US\$160) until they comply with the relevant blocking order. Enforcement of the penalty provision for non-compliant ISPs would help to ensure an effective site blocking program in Thailand, but the Ministry of Digital Economy & Society (MDES) has never enforced it. The National Broadcasting and Telecommunications Commission (NBTC) has provided concrete support by issuing notices of administrative orders to ISPs to closely examine and comply with the pending court orders. Enforcement authorities should support efforts to ensure that ISPs comply with website blocking orders, including pursuing enforcement actions against ISPs that do not comply. Enforcement authorities should also receive training on prominent digital piracy methods, such as stream ripping and cyberlockers, to enable rights holders to effectively utilize available enforcement tools and remedies.

- **Implement effective measures by e-commerce platforms to prevent distribution of infringing physical goods, including by repeat infringers.**

The distribution of infringing physical products, including counterfeit CDs and digital storage devices pre-loaded with infringing music content, remains an issue on e-commerce platforms in Thailand. According to the Thai Entertainment Content Trade Association (TECA) report, the Department of Intellectual Property (DIP) took swift action against repeated infringers by cooperating with an e-commerce platform, namely Shopee, within two days after TECA sent the report to DIP regarding music products that infringed the rights of its members. DIP has provided good support to TECA for a range of activities, including work on site blocking for stream ripping, conducting anti-piracy workshops with TECA, assisting TECA and platforms with the Memorandum of Understanding on the Protection of IPR on the

<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/>

Internet, and working on repeat infringer and other infringement issues. However, repeat infringers are still able to distribute infringing products on various e-commerce platforms.

E-commerce platforms should implement effective measures to prevent the distribution of infringing products on their platforms, including by repeat infringers (including, for example, “Poohstudio1999”, which manifested itself across several platforms and using several derivative names like “poohstudio1976”). Authorities should, *inter alia*, leverage the existing Memorandum of Understanding on the Protection of Intellectual Property Rights (IPR) on the Internet for meaningful action by e-commerce platforms.

- **Act against rogue CMOs and combine this enforcement action with regulatory reforms to change the criteria for CMO registration.**

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. Enforcement officials should act against these rogue CMOs and as discussed below, legal reforms are also needed to effectively address this problem.

## **LEGAL REFORMS**

- **Introduce legal reforms, including further amendments to the Copyright Act, to address several critical issues (e.g., injunctive relief, making IP infringement non-compoundable, service provider liability, technological protection measures (TPMs), rights management information (RMI), theatrical camcording, collective management, exceptions, and term of protection) to improve Thailand’s copyright protection and enforcement framework.**

On July 13, 2022, Thailand officially acceded to the WCT, effective October 13, 2022. After amending the Copyright Act in February 2022, the Government of Thailand is now undertaking a review of the Copyright Act as part of efforts to meet the requirements of the WPPT, with the goal of acceding to the treaty by the end of 2026. DIP is seeking stakeholders’ views on the proposed draft amendments. The proposed amendments are broadly drafted, and in some respects are not consistent with the WPPT. The draft amendments also propose removing minimum penalties in the Act, which could result in non-deterrent penalties for copyright infringement. The proposal, if enacted, could send a troubling signal that copyright infringement does not have serious adverse economic impacts on rights holders, authors, and performers. The following are critical issues that remain with the proposed amendments to the Copyright Act that should be addressed in subsequent drafts 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).

- **Injunctive Relief:** To improve the effectiveness of enforcement against online copyright piracy, the draft amendments should provide mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities (analogous to the CCA remedy, which applies to all IP crimes). The current FTA negotiations between the EU and the Royal Thai Kingdom present a good opportunity to agree to disciplines in this area.
- **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 2022 amendments to the Act included 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.
- **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 2022 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). IIPA requests the government issue further regulations or guidelines on the provisions for TPMs to clarify that service, promotion, manufacture, sale, or distribution of piracy devices and applications/software/add-ons available thereon violate TPMs protections.<sup>7</sup>
- **RMI:** Exceptions to protections for RMI 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 RMI protections is inappropriate and unjustified.
- **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.<sup>8</sup> 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. These provisions should 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

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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.

<sup>7</sup> Piracy devices 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.

