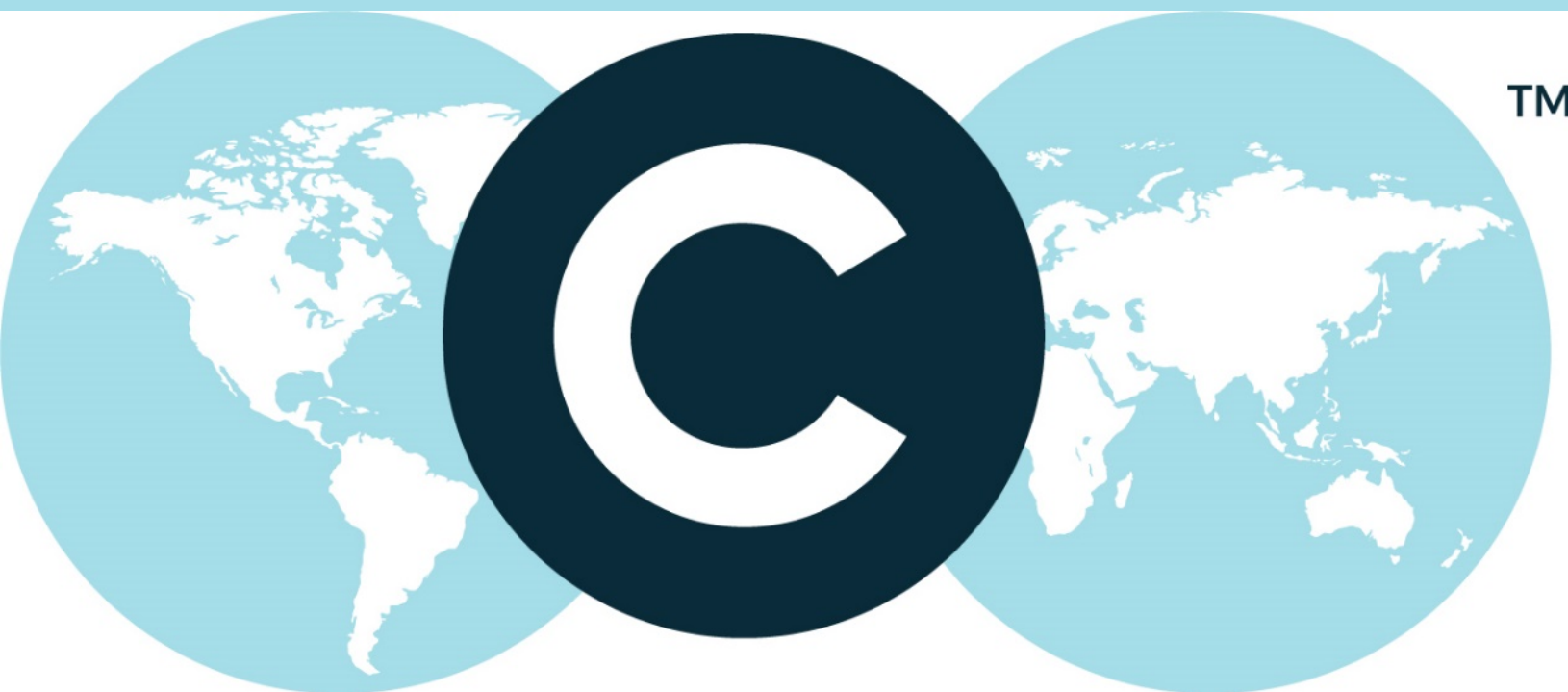


IIPA 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT



**SUBMITTED FEBRUARY 7, 2019
TO THE
UNITED STATES TRADE REPRESENTATIVE
BY THE
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®**

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February 7, 2019

Submitted via regulations.gov Docket No. USTR-2018-0037

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

Re: IIPA Written Submission Regarding 2019 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Comments and Notice of a Public Hearing, 83 Fed. Reg. 67468 (Dec. 28, 2018)

Dear Mr. Lee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the above-captioned Federal Register Notice. The IIPA filing, for consideration as a part of the “Special 301” review, focuses on copyright protection and enforcement issues, including market access barriers, which are of concern to American creators and producers in U.S. trading-partner countries.¹

IIPA has filed comments on behalf of a coalition of U.S. rights holders every year since the 1988 Trade Act established the Special 301 review proceeding. IIPA members produce and distribute copyrighted materials worldwide, including literary works, music, movies and TV programming, video games and software. During the three decades of Special 301 reviews, dramatic technological advances, including digital technologies, have allowed rights holders to make and disseminate copyrighted materials using a wide variety of media and ever-more sophisticated systems, including the launching of new businesses, services, and apps. These digital technologies have yielded tremendous benefits for consumers, providing convenient and ubiquitous licensed accessibility. As a result, more copyrighted material is now legally available to consumers, in more diversified ways and with more flexible pricing, than at any other time in history.² This consumer appetite does not stop at our borders. More than any other sector in the U.S. economy, the copyright sector has moved aggressively to electronically deliver its products and services across borders, inextricably linking “digital trade” with trade in copyright-protected material. At the intersection of growing consumer demand and worldwide digital dissemination of all types of copyrighted material, is a reliance on strong rules and practices for digital trade. This allows creators and producers to invest in the creation and dissemination of new materials in secure markets, and reaps rewards for worldwide consumer demand for copyrighted works and recordings.

The purpose of the Special 301 review process is to help the U.S. Government 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.”³ It is not the goal of the review, nor of the IIPA comments, to catalog trade barriers, or to admonish foreign governments for deficient laws or enforcement regimes. Rather, the goal of the Special 301 review is ultimately, to open markets for American copyrighted materials in digital and hard

¹IIPA will file under separate cover a Notice of Intent to Testify at the February 27, 2019 public hearing on Special 301.

²For example, there are now over 45 million licensed tracks on major music streaming services (see e.g., <https://www.apple.com/music>; <https://music.amazon.com/home>) and hundreds of digital music services. For more information on the proliferation of services, see, e.g., <https://www.mpa.org/watch-it-legally/> (movies and TV content); <http://www.whymusicmatters.com> and <http://www.pro-music.org/> (music); and <http://www.theesa.com/purchasing-legitimate-digital-copies-games/> (video games).

³19 U.S.C. Section 2242(a)(1).

copy formats, by providing fair and equitable market access. The Special 301 review is critical to identifying weak legal or enforcement regimes, or market access barriers that prevent U.S. creators from fairly competing in foreign markets, and it thus facilitates the growth of legitimate electronic and physical distribution channels in those markets. IIPA members appreciate USTR's efforts to maintain Special 301's focus on improving and strengthening copyright protection and enforcement in the reported countries—as the statute requires, and Congress intended.

There are three elements necessary for the copyright industries to flourish in foreign markets: (i) national copyright laws that meet high standards of protection; (ii) local enforcement regimes that are efficient and based on sound legal structures (and that uphold licensing and distribution agreements in practice); and (iii) open and non-discriminatory market access.⁴ Markets with these features also help our trading partners to develop, nurture, and enjoy the benefits of their own local cultural and creative output, ultimately for the benefit of local consumers.

The IIPA filing focuses on the acts, practices and policies of our key trading partners that present obstacles to achieving the goals of expanding new markets and satisfying consumer demands for U.S. creative materials in new and existing foreign markets. This filing recounts, by country, the deficiencies of legal regimes, enforcement practices, and market access barriers, and recommends improvements. Dynamic market conditions and ever-changing technologies continue to create enormous opportunities, with huge potential to further expand economic growth and creative activity in key foreign markets. But that potential will only be reached if these protection and enforcement shortcomings, and market access barriers, can be corrected. IIPA's recommendations include, where possible, emerging best practices. Overcoming the challenges to the creative industries identified in these reports will help to create well-paying jobs, promote U.S. exports and foreign sales, further reinvestment in new productions, and contribute generally to healthy economic growth in the U.S. and abroad.

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

The focus of the 2019 IIPA submission is on 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. Each Country Report contains a summary of key issues and a set of priorities identified by the IIPA members, specific to each market. Some Country Reports also discuss that country's specific trade obligations to the United States in bilateral or multilateral trade agreements or in other fora, identifying unfulfilled obligations that, if fulfilled, could improve the local market.

IIPA members appreciate that USTR has made the Special 301 process a positive catalyst for change to address the challenges faced by the U.S. creative industries in key markets around the world. To highlight progress, we include a section below on "Positive Developments" in several countries, identifying specific instances of improvement.

IIPA's 2019 Submission includes this Cover Letter and two appendices—Appendix A and Appendix B.

Appendix A: Appendix A has three parts:

The first part of Appendix A contains detailed full Country Reports on 19 countries that we recommend for designation in the USTR's Special 301 Report this year.⁵ These 19 Country Reports cover: **Argentina; Brazil;**

⁴The 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 2018 National Trade Estimate Report on Foreign Trade Barriers (March 30, 2018). That report is available at: <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20National%20Trade%20Estimate%20Report.pdf>.

⁵Country Reports and Annex entries were prepared by counsel to the IIPA, including, Kevin Rosenbaum, Dima Budron, Alesha Dominique, Leo Lichtman, and the undersigned, and are based on information furnished by IIPA's member associations. We thank Pamela Burchette for her contribution in preparing, producing and distributing this submission, and Julia Davis and Timothy Carter for reviewing and editing the report. The Country Reports and Annex contain information which should not be construed as providing legal advice.

Canada; Chile; China; Colombia; Ecuador; India; Indonesia; Mexico; Peru; Russian Federation; South Africa; Switzerland; Taiwan; Thailand; Ukraine; United Arab Emirates; and Vietnam.

The IIPA recommendations for USTR's Special 301 placement, as detailed in these 19 Country Reports, are as follows:

IIPA 2019 Special 301 Recommendations	
Priority Watch List	Watch List
Argentina	Brazil
Chile	Canada
China	Colombia
India	Ecuador
Mexico	Indonesia
Russian Federation	Peru
South Africa	Switzerland
Taiwan	Thailand
Ukraine	United Arab Emirates
Vietnam	
10 Countries Total	9 Countries Total

The second part of Appendix A includes an Annex Report providing a short summary of discrete issues in the following seven countries: **Barbados; Costa Rica; Egypt; Guatemala; Jamaica; Turkey and Venezuela.**

The short summaries were prepared in these seven countries in lieu of full Country Reports because IIPA members are aware of no new major developments in the preceding year that would lead us to revisit our current recommendations for USTR designations under Special 301. The short summaries treat one or two key issues pertaining to legal reforms, enforcement issues and/or market access barriers in each of these seven countries.

Each of these seven countries were identified in USTR's 2018 Special 301 Report, and previous IIPA submissions have provided detailed analyses of legal and enforcement regimes in these countries. IIPA makes the same recommendations on these seven countries as in our prior reports, for USTR's Special 301 placement in 2019, namely:

Priority Watch List: **Costa Rica (currently on USTR's Watch List); Venezuela**

Watch List: **Barbados; Egypt; Guatemala; Jamaica; Turkey**

The third part of Appendix A covers 11 countries for which IIPA members neither prepared full Country Reports, nor short summaries. For 2019, IIPA makes no recommendation for these 11 countries: **Bolivia; Dominican Republic; Greece; Kuwait; Lebanon; Pakistan; Romania; Saudi Arabia; Tajikistan; Turkmenistan and Uzbekistan.**

Each of these 11 countries were identified in the U.S. Trade Representative's 2018 Special 301 Report. IIPA has, in prior years, filed Country Reports and recommended USTR's Special 301 placement on the Watch List for each of these 11 countries (the last time IIPA filed Country Reports on them).⁶ IIPA ranking recommendations for these countries from previous years were as follows:

⁶For copies of each of these prior reports, see <https://iipa.org/reports/reports-by-country/>.

<u>Country Name</u>	<u>Last Year IIPA Filed Full Country Report</u>	<u>Last IIPA Full Country Report Recommendation</u>	<u>2018 USTR Placement</u>
Bolivia	2006	WL	WL
Dominican Republic	2008	WL	WL
Greece	2014	WL	WL
Kuwait	2014 (and, in 2017 Annex)	WL	PWL
Lebanon	2013	WL	WL
Pakistan	2013	WL	WL
Romania	2014	WL	WL
Saudi Arabia	2014	WL	WL
Tajikistan	2014	WL	WL
Turkmenistan	2014	WL	WL
Uzbekistan	2014	WL	WL

Appendix B: Appendix B provides a Historical Chart of every IIPA Special 301 filing, and IIPA's recommended USTR placement designations since 1989.⁷

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 international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the 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 of America \(www.mpa.org\)](http://www.mpa.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 distributed by IIPA-member companies include: entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl), for streaming and download services, or synchronization in audiovisual materials; and fiction and non-fiction books, educational, instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

In December 2018, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2018 Report*, prepared by Stephen E. Siwek of Economists Inc. (2018 Report). According to the 2018 Report, the "core" copyright industries in the United States generated over \$1.3 trillion of economic output in 2017, accounting for 6.85% of the entire economy, and employed approximately 5.7 million workers in 2017, accounting for 3.85% of the entire U.S. workforce and 4.54% of total private employment in the U.S.⁸ The jobs created by these industries are well-paying jobs; for example, copyright industry workers earn on

⁷A number of countries/territories have appeared on a Special 301 list every year since 1989, or for a considerable number of years. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of "priority foreign countries," provides that USTR must take into account "the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country." *Uruguay Round Agreements Act Statement of Administrative Action*, reprinted in H.R. Doc. No. 103-316, vol. I, at 362 (1994).