<sup>8</sup> Thailand continues to represent a potential risk for illicit theatrical camcording, particularly in relation to illegal Thai audio tracks. Although there were no forensically traced camcords to Thai theater locations in 2023, a large number of Thai audio files are still being made and subsequently edited onto illicit movie versions. 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.



code of conduct for CMOs, which is not a sufficient response to the long-standing challenge in the Thai market. The number of CMOs now stands at 35, with 13 of them 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>9</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 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 did 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. Thailand is encouraged to act quickly to catch up with the new international standard of protection, or risk development of the Thai music market being adversely affected. Further, if the term of protection is not extended in time, some Thai classics from the 1970s—including the classics of Soontaraporn, Suraphol Sombatcharom, 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.

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<sup>9</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).

- **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**

- **Remove market access restrictions negatively impacting the creative industries, such as foreign ownership and censorship restrictions, screen quotas, television must-carry requirements, and over-the-top (OTT)/video-on-demand (VOD) regulations.**

**Foreign Ownership Restrictions:** Foreign ownership of terrestrial broadcast networks is prohibited in Thailand. Further, rules established in 2015 require National Broadcasting and Telecommunications Commission (NBTC) approval when a television license holder seeks to either invest more than 25% directly or more than 50% indirectly in another licensed company. This rule severely limits investment and creates significant barriers to entry for U.S. companies.

**Screen Quota:** Section 9(5) of the Motion Picture and Video Act (MPVA) allows the Film Board to establish ratios and quotas for foreign films. If implemented, such restrictions would create new barriers and reduce consumer choice. The Ministry of Culture has considered amending the MPVA since 2017. IIPA urges the Ministry to delete Section 9(5) and the related Section 68.

**Censorship Restrictions:** The MPVA imposes onerous classification and censorship requirements on films. Thailand should remove these onerous 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.

**Television Must-Carry Requirements:** Although some media reports suggest the 2012 “must carry” rules—which require that the programs aired on free-TV be broadcast on any platforms (including satellite and Internet protocol TV (IPTV)) without conditions—will finally be reversed by the NBTC. Until this is done, the regulations raise important IPR issues, precluding the ability of rights holders to enter exclusive distribution arrangements in Thailand.

**OTT/VOD Regulation:** Various government agencies, including the NBTC, have publicly noted their interest in regulating OTT services as recently as August 2023, including the possibility of 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) as well as to “promote” local content via local content investment obligations. These regulations, if enacted, would limit consumer choice, stifle business development, and add further burdensome barriers to market entry.

## **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)

### 2024 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 2024.<sup>1</sup>

**Executive Summary:** UAE has made recent legislative improvements to its copyright law but must further amend it to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) and ensure UAE's standards for copyright protection and enforcement meet international norms and best practices. The government is also making welcome progress towards the establishment of a collective management organization (CMO). Continuing this progress is necessary to overcome market access barriers and weaknesses in enforcement that enable diverse methods of piracy to persist and prevent foreign rights holders from protecting their property. IIPA urges UAE to bring its laws and practices in line with international obligations, norms, and best practices.

#### **PRIORITY ACTIONS REQUESTED IN 2024**

##### **Enforcement**

- Engage with intermediaries through the Telecommunication and Digital Government Regulatory Authority (TDRA) to require effective action to deter infringement.
- Ban the importation of illicit streaming devices (ISDs).
- Encourage more transparency and effective enforcement from enforcement authorities.
- Harmonize requirements for enforcement with international norms.

##### **Legal Reforms**

- Revise the Copyright Law to fully implement the WIPO Internet Treaties.
- Amend the Copyright Law to align the term of protection for works and sound recordings with international norms.
- Address inconsistencies between Executive Regulation No. 47/2022 and international standards and best practices.
- Provide additional mechanisms that ensure Internet service providers (ISPs) can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.

##### **Market Access**

- Enable rights holders to establish a music CMO in UAE and permit that CMO to commence meaningful operations in the UAE.

#### **ENFORCEMENT**

- **Engage with intermediaries through the Telecommunication and Digital Government Regulatory Authority (TDRA) to require effective action to deter infringement.**

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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/2024/01/Appendix-B-2024.pdf>.