⁸See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* (December 6, 2018) available at <https://iipa.org/reports/copyright-industries-us-economy/>. Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials. The link between copyright protection and economic growth is well documented by the World Intellectual Property Organization (WIPO) in its report, *2014 WIPO Studies on the Economic Contribution of the Copyright Industries: Overview*, available at

average 39% higher wages than other U.S. workers. In addition, according to the 2018 Report, the core copyright industries outpaced the U.S. economy, growing at an aggregate annual rate of 5.23% between 2014 and 2017, while the U.S. economy grew by 2.21%. When factoring in other industries that contribute to the copyright economy (which together comprise what the 2018 Report calls the “total” copyright industries), the numbers are even more compelling. Additionally, the 2018 Report highlights the positive contribution of selected copyright sectors to the U.S. overall trade balance. Given the importance of digital delivery to the copyright-based industries, this sector has the potential to multiply its export revenues if our trading partners provide strong copyright-protective environments. In 2017, these sectors contributed \$191.2 billion in foreign sales and exports, exceeding that of many other industry sectors, including chemicals, aerospace products and parts, agricultural products, and pharmaceuticals and medicines.

In sum, these statistics show the economic importance of the copyright industries to the U.S. economy, and the value of improving protection, enforcement and market access abroad.

III. KEY CHALLENGES FOR THE COPYRIGHT INDUSTRIES – PROTECTION, ENFORCEMENT AND MARKET ACCESS ISSUES

The U.S. copyright industries face complex challenges in overseas markets. These challenges are in three distinct, but overlapping categories:

Legal Reforms: Inadequate copyright and related laws (e.g., civil, criminal and procedural codes) that fail to meet current and evolving global standards and commitments, necessary to adequately and effectively address all forms of authorized and unauthorized uses in a fast-changing technological environment.

Enforcement: Inadequate enforcement of existing copyright 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.⁹ To be effective, enforcement tools must address modern infringement challenges, such as pirate operations based online and/or outside the jurisdiction. Moreover, enforcement authorities need the resources and capacity to do their job effectively.

Market Access: The existence of barriers, investment restrictions, and discriminatory measures that make it difficult for U.S. producers and distributors to compete on a level playing field in foreign markets. These barriers also include interference with rights holders’ contractual freedom or with their licensing practices.

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

http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf, and the WIPO website now provides links to 49 country studies employing virtually the same agreed-upon methodology, see <http://www.wipo.int/copyright/en/performance/>. These national studies provide the economic underpinnings for efforts to reform copyright law, improve enforcement, and lower market access barriers. The Motion Picture Association (Asia Pacific) has issued a series of “Economic Contribution of the Film and Television Industries” studies. The most recent editions of these studies include: China (2019); India (2018); Taiwan (2017); Thailand (2017); South Korea (2016); Australia (2015); Hong Kong (2015); Japan (2015); New Zealand (2015) Malaysia (2014) and Indonesia (2012). See Motion Picture Association Asia-Pacific, *Research and Collateral*, available at <https://www.mpa-i.org/research-collateral/>. See also UK Music’s *The Economic Contribution of the Core UK Music Industry (2013)* available at http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry_WEB_Version.pdf, and PWC’s *Economic contribution of the New Zealand music industry, 2012 and 2013 (2014)*, available at <http://www.wecreate.org.nz/wp-content/uploads/2014/07/PWC-Music.pdf>. See also *Video Games in the 21st Century: The 2017 Report (2017)*, available at http://www.thesa.com/wp-content/uploads/2017/02/ESA_EconomicImpactReport_Design_V3.pdf.

⁹See 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.

A. LEGAL REFORMS

1. *WIPO Internet Treaties*

The World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties)—completed in 1996—set the global minimum standards for providing copyright holders with the full panoply of exclusive rights in the digital networked environment. The treaties also include an overarching commitment for countries to enable effective exercise of these rights in practice and include deterrent levels of enforcement of those rights online as well as offline. In the 23 years since their adoption, 99 countries have acceded to each of these critical treaties. In 2018, **India** and **Nigeria** acceded to both treaties. In 2019, **Belize** (February 9, 2019) and **New Zealand** (March 17, 2019) will accede to the WCT and WPPT. **Uzbekistan** enacted legislation in December 2018 to authorize WCT and WPPT accession in 2019 (but has not adopted any implementing legislation).

There are still several large trading partner countries that have not acceded to the treaties, including: **Brazil**, **Thailand**, **Pakistan**, **Saudi Arabia**, **Vietnam**, **South Africa** and **Egypt**, as well as smaller markets, such as **Bolivia**, **Kuwait** and **Lebanon**. Many countries have joined the treaties, but have not yet fully implemented the treaties' obligations into their national laws, including: **Algeria** (2014), **Ecuador** (2002), **India** (2018), **Mexico** (2002), **Nigeria** (2018), and the **UAE** (2004). The U.S. Government should make it a priority in 2019 to encourage all U.S. trading partners to both accede to and fully implement the WIPO Internet Treaties.

The WIPO Internet Treaties were the catalyst for the global consensus on the need to provide legal protection to technological protection measures (TPMs) that copyright owners (or their licensees) use to control access to and the copying of their works. As discussed below, these access controls are key enabling technologies for the range of online digital services, such as subscription streaming services that have brought more creative works than ever to consumers. IIPA urges the U.S. Government to remain vigilant on this issue, especially in reviewing legislation in any country purporting to implement the WIPO Internet Treaties, and particularly when reviewing copyright reforms being undertaken in our Free Trade Agreement (FTA) countries. In particular, TPMs protections should be adopted in ways that protect access controls independent of whether there is an accompanying copyright infringement. Only in this way can effective TPM legislation establish a practical and enforceable anti-circumvention prohibition.

2. *Copyright Principles and Norms Under Threat*

IIPA urges the U.S. Government to continue to press for reform and modernization of national copyright laws in all countries that have failed to keep pace with market and technological trends. Unfortunately, there has been a trend in recent years to use these copyright reform initiatives in some countries to weaken, not strengthen protection. In some cases, these reform efforts have become a vehicle for proposals that threaten well-established global norms enshrined in long-standing international instruments.

Some copyright "reformers" call for broadly drawn exceptions to copyright protection that threaten to violate the cardinal global rule that such exceptions and limitations be confined to those that meet the familiar "three-step test."¹⁰ In 2011, as part of major revision of its copyright law, **Canada** adopted a sweeping "user-generated content" exception, along with a number of other questionable new or expanded incursions on exclusive rights, notably an undefined extension of the "fair dealing" exception to cover education. As detailed more fully in the **Canada** Country Report in [Appendix A](#), the education as fair dealing exception has wreaked havoc on a once thriving licensing regime

¹⁰Article 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).

for educational use of published materials, and has produced instability and deterred investment in educational publishing in **Canada**. In **Ecuador**, legislation was adopted that will substantially weaken copyright protections with broad exceptions that makes the overall scope of protection very unclear; the problems are detailed in the Country Report in [Appendix A](#).

Most recently, the National Assembly of **South Africa** adopted legislation in December 2018 that also features a broad spectrum of vaguely delineated exceptions. On top of a set of extremely broad new exceptions and limitations to copyright protection (and the existing “fair dealing” system), the new law adds a version of the U.S. “fair use” statute that will allow judges to excuse certain uses from licenses. This version of “fair use” can be applied to eight broad and unclear “purposes” of use, such as “scholarship, teaching and education,” and “expanding access for underserved populations.” The proposed “fair use” system lacks the decades of legal precedent that have served to define, refine, and qualify that doctrine in the United States. The effects of this provision, along with overlapping exceptions and limitations, will result in confusion and uncertainty about which uses of copyright works require licenses, and could hinder investment in and the development of new copyright services in South Africa. It will, in particular, imperil the legitimate markets for educational texts, locally distributed works, and online works in general.¹¹ Taken as a whole, these provisions are inconsistent with **South Africa’s** international obligations since they far exceed the degree of exceptions and limitations permitted under the WTO TRIPS Agreement (the “three-step test”).

Switzerland continues to ignore its obligations to provide basic levels of online copyright enforcement (civil, administrative, criminal or even voluntary cooperation) by not providing any means for investigating or acting on infringing activities. Proposals for new legislation evidence a deliberate decision to continue to allow downloading from and access to illegal services. Additionally, the draft legislation, if enacted, would contravene Switzerland’s current WPPT obligations.

Nigeria, as noted, ratified the WPPT and WCT in 2018, but has not implemented the treaties, and its legal regime has fallen short of international copyright norms in several key respects. A draft copyright bill, published in 2015, had a number of significant deficiencies.¹² Nigeria needs a revised bill to properly implement the treaties and to focus on enforcement by the National Copyright Commission and local authorities. One additional concern is the suspension of the collective management organization COSON Limited (responsible for performance rights in sound recordings).

3. Copyright Duration

Many U.S. trading partners have extended the duration of copyright in line with evolving global trends. Setting the term of copyright protection at life of the author plus 70 years (or at least 70 years from publication for products whose terms are not measured by the life of the author, e.g., sound recordings) has become a *de facto* global norm. More than 80 countries, including almost all of our major trading partners in Europe and in the Americas, and all but a handful of developed economies in the Organization for Economic Cooperation and Development (OECD), already meet or exceed this norm for some or all categories of creative works. The U.S.’ trading partners in the Trans Pacific Partnership (TPP) negotiations agreed to bring their laws up to this standard for all copyright materials. Even though the U.S. withdrew from the TPP, it is hoped that, in particular, **New Zealand, Vietnam** and

¹¹In addition, the bill includes provisions that directly threaten the development of South Africa’s cultural economy, including sweeping interventions in private contractual relations (i.e., ministerial powers to set standard and compulsory contractual terms, including setting royalties), mandating the mode of remuneration for audiovisual performers, and limiting the term of assignments for literary and musical works and performers’ rights in sound recordings to a maximum of 25 years. In addition, the bill provides: (i) inadequate protection against the circumvention of TPMs; (ii) protection of certain performers’ rights that falls below the levels required by WPPT (which South Africa intends to ratify) and the Beijing Treaty (to which South Africa intends to accede); and (iii) numerous other unclear provisions which risk major disruption to the creative industries. Because a robust legitimate marketplace for copyright works cannot develop in such an unpredictable environment, IIPA urges the U.S. Government to be vigilant regarding the new law, as well as similar proposed incursions on copyright norms in other jurisdictions.

¹²The shortcomings include: providing a making available right as a remuneration right rather than an exclusive right; a term of protection too short for sound recordings (it should be at least 70 years); broad exceptions and limitations (these should be limited by the three-step test); safe harbors that also permit injunctive relief and are limited to ISPs of a technical, neutral or passive nature.

Malaysia will take this step on its merits. **Japan** completed the process of extending terms of protection for all works and sound recordings. **Canada** has committed to extend its term for all works and sound recordings as part of the obligations in the U.S. Mexico Canada Agreement (USMCA). In 2015, **Canada** extended the term of protection for sound recordings to 70 years from publication. The duration for most other works is life of the author plus 50 years, or 50 years from publication. In compliance with Article 20.63 of the USMCA, **Canada** is committed to extend the protection for sound recordings an extra five years, and the duration for other works by 20 years. This will generate extra licensing and sales revenues for U.S. rights holders, for works and recordings that would otherwise be in the public domain.

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

While direct licensing by individual rights holders of their exclusive rights should always remain the baseline, in certain circumstances where it makes economic sense (and where international treaties permit it), rights and uses are most effectively exercised on a collective basis, e.g., through CMOs. Public performance rights are a good example, because there are a large number of licensees and users (from cafes and restaurants, to hundreds of radio stations), and the value of individual transactions may be relatively small. Public performance income from these uses has become an increasingly important source of revenue for music rights holders, and a source of income important for the production and dissemination of new works. This has heightened the need for efficient, transparent, and accountable collective management services. It is essential that rights holders can set up (on a voluntary basis) and govern their own CMOs. Governmental roles should be limited to establishing regulatory frameworks that enable efficient, fair and non-discriminatory operations, and, where appropriate, providing expert fora for the resolution of disputes on certain aspects of collective management.