Industry reports that unjustified delays have impeded enforcement in the past three years, and both UAE police and the economic departments are hesitant to consider serious actions against infringers.<sup>2</sup> While the Dubai Police has created a dedicated platform on its website to file criminal complaints against intellectual property (IP)-violating websites,<sup>3</sup> 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 order ISPs to implement website blocks. In 2023, the Ministry of Economy (MoE), which has the authority to instruct TDRA to restrict violating websites,<sup>4</sup> began accepting copyright complaints through its portal.

The government has an important role to play in promoting piracy prevention efforts and needs to encourage ISPs to restrict access to illegal Internet protocol TV (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 virtual private network (VPN) Internet protocol addresses dedicated to streaming content to hybrid set-top boxes. *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>5</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. 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 should also publish statistics including the legal basis on which a site was blocked. Addressing these issues would greatly improve the enforcement environment in the UAE.

- **Ban the importation of illicit streaming devices (ISDs).**

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 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 inspect these devices. These ISDs are known to be commonly used for notorious stream-ripping services and cyberlockers such as *UKTV Abroad*, *King-iptv.net*, and *Kingiptv.org*.

- **Encourage more transparency and effective enforcement from enforcement authorities.**

Over the past few years, the judicial system in the UAE has shown signs of improvement with prosecutors referring cases for IP violations or cybercrime. For example, in the Higher Criminal Court in Dubai, a judgment was issued in a case against an administrator of the torrent website called *arabscene.org* 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. This case is significant because it involved a website that was hosted

<sup>2</sup> For example, in February 2022, King Printers Company Limited, the UAE-based company and copyright holder of website [www.printarabia.ae](http://www.printarabia.ae), filed a criminal complaint with Dubai Police against the website [astuae.com](http://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 intellectual property (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/individualservices/content/cybercrime>.

<sup>4</sup> See UAE Ministry of Economy Website, <https://id.moec.gov.ae/>.

<sup>5</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>.

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.

Additional enforcement efforts are being performed by the Dubai Police, who serve a similar function to the TDRA, ordering ISPs to restrict 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.

Enforcement in Free Zones 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 Economy and Tourism (DET), formerly the Department of Economic Development, 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.

Further, in 2023 the DET stopped accepting copyright complaints through their electronic portal. The DET claims they are not equipped to receive these complaints and has begun to refer them to the police force. This new practice constitutes a challenge to copyright owners attempting to enforce their rights.

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 them. Previously, Dubai Customs would re-export the counterfeit products to the country of origin instead of destroying or recycling the counterfeit goods, risking their ending 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 first receive a complaint from a rights holder. The law recently was amended to provide *ex officio* authority so that customs authorities may take actions even in the absence of complaints by rights holders. Nevertheless, customs authorities still require a complaint from the rights holder to destroy counterfeit products.<sup>6</sup>

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.

Over 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.

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 DET, which reduced fines by up to 50%. IP rights holders would like to see this reduction applied to complainants (the brand

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<sup>6</sup> See Decree-Law No. 38 of 2021 on Copyright and Neighboring Rights, 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.").

owners) instead of infringers. Additionally, the Dubai DET'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.

- **Harmonize requirements for enforcement with international norms.**

Dubai DET 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.

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. These fees are prohibitive for rights holders seeking to enforce their copyright in UAE.

## **LEGAL REFORMS**

- **Revise the Copyright Law to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties).**

The Decree-Law 38 of 2021 on Copyrights and Neighboring Rights introduced several improvements to UAE's copyright legal framework, including criminalizing the acts of storing electronically illegal copies of copyrighted works (Article 7), which should allow for actions against cyberlockers hosted in UAE. Consistent with the WPPT, Article 18 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 UAE's copyright legislation is fully compliant with the WIPO Internet Treaties and other relevant international copyright standards, the government of UAE should make further improvements to its copyright legal framework.

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:

- **Limit the scope of copyright exceptions and limitations:** Confine the exceptions and limitations outlined in Article 22 to the three-step test, including: 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 ensure adequate protections for TPMs and RMI.<sup>7</sup>

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<sup>7</sup> See Articles 18 and 19 of the WPPT requiring “adequate legal protection and effective legal remedies” against the circumvention of technological protection measures (TPMs) and the removal or alteration of rights management information (RMI) without the permission of right holders.