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

- Collective management should never limit exclusive rights or direct licensing, by always being voluntary, transparent, and allowing rights holders the ability to organize as efficiently as they wish to do so;
- CMOs should only be established (and should only be governed) by rights holders who have mandated a CMO to manage their rights;
- CMOs may not discriminate in policy or practice between rights holders on the grounds of nationality or similar criteria (and, rights holders large and small should have a voice in governance, with majority approval);
- Distributions should be based on actual use of works and made in a fair and transparent manner, and administrative fees limited to demonstrable costs and expenses;
- A CMO's tariffs should reflect the market value of the use of the rights in the given commercial context, i.e., they should be set following a "willing buyer, willing seller" standard.

Appendix A details serious concerns about these issues in a number of countries, including **Ukraine, Thailand, Malaysia, Indonesia, the UAE, Russia, Taiwan, Switzerland, Vietnam, Uruguay, Brazil** (albeit for different reasons), and **India**. A separate problem concerns the number of CMOs in countries where governments have failed to establish robust criteria for CMOs and/or have misapplied the so-called extended collective license (ECL) provisions leading to an uncontrolled proliferation of CMOs, for instance in **Ukraine, Kazakhstan** and **Thailand**. In **Malaysia**, the government has forced different categories of music rights holders' CMOs to operate

through a single government-controlled entity. Lastly, in the **UAE**, the government—by refusing to grant an operating license to a music CMO—has prevented rights holders from effectively exercising their performance rights.

The motion picture industry is particularly concerned that mandatory licensing is on the rise in Latin America, under pressure from collective management organizations representing authors and performers, seeking to establish new revenue streams to enhance both their members' compensation and their own infrastructure. While the scope of these laws varies, they tend to vest collective management organizations with a statutory right to enforce remuneration claims against third party platforms (i.e., licensees of producers). These claims impact all exploitations of motion pictures and television programs, and are a restraint on trade for U.S. works, because author and performer compensations are collectively bargained for and keyed to worldwide exploitation. These schemes, when applied to American works, undermine the exercise of exclusive rights as set out in international copyright treaties and negotiated agreements with unions and individual creators. These seemingly arbitrary CMOs also dampen investment in production, and create a non-transparent and uncertain environment for local distribution. In short, these laws are encumbering distribution and adding unnecessary costs that are passed on to consumers. The recording industry is also concerned about these developments for their unintended consequences as well as the impact on the proper licensing of music videos as “audiovisual works.”

5. Bilateral and Multilateral Treaty Obligations to the United States

For the past three decades, there has been bipartisan agreement in the United States that strengthening copyright laws and enforcement worldwide is in the vital economic interests of the country. One effective strategy to elevate the levels of protection and enforcement has been the negotiation and implementation of numerous bilateral and multilateral trade agreements.

The short list of these agreements includes: (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 20 countries, the most recent entering into force in 2012, with **South Korea, Colombia and Panama**. Each of these agreements contains enforceable provisions designed to open foreign markets to U.S. goods and services dependent on copyright protection, chiefly (though 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.

In 2018, the U.S., **Mexico**, and **Canada** concluded negotiations and signed the USMCA; the trade agreement has not yet been ratified in any of the three countries. Although **Mexico** and **Canada** have enjoyed free trade status with the U.S. for more than 20 years under the North American Free Trade Agreement (NAFTA), the copyright and enforcement provisions of that agreement are limited and severely outdated, and do not reflect international norms of protection and enforcement for the digital age. The USMCA was intended to address those concerns, but opinions are divided on whether the text represents the right model for copyright in U.S. trade agreements at this time. The USMCA's overall impact is uncertain, and will depend on how it is implemented. If fully and properly implemented and vigorously enforced, certain provisions in the USMCA will improve a number of key existing deficiencies in **Mexico** and **Canada**. For example, the USMCA includes strong rules on the presumptions of ownership, contractual transfers, national treatment, criminal remedies for cable and satellite signal theft, the protection of TPMs and Rights Management Information (RMI), as well as criminal, civil, and border enforcement. The USMCA defines “commercial scale” to clarify that infringing acts without a profit motive or commercial purpose are actionable, properly addressing a long-standing enforcement challenge in **Mexico**. The USMCA also provides for criminal procedures and remedies for aiding and abetting infringement, and requires the full application of enforcement procedures and obligations to the online environment; and, the USCMA obligates **Mexico** in particular, to finally and properly address the problem of camcording with criminal remedies. The USMCA also provides rigorous and important protections relating to TPMs, which are critical for enabling business models that have fostered many

of the innovative products and services available online. While **Canada** presently provides adequate protections for TPMs, **Mexico** does not.

On the other hand, some of the provisions in the USMCA, most notably the exception for **Canada's** cultural industries, and some of the limitations on liability for online service providers, could potentially undermine many of the benefits of this agreement for the copyright industries in all three countries.

In 2019, the Administration intends to commence negotiations on new trade agreements with the **European Union**, **Japan** and the **United Kingdom**. There are specific concerns and hoped-for expectations for each of these agreements that the copyright industries have addressed in separate written submissions to the U.S. Government.¹³

The U.S. Government has entered into a wide range of other bilateral agreements, including binding trade agreements, in which our trading partners have committed to take steps to modernize and strengthen their copyright laws and/or enforcement regimes.¹⁴ Some of the agreements were negotiated bilaterally in the context of accession of our 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. Some of these latter agreements (or, in some cases action plans), such as with **Russia** and **Ukraine**, are specific to digital protections and online enforcement schemes. The benefits of these agreements can only be realized if the obligations taken on by our trading partners are properly and promptly implemented in the statutes, regulations and policies of these countries. Unfortunately, too often many countries, including, for example, **Russia** and **Ukraine**, have simply ignored important obligations, or have insufficiently implemented them.

There are some signatories to existing FTAs that have not met their agreement obligations, yet these countries continue to enjoy unfettered access to our huge national markets for goods and services. These concerns are specifically cataloged in the Country Reports in Appendix A, notably those for **Chile**, **Colombia**, and **Peru**. In some instances, proposed online enforcement remedies are outdated, while new more efficient enforcement remedies exist. In these instances, the U.S. Government should seek remedies, consistent with U.S. law, that are relevant for current copyrighted works and delivery services.