- **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, both of 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 consists of one specialized judge and two specialists—established under the Ministry of the Economy has jurisdiction to “adjudicate grievances filed by the interested parties against the decisions issued by the Ministry.” 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.
- **Amend the Copyright Law to align term of protection for works and sound recordings with the international norms.**

UAE currently grants authors copyright protection for a period of life-plus-50 years and producers of sound recordings protection for 50 years after publication, which is substantially less time than UAE’s international counterparts. UAE should 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.

- **Address inconsistencies between Executive Regulation No. 47/2022 and international standards and best practices.**

While the priority is for the UAE to establish a CMO for music rights holders, Executive Regulation No. 47/2022 on Implementing Federal Decree-Law No. 38/2021 contains several provisions addressing collective management, which could be improved to be 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 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 three 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. Capping administrative cost could be considered in the future, after the CMO is given time to stabilize operations.
- **Clarify registration of copyright works is voluntary:** Article 2 on copyright registration should clarify 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 and/or 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>8</sup>
- **Provide additional mechanisms that ensure Internet service providers (ISPs) can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities.**

To complement the existing website blocking program operated by the government, legislation should introduce additional mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites (both those hosted in the UAE and those hosted in other countries but available in the UAE) on a no-fault basis, upon rights holders’ applications to appropriate authorities. Such mechanisms would help tackle piracy and support the growth of the market for copyrighted works and sound recordings in the UAE.

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<sup>8</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>.



## **MARKET ACCESS**

- **Enable rights holders to establish a music CMO in UAE and permit that CMO to commence meaningful operations in the UAE.**

The failure to implement a collective management regime in the country effectively prevents producers and performers from licensing large parts of the market, which serves as a market access barrier. This inaction is also protectionist and discriminatory, 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.

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. The music industry estimates that the revenue a CMO would collect from broadcasting and public performance of music in the UAE (such as in hotels, restaurants, shops, discos, bars, dance schools, and airlines) would be in the tens of millions of U.S. dollars if the government accredited a CMO and allowed such collection. 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. While meaningful progress is being made, any slowing of this progress to accredit a CMO will mean that no monies can be 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.

# URUGUAY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Uruguay be placed on the Watch List in 2024.<sup>1</sup>

**Executive Summary:** Uruguay's Budget Bill, introduced in June 2023, contains two provisions that directly relate to the creative industries. The drafters of these provisions did not consult rights holders in the audiovisual and music industries or even the Uruguayan Copyright Council. Adoption of these two provisions would call into question contracts freely negotiated between producers and performers. The legislation would allow additional claims to compensation from third-party users who have no contractual relationship with authors or performers. This bill was approved by the Uruguayan Congress and currently awaits Presidential approval. It is expected that the President will sign the bill into law, which will be followed by a process for drafting regulations on implementation of the amendments. IIPA urges the Uruguayan government to ensure that the implemented regulations limit the negative impact of this law on the creative industries.

#### **PRIORITY ACTION REQUESTED IN 2024**

##### **Legal Reform**

- Ensure that implementing regulations regarding amendments to Articles 36 and 39 of Uruguay's Copyright Law limit to the greatest extent possible the negative impact of this law on the creative industries.

#### **LEGAL REFORM**

- **Ensure that implementing regulations regarding amendments to Articles 36 and 39 of Uruguay's Copyright Law limit to the greatest extent possible the negative impact of this law on the creative industries.**

On June 30, 2023, the Uruguayan Executive Branch proposed the Bill on Accountability and Balance of Budget Execution for the Fiscal Year 2022 (The Bill) in the Uruguayan Parliament, and the Bill was enacted into law in late 2023. The Bill contains four provisions that amend Articles 36 and 39 of the Copyright Law to introduce a problematic remuneration right. These provisions negatively impact the copyright creative industries and rights holders on both sides of Uruguay's borders. These amendments disincentivize creators in Uruguay due to limitations on the ability to freely contract, limit Uruguayan access to international works, and generally contradict international norms for remuneration for the exploitation of copyrighted works and sound recordings. Backend costs related to enforcement of the proposed remuneration right are unquantifiable and will likely result in reduced distribution of foreign and domestic works in Uruguay. It is critical that implementing regulations of these amendments is consistent with international copyright related norms.