Costa Rica has not implemented key provisions in the Dominican Republic–Central America FTA (DR-CAFTA), more than seven years after the obligations came into force. The copyright industries' concerns in **Costa Rica**, detailed in the Annex Report in Appendix A, include the need to improve basic protections for copyrighted works and sound recordings, especially regarding online enforcement.¹⁵ There are similar problems in **Panama**, where an extended deadline of October 2015 for implementation of certain provisions of the U.S.–Panama Trade Promotion Agreement came and went without meaningful action.

It is critical that the U.S. Government ensure in 2019 that our trading partners improve their laws and practices regarding copyright protection and enforcement consistent with the obligations they have already taken on in bilateral, regional, and multilateral copyright agreements to which the United States is also a party. It is also the case that the provisions of some of these agreements have become somewhat outmoded. Some of the provisions meant to address digital technologies were negotiated more than a quarter century ago, before the dawn of the digital age that has so dramatically changed the landscape of the marketplace for goods and services protected by copyright. In such instances, the U.S. Government should seek remedies, consistent with U.S. law, that are suited to

¹³See https://iipa.org/files/uploads/2019/01/2018_Dec10_IIPA_Comments_US_EU_Trade_Agreement_Negotiating_Objectives.pdf; https://iipa.org/files/uploads/2019/01/2018_Nov26_IIPA_Comments_US_Japan_Trade_Agreement_Negotiating_Objectives.pdf; and https://iipa.org/files/uploads/2019/01/2019_Jan15_IIPA_Comments_US_UK_Trade_Agreement_Negotiating_Objectives.pdf.

¹⁴See, 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. Other bilateral agreements do not appear in this compilation, such as the 2006 IPR Agreement between the U.S. and Russia, available at: https://ustr.gov/archive/assets/Document_Library/Fact_Sheets/2006/asset_upload_file151_9980.pdf.

¹⁵Costa Rica was the last DR-CAFTA country to ratify the agreement, which came into force for Costa Rica on January 1, 2009. The agreement granted Costa Rica a 30-month transition period to upgrade its legislation needed to improve online copyright enforcement; however, that transition period expired in July 2011.

addressing today's market needs (and the nature of today's piracy problems) to ensure the proper delivery of digital works and services.

B. ENFORCEMENT TRENDS

While some enforcement challenges have been plaguing the copyright industries for many years, some challenges are the byproduct of evolving technologies. The evolution and development of new technologies creates welcome opportunities for rights holders for the creation and dissemination of their works for new consumer services and business-to-business applications upon which consumer services are built. These technologies and applications include: high-resolution audio and visual delivery and play-back systems, 360° video, and virtual reality. These technologies require new digital infrastructures through the value chain from content capture, post-production, format standards, delivery and consumer consumption. Technologies keyed to content delivery include: cloud-based data processing, storage, software applications, new communication services, as well as TPMs.

Some examples of innovative technologies include: digital cinema technologies, which include encryption, compression, and high-speed data networking and storage, that are deployed in theaters around the world in order to digitally distribute and project the latest motion picture content (now available in well over 90% of the world's cinema screens). Another example are the video game companies who have built game engines to be used as platforms for others in the development and production of enterprise applications, improved cinematic experiences and high-quality video games for consoles, mobile devices and personal computers. Video game companies have also given consumers choices in how to access video gaming content by, for example, launching tools that enable cross-platform play, or through console-based Internet television service, or through cloud gaming. In the music sector, rights holders have worked with digital platforms to develop the Digital Data Exchange (DDEX) standards, used ubiquitously to deliver content and metadata to consumer-facing platforms. The development of metadata has also been used to empower voice-activated delivery via "smart speakers." Unfortunately, these same technologies are exploited by rogue services to facilitate new forms of piracy that undermine rights holders' investments in the production of new materials and new services. For example (as described below), cloud computing and streaming technologies are now used for stream-ripping applications by circumventing TPMs and converting streamed content into downloadable content.

1. *Internet and Mobile Network Piracy*

Online and mobile network piracy threatens the viability of licensed platforms and erodes the capacity of authors, artists, musicians, filmmakers, publishers, video game developers, performers and songwriters to earn a living, as well as to invest in creating new materials. The entrenchment of infringing services (including those avoiding licensing based on a misconstruction of the law) is a leading barrier to U.S. creators and rights holders in markets worldwide.

An October 2018 study for the International Federation of the Phonographic Industry (IFPI), keyed on 18 major music markets worldwide, found that 86% of consumers had engaged in licensed on-demand (audio and video) music streaming in the past six months, with 75% of consumers using smartphones to listen to music. This shows the exponential growth in the popularity of new services that offer huge libraries—now including over 45 million tracks—of licensed music content to consumers.¹⁶ Licensed video streaming services were responsible for more than half (52%) of all on-demand music streaming use across these markets (with YouTube comprising 47% of that total). In **Mexico** 81% of consumers use licensed audio streaming services such as Spotify or Apple Music; in **Brazil** 77% of consumers use these services. In **South Korea**, 55% of consumers use licensed audio streaming services, such as Melon and Soribada. In **India**, 96% of consumers are listening to music on their smartphones, the highest rate in the world. However, 38% of consumers globally still access unlicensed music, with stream-ripping

¹⁶IFPI, *Music Consumer Insight Report 2018*, available at: <https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf>.

being the most common form of music copyright infringement. The second most common form of accessing pirated music is by downloading it through cyberlockers or via peer-to-peer (P2P) services; 17% of consumers use search engines to locate infringing music content.

Massive online infringement of entertainment software continues to be an international problem that undermines legitimate markets worldwide, as reflected in industry monitoring of P2P and direct download activity. For 2018, **Russia, Brazil, Ukraine, Kazakhstan and India** were identified as the top five countries in terms of the number of connections by peers participating in the unauthorized file-sharing of video games for personal computers on public P2P networks, while **Brazil, Russia, Mexico, Algeria and Chile** were identified as the top five countries with respect to such infringement of games for console platforms.

The motion picture industry reports that (in 2016) there were an estimated 450 million downloads of pirated wide-release films and television programs (including video-on-demand (VOD)) using P2P protocols just in the United States. Worldwide, this number was 5.4 billion downloads. Additionally (in 2016) there were an estimated 21.4 billion visits to streaming piracy sites worldwide on desktop and mobile devices.

There are many countries with capable legal regimes to address Internet and mobile network piracy, but which fail to provide effective enforcement. Some examples of these countries include: **Bulgaria, Greece and Romania**.

To address the problem of Internet and mobile network piracy, IIPA supports a multi-step approach including: (1) enabling identification of markets and actors engaged in these activities, especially criminal syndicates—and closing down operations and using criminal enforcement remedies directed at these operations; (2) creating legal frameworks that (i) prevent the operation of services that promote or otherwise induce infringement; and (ii) provide strong incentives for neutral network service providers to work with rights holders to curb the use of their proprietary networks and services for infringing purposes; (3) providing for and applying injunctive relief, or administrative measures, especially where notorious online marketplaces are hosted in one country but target consumers in another; and (4) engaging in inter-industry cooperation, wherever possible.

The first step, the identification of large-scale illegal markets, has been effectively undertaken by USTR as part of its “Special 301 Out-of-Cycle Review of Notorious Markets” which identifies such online (and offline) marketplaces.¹⁷ As detailed in the Country Reports, there have been many successes in the closure of Internet sites and services identified as Notorious Markets by USTR. In addition, IIPA members routinely identify their own notorious online markets for all categories of works, or those sites that traffic in unlawful devices or services that circumvent TPMs used by copyright owners (or, their licensees). The IIPA members include their list of such sites in filings with the USTR as part of the annual “Notorious Markets” review, as they did in October 2018. We continue to urge USTR to emphasize in its bilateral engagement with these countries, the need to either convert to licensed dissemination of works, or else shut down such notorious markets, and that such actions (i.e., shut downs) be followed where appropriate, by criminal enforcement actions.

Creating legal frameworks to prevent the operation or emergence of illegal services is itself, multi-staged, including: (a) providing the relevant panoply of exclusive copyright and related rights (as well as TPM and RMI protections) as mandated by the WIPO Internet Treaties, which set out minimum protection standards; (b) recognizing online piracy as a form of cybercrime; and (c) fostering cooperation among all industry stakeholders (including ISPs) in the online supply chain, including the removal of impediments to collaboration.

¹⁷The most recent report is USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at: <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf> (“USTR NM 2017 Report”). The 2018 Notorious Markets report has not yet been issued.

While arrangements for notice and takedown of infringing materials are in place in many markets, they are often invoked by clearly pirate services, or viewed as the only means of online enforcement, which they are not. Moreover, some services attempt to rely on notice and takedown procedures to avoid standard copyright licensing. Clearer primary and secondary liability rules are necessary to discourage abuses and to remove the safe harbor as an unjustifiable excuse for inaction or license evasion. Where infringing activity rises to the level of criminal liability, imposing responsibility for aiding and abetting infringement would also prevent services from basing commercial platforms on copyright theft.

IIPA members are concerned about proposals granting total immunity to ISPs and other platforms from any civil or criminal liability, and urge foreign governments to include in these proposals exceptions for IP enforcement, which must then be properly implemented. Additionally, there are concerns with overly broad copyright immunity, for example, provisions that immunize parties who induce or facilitate infringement. There have been troubling proposals in **Brazil** and **Argentina**, and broad immunities are in operation in **Chile**. Legal incentives that ensure cooperation of ISPs and other online intermediaries with rights holders are important for online enforcement.

A third effective step, especially for illegal marketplaces hosted in one country but targeting consumers in another, is injunctive relief. This is necessary because of the failure of the host country for services based in the jurisdiction to take effective action against their own “homegrown” notorious markets, which pollute the markets of neighboring countries or trading partners. Increasingly, responsible governments have pushed back against this “offshoring” of enforcement responsibility, by developing means and processes for restricting or disabling access to these foreign pirate sites from within their borders. Government agencies and courts, in over 40 countries (for example, in **South Korea, Australia, Singapore, United Kingdom, France, Denmark, Germany, Portugal, Spain, Italy** and **Ireland**) employ injunctive relief to ensure that ISPs take steps to disable access to copyright infringing websites. In short, there is a wide spectrum of judicial and administrative means that can impose restrictions under defined circumstances when other domestic remedies are insufficient, and, this deserves the close attention of the U.S. Government. In addition, legal systems should ensure that proportional injunctive relief orders are available that direct ISPs to take measures that have been demonstrably effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content. After a decade of experience, studies have shown that these practices can reduce usage of infringing sites, and increase traffic to legitimate offerings of copyrighted material. These steps are also effective for service operators who cannot be identified, or who avoid service of legal process.

The fourth step is the development of inter-industry cooperation, since Internet services (including piratical services) are enabled by and interlinked with a wide spectrum of supporting services. Combating systematic online infringement of copyright requires the active cooperation of all participants in the e-commerce ecosystem, including online advertising players (advertisers, ad agencies, ad networks, and the providers of advertising placement and related services); payment processors; hosting providers (including reverse proxy providers and related optimization services); domain name registrars and registries; and search engines. As entities with a direct stake in a secure and stable Internet, and in the healthy growth of legitimate e-commerce (including e-commerce in products and services protected by copyright), cooperation against threats to that security, stability and health is part of a sound business strategy for all Internet intermediaries. Governments in many countries can do much more than they are currently doing to foster and encourage such cooperation and the development of best practices to advance the common goal of a safer, cleaner online marketplace.

2. Piracy Devices

A damaging piracy ecosystem has emerged around Piracy Devices and apps (also referred to as “illicit streaming devices” (ISDs)) which allow users to stream, download, or otherwise access unauthorized content from the Internet. IIPA appreciates USTR’s focus on this problem in its 2017 Notorious Markets Report.¹⁸

Piracy Devices and apps provide illegal access to movie and television content through a variety of means, including downloading and streaming content as well as unauthorized streaming of live television and sporting events, thus undermining the licensing fees paid by distributors on which content creators depend. Motion Picture Association of America (MPAA) members continue to suffer enormously from a growing threat of these devices and apps. For example, the BeOutQ piracy device and related services infringe high-quality film and television productions, including sports rights, undermining the growing Middle East marketplace. Moreover, the 2017 Notorious Markets report estimated that Piracy Devices had a market penetration rate at 6.5% in **North America** and a shocking 19% in the **United Kingdom**, with annual losses inflicted by these devices on the North American entertainment industry estimated at \$4-5 billion.