For example, under U.S. law, performers have a right to share in statutory royalties limited to non-interactive public performances of digital audio transmissions of sound recordings.<sup>2</sup> By contrast, Uruguay's amendments appear to grant performers the right to demand remuneration for any making available to the public, well beyond the limited case of performances in non-interactive digital audio transmissions.

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<sup>1</sup> For more details on Uruguay's Special 301 history, see previous years' reports at <https://www.iipa.org/reports/reports-by-country/>. For the history of Uruguay's Special 301 placement, see <https://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf>.

<sup>2</sup> See 17 USC § 114(g)(2).

The drafters of these provisions did not consult the Uruguayan Copyright Council (*Consejo de Derechos de Autor*) or music and audiovisual stakeholders within Uruguay. The Bill was kept in reserve until introduction, meaning that stakeholders could not provide input on these provisions because the existence of the provisions was undisclosed. Because budgetary bills are only allotted 45 days for approval in Uruguay, consultation after introduction is essentially impossible. Further, the stated rationale for these amendments is that the current copyright law is outdated because it was enacted in 1937. Yet, the Copyright Law has in fact been amended several times in recent years, including in 2003, 2013, and twice in 2019.<sup>3</sup> Uruguay's existing copyright laws are in line with the TRIPS Agreement, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively the WIPO Internet Treaties).

These amendment introduce a right to a “fair and equitable” remuneration for performers for making available to the public of phonograms and recordings of musical works and audiovisual works. Because the amendments are unclear, the full scope of their consequences is indeterminate until the regulatory process implementing the amendments concludes. There is no legislative vacuum or inconsistency with international obligations that required these amendments to be pushed through Parliament without consultation of the Uruguayan Copyright Council. As the copyright laws in Uruguay stood prior to passage of the Bill, performers had the power under existing law to make their performances available as they choose while simultaneously contracting at their own discretion with producers.

This Bill was passed by the Parliament on October 17, 2023, and was subsequently signed by President Lacalle Pou. IIPA urges Uruguayan lawmakers and regulators to develop substantial and comprehensive regulation implementing this law that limits the negative impact to the copyright creative industries and rights holders within and outside of Uruguay. In particular, implementing regulations should avoid imposing a new additional collectively managed right to remuneration for performers in addition to their already-negotiated fees and royalties.

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<sup>3</sup> Uruguay Copyright Laws No. 17,616, No. 19,857, No. 19,858, and No. 19,149, available at <https://www.wipo.int/wipolex/en/legislation/details/21441>.

**APPENDIX B**  
**CHART OF COUNTRIES'**  
**SPECIAL 301 PLACEMENT (1989-2023)**  
**&**  
**IIPA'S 2024 SPECIAL 301 RECOMMENDATIONS**

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2023)  
AND IIPA 2024 SPECIAL 301 RECOMMENDATIONS**

**IIPA 2024 SPECIAL 301 RECOMMENDATIONS AND USTR 301 PLACEMENT 2024-2007  
(AS OF APRIL/MAY OF EACH YEAR)**

COUNTRY	IIPA RECOMMENDATION 2024	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	
ALGERIA		WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL		
ARGENTINA	<b>PWL</b>	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
ARMENIA																			
AUSTRALIA																			
AUSTRIA																			
AZERBAIJAN																			
BAHAMAS																			
BAHRAIN																			
BARBADOS		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL							
BELARUS	<b>WL</b>	WL								WL	WL	WL	WL	WL	WL	WL	WL	WL	
BELIZ																		WL	
BOLIVIA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
BRAZIL	<b>WL</b>	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	
BRUNEI DARUSSALAM													WL	WL	WL	WL			
BULGARIA		WL + OCR	OCR					WL	WL	WL	WL	WL							

COUNTRY	IIPA RECOMMENDATION 2024	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	
CANADA	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	
CHILE	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
CHINA (PRC)	PWL	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	PWL + 306	
COLOMBIA	WL	WL	WL	WL	WL	WL	PWL + OCR	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	
COSTA RICA						WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
CROATIA																			
CYPRUS																			
CZECH REPUBLIC																WL	WL	OCR	
DENMARK																			
DOMINICAN REPUBLIC		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
ECUADOR		WL	WL	WL	WL	WL	WL	WL	WL	PWL	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	
EL SALVADOR												OCR							
ESTONIA																			
EUROPEAN UNION																			
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	
HONDURAS										OCR									

COUNTRY	IIPA RECOMMENDATION 2024	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007
HONG KONG																		
HUNGARY																WL	WL	WL
INDIA	<b>PWL</b>	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL
INDONESIA	<b>PWL</b>	PWL + GSP	PWL + GSP	PWL + GSP	PWL + GSP	PWL + GSP	PWL + GSP	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL
IRELAND																		
ISRAEL												WL	PWL (9/12 to WL)	PWL	Status Pending	PWL + OCR	PWL+ OCR	PWL
ITALY												WL	WL	WL + OCR	WL	WL	WL	WL
JAMAICA						WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
JAPAN																		
JORDAN																		
KAZAKHSTAN																		
KENYA																		
KUWAIT				WL	WL	PWL	PWL + OCR	PWL+ OCR	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL
KRYGYZ REPUBLIC																		
LATVIA																		
LEBANON				WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + GSP	WL + GSP	WL + GSP	WL + GSP	WL + GSP	PWL + GSP
LITHUANIA																		WL

COUNTRY	IIPA RECOMMENDATION 2024	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	
LUXEMBOURG																			
MACAU																			
MALAYSIA					OCR	OCR	OCR							WL	WL	WL	WL	WL	
MEXICO	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
MOLDOVA																			
MOROCCO	WL																		
NAMIBIA																			
NETHERLANDS																			
NEW ZEALAND																			
NICARAGUA																			
NIGERIA	WL																		
NORWAY													WL	WL	WL	WL	WL		
OMAN																			
PAKISTAN		WL	WL	WL	WL	WL	WL	WL	WL	WL+ OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR
PANAMA																			
PARAGUAY	WL	WL	WL	WL	WL	WL				WL + 306 + OCR	WL + 306 + OCR	WL + 306	306	306	306	306	306	306	
PERU	WL	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	WL	
POLAND	WL															WL	WL	WL	



COUNTRY	IIPA RECOMMENDATION 2024	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007
																+ OCR		
PORTUGAL																		
QATAR																		
ROMANIA				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 + GSP	PWL + GSP	PWL + GSP	PWL + GSP	PWL + GSP	PWL + OCR + GSP
SAN MARINO																		
SAUDI ARABIA				PWL	PWL + OCR	PWL	WL									WL + OCR	WL	WL
SERBIA AND MONTENEGRO																		
SINGAPORE																		
SLOVAK REPUBLIC																		
SLOVENIA																		
SOUTH AFRICA	<b>PWL</b>	GSP	GSP	GSP														
SOUTH KOREA																	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

COUNTRY	IIPA RECOMMENDATION 2024	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007
TAJIKISTAN							WL	OCR	OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL
THAILAND	<b>WL</b>	WL	WL	WL	WL	WL	WL	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL	PWL	PWL
TRINIDAD & TOBAGO		WL	WL	WL	WL					WL	WL	WL						
TUNISIA																		
TURKEY		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL
TURKMENISTAN		WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL
UNITED ARAB EMIRATES	<b>WL</b>				WL	WL	WL											
UKRAINE		SUSP	SUSP	PWL + GSP	PWL + GSP	PWL + GSP	PWL + GSP	PWL + GSP	PWL	PWL		PFC + 301	PWL	WL	WL	WL	WL	PWL
URUGUAY	<b>WL</b>																	
UZBEKISTAN		WL	WL	WL	WL	WL + GSP	WL + GSP	WL	WL	WL	WL	WL	WL + GSP	WL + GSP	WL + GSP	WL + GSP	WL + GSP	WL + GSP
VENEZUELA		PWL	PWL	PWL	PWL	PWL	PWL	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	WL	WL	WL	WL	WL	WL	WL
THE WEST BANK AND GAZA																		
YEMEN																		

**USTR 301 PLACEMENT 2006-1989  
(AS OF APRIL/MAY OF EACH YEAR)**

COUNTRY	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
ALGERIA																		
ARGENTINA	PWL	PWL	PWL + DS	PWL + DS	PWL + DS	PWL + DS	PWL + DS	PWL + GSP + DS	PWL + GSP	PWL + GSP	PWL + OCR	WL + OCR	PFC	PWL + OCR	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	WL	PWL	PWL	WL + OCR	OCR												
BAHRAIN									WL	WL	WL	WL						
BARBADOS																		
BELARUS	WL	WL	WL	WL	WL	WL	WL	WL	OO									
BELIZE	PWL	WL	WL															
BOLIVIA	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO + OCR							
BRAZIL	PWL	PWL + GSP	PWL + GSP	PWL + GSP	PWL + DS + GSP	WL + DS + GSP	WL + DS	WL		WL	WL	PWL + OCR	SM	PFC	PWL	PWL	PWL	PWL
BRUNEI																		
BULGARIA	WL	WL	WL						PWL + OCR	WL + OCR	OO + OCR	OO						
CANADA	WL + OCR	WL + OCR	WL	WL	WL	WL	WL + DS	WL + DS	WL	WL + OCR	WL + DS	WL + 301	SM		WL	WL	WL	WL
CHILE	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL

COUNTRY	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
CHINA (PRC)	PWL + 306	PWL + 306	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL
COLOMBIA	WL	WL	WL	WL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL
COSTA RICA	WL	WL	WL	WL	WL + OCR	PWL + OCR	WL	WL	WL	WL	WL	WL						
CROATIA	WL	WL	WL	WL														
CYPRUS										OO	OO	OO	WL + GSP	WL + OCR	WL	WL		
CZECH REPUBLIC							WL	WL + OCR	WL	OO								
DENMARK							WL + DS	WL + DS	WL + DS	WL + DS								
DOMINICAN REPUBLIC	WL	WL	WL + GSP	WL	PWL	PWL	PWL + GSP	PWL	PWL	WL	OO		GSP					
ECUADOR	WL	WL	WL	WL			WL	WL	PWL	PWL + OCR + DS	WL			WL	WL			
EGYPT	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL + OCR + GSP	PWL + OCR	PWL	WL	WL	WL
EL SALVADOR							OCR				WL + OCR	WL	WL + OCR + GSP	WL	WL			
ESTONIA									OO									
EUROPEAN UNION (formerly European Community)	WL	WL + OCR	PWL + DS	PWL + DS	PWL + DS	PWL + DS	PWL + DS	PWL + DS	PWL + DS	PWL	PWL	PWL	PWL	PWL	PWL	PWL		
FIJI																		
FINLAND																		
GEORGIA						OCR												
GERMANY									OO	OO	OO	OO	SM		WL	WL		

COUNTRY	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
GREECE					WL	WL	PWL + DS	PWL + DS	PWL + DS	PWL + OCR	PWL + OCR	PWL + OCR	WL + OCR	WL	WL	WL	WL	WL
GUATEMALA	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL + GSP	WL	WL			
HONDURAS									WL + GSP	WL	OO	OO	SM + GSP					
HONG KONG								OCR	WL + OCR	WL + OCR	OO + OCR							
HUNGARY	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL		
INDIA	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + DS	PWL + DS	PWL	PFC	PFC	PFC	PFC	PWL	PWL
INDONESIA	PWL + OCR	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL + DS	PWL + DS	WL + OCR	WL	WL	WL	WL	WL	WL
IRELAND							WL + DS	WL + DS	WL + DS	WL + DS	OO							
ISRAEL	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	OO	OO	SM					
ITALY	WL	WL	WL	WL	WL	WL	PWL + OCR	PWL	PWL	WL + OCR	WL + OCR	WL	WL	WL + OCR	WL	WL	WL	WL
JAMAICA	WL	WL	WL	WL	WL	WL	WL	WL	WL									
JAPAN						OCR		WL	WL	WL	PWL + DS	PWL	PWL	WL	WL	WL	WL	WL
JORDAN								WL	WL + OCR	WL	OO	OO						
KAZAKHSTAN		WL + GSP	WL + GSP	WL	WL	WL	WL		OO									
KENYA																		
KUWAIT	WL	PWL	PWL	WL	WL	WL	WL	PWL + OCR	PWL	WL	WL	OO						
KRYGYZ REPUBLIC						OCR												
LATVIA	WL + OCR	WL	WL	WL	WL	WL	WL											

COUNTRY	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
LEBANON	PWL + GSP	PWL+ GSP	PWL + GSP	PWL + GSP	PWL	PWL	WL	WL	OO	OO	OO							
LITHUANIA	WL	WL	WL	WL	WL	WL + OCR	WL											
LUXEMBOURG										WL + OCR								
MACAU						WL	WL + OCR	PWL	PWL									
MALAYSIA	WL	WL	WL + OCR	WL	WL	PWL + OCR	PWL	OCR									WL	WL
MEXICO	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
MOLDOVA							WL											
NAMIBIA																		
NETHERLANDS									OO									
NEW ZEALAND					WL	WL		WL							WL	WL		
NICARAGUA									OO	OO	OO							
NIGERIA																		
NORWAY																		
OMAN							WL	WL	WL	WL	WL	OO						
PAKISTAN	WL	PWL + GSP	PWL	WL	WL	WL	WL	WL	WL	WL	WL + DS	WL	WL	WL + OCR	WL	WL	WL	WL
PANAMA									OO	WL + OCR	OO		SM					
PARAGUAY	306	306	306	306	306	306	306	306	PFC + 301	PWL + OCR	WL + OCR	OO	SM		WL			
PERU	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
PHILIPPINES	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	PWL	WL	WL	WL
POLAND	WL	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL + OCR	WL	WL	WL	WL	WL + GSP	PWL + OCR	PWL			

COUNTRY	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
PORTUGAL											OO + DS							WL
QATAR					WL		WL	WL	WL	OO	OO	OO						
ROMANIA	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL						
RUSSIAN FEDERATION	PWL + GSP	PWL + OCR + GSP	PWL + GSP	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	SM					
SAN MARINO										WL								
SAUDI ARABIA	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL + OCR	PWL	PWL	WL	WL	WL	PWL
SERBIA AND MONTENEGRO (formerly Yugoslavia)																WL	WL	WL
SINGAPORE							WL	WL	WL	WL	WL	WL	SM					
SLOVAK REPUBLIC (formerly Slovakia)		WL	WL	WL	WL	WL												
SLOVENIA							OCR											
SOUTH AFRICA								WL + OCR	WL		OO + OCR	WL + OCR						
SOUTH KOREA	WL	WL	PWL	WL + OCR	WL	PWL	PWL + OCR	WL + OCR	WL	WL	PWL	PWL	PWL	PWL + OCR	PWL	WL	WL	PWL
SPAIN							WL	WL	OO				WL	WL + OCR	WL	WL	WL	WL
SWEDEN								WL	WL + DS	WL + DS								
SWITZERLAND																		
TAIWAN	WL	WL	PWL + OCR	PWL	PWL	PWL	WL	WL			OO + OCR	WL	WL	PWL	PFC	WL	WL	PWL
TAJIKISTAN	WL	WL	WL	WL	WL	WL	WL											

COUNTRY	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
THAILAND	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL + OCR	WL + OCR	WL	PWL	PFC	PFC	PFC + 301	PWL	PWL
TRINIDAD & TOBAGO																		
TUNISIA									OO									
TURKEY	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL + OCR + DS	PWL + DS	PWL + OCR	PWL + GSP	PWL + OCR	PWL	WL	WL	WL
TURKMENISTAN	WL	WL	WL	WL	WL	WL	WL											
UNITED ARAB EMIRATES						WL	OCR	WL	WL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL		
UKRAINE	PWL + 306	PFC + GSP + OCR	PFC + GSP	PFC + GSP	PFC + GSP	PFC + 301 + GSP	PWL	PWL	WL									
URUGUAY		WL	WL	WL	PWL	PWL	WL	WL	OO	OO								
UZBEKISTAN	WL + GSP	WL + GSP	WL + GSP	WL	WL	WL	WL											
VENEZUELA	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL
VIETNAM	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	OO	OO						
THE WEST BANK AND GAZA							OCR											
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