Streaming devices that are preloaded with infringing apps enabling access to television and VOD subscription services, can be found online and in physical marketplaces. **China** is a hub for the manufacture of these devices and development of the piracy apps and add-ons that allow them to be used to pirate content. They are not only distributed domestically, but are also exported to overseas markets, and what was once a problem centered mainly in Asian markets has now proliferated worldwide. Additionally, illegal apps that can make legitimate streaming devices infringing ones, can be found through a myriad of legitimate and specialty app repositories. These apps allow the user to connect to a supporting over-the-top (OTT) online infrastructure that provides users with instant access to infringing audiovisual and other content. Many of these piracy apps cross over multiple platforms, including set-top boxes, mobile phones and computers.

Piracy Devices are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials, and enforcement against them presents complex challenges. Under the right fact patterns, the retailer/distributor can be held liable; if the app developer can be identified and located, this may provide another enforcement path. Governments should also take action against key distribution points for devices that are being used illegally. Marketplaces (both online and physical) where such devices are sold should be targeted; indeed, many of the physical marketplaces of greatest concern to the copyright industries now increasingly feature goods and services enabling Piracy Devices, and/or stalls or kiosks, or “repair” shops, offering to load unauthorized copyright material or piracy-enabling apps onto any device. Unless effectively countered with vigorous action against one or more of these ecosystem participants, the impact of ISDs on the legitimate market for digital delivery of copyright materials will be increasingly destructive.

3. Circumvention of Technological Protection Measures (TPMs), Including Stream-Ripping Services

A major reason why so much legitimate material is now available to consumers, and in so many formats and platforms, is 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 services to control and manage access to copyrighted works, as well as to diversify products, services and their pricing. In short, new business models depend on such 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

¹⁸In its 2017 Notorious Markets Report, USTR spotlighted the growing problem of Piracy Devices (i.e., ISDs), 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 media service providers.” USTR 2017 NM Report at 8-9.

streaming services or conditional access (e.g., Pay-TV, Pay-per-View) are not easily stolen, and that pirate copies of video games are not playable on console platforms.

Unfortunately, there are business models built entirely around providing services, and/or manufacturing and distributing technologies, software, devices, components, or tools, to circumvent TPMs in order to gain unlawful access to the content or to copy it without authorization. A salient example, highlighted by USTR in its 2016 Notorious Markets report, is stream-ripping.¹⁹ 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, and as noted, stream-ripping is now the dominant method of music piracy, and a global problem undermining the legitimate online music market. 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. They thus inflict damage both on legitimate streaming services and legitimate channels for authorized downloads. In 2016, organizations representing record companies in the **United States** and **United Kingdom** took legal action against *YouTube-mp3.org*, the largest site dedicated to offering illegally “stream-ripped” music. The site closed in September 2017 after its owner agreed to cease operations and not to infringe copyrights in the future.²⁰ However, stream-ripping sites have proliferated across the world and many of those benefitted from the closure of *YouTube-mp3.org* as users sought alternatives. Stream-ripping is currently the largest threat to the music industry, undermining the sustainability and development of new and existing legitimate subscription streaming services. A positive note has been the numerous advances in court cases to address stream-ripping in **Denmark, Italy, Spain** and **Germany**.

While legal protection of TPMs, where properly implemented, enables effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are often undermined by countries that have yet to implement any or adequate protections. **China** stands out as needing close scrutiny, as it is the locus for manufacturing of a host of circumvention devices. In addition to many others identified in the Country Reports in Appendix A, such as **Mexico** (now committed by the USMCA to properly address this problem), IIPA also notes **Israel** as a developed country that has failed to adopt any protection whatsoever in this field, as well as **New Zealand** which has adopted generally weak measures.

4. *Illegal Camcording of Theatrical Motion Pictures*

A priority for the motion picture industry involves illegal recordings of movies in theaters. Approximately 90% of newly released movies that are pirated can be traced to use of a digital recording device in a movie theater to record the audiovisual work (whether image or sound or both) from the theater screen and/or sound system. One digital (camcorder) copy, uploaded to the Internet and made available around the world, can undermine global markets and the huge investments needed to produce and distribute a feature film. In 2018, the MPAA identified 510 total illegal recordings of its member company titles from cinemas around the world, including both video and audio captures—this was a decrease from the 610 titles recorded in 2017, although there were increases in some key markets. These figures do not include numerous independent or foreign films that were illegally camcorded.

A multifaceted approach is needed to tackle this problem, including 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; educating the public about how unauthorized camcording hurts both businesses and the consumer; and 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 **Korea**) with good results. The USMCA will now also require **Mexico**, which has been a major source of camcorded movies, including many on the Internet, to add proper criminal remedies into its national law. The Country Reports in this

¹⁹See <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

²⁰See, <http://www.ifpi.org/news/Worlds-largest-music-stream-ripping-site-shuts-down-after-successful-international-legal-action>.

submission highlight many other markets where an effective strategy against camcording has not yet been implemented, and where new criminal laws are clearly needed. However, enactment of criminal legislation is not by itself enough, enforcement of these laws remains critical.

5. Piracy of Books and Journals

The book publishing industry continues to face large-scale unauthorized photocopying of academic, scientific, technical and medical books, principally on and around university campuses; sophisticated infringing offset print versions of books (essentially akin to counterfeiting); and unauthorized translations of popular books. Combatting book and journal piracy requires consistent action by law enforcement authorities against entities engaged in unauthorized reproduction of textbooks and other professional books. Counterfeit books are often also being produced not just for sale in the domestic market, but also for export to the U.S. and other developed markets. Government agencies, universities and educational institutions (especially those that are state-funded or state-operated) should do more to promote and adopt appropriate use and copyright policies, in particular the use of legitimate textbooks and journal publications, and to discourage the use of unauthorized copies of all literary, educational and professional works. The U.S. Government should ensure that such acts of infringement are fully covered in all bilateral, regional, and multilateral engagements. In addition to discussion of these issues in various Country Reports in Appendix A, publishers note significant problems that remain in **India**, **Indonesia**, and **Malaysia**, where the growth of the publishing market is undercut by widespread unauthorized photocopying of educational materials.

6. Pay-TV Piracy and Signal Theft

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, has been a long-standing problem for the motion picture and recorded sound industries. Related problems include operators who take cable and satellite signals by unauthorized means (hacked set top boxes; decoding or decrypting signals; or, stealing “overspill” signals from neighboring countries) and sell them to consumers without paying for any of the content. The latter remains a problem in several countries in the **Caribbean** and **Central and South America**, as well as in **Albania**, **Egypt**, the **UAE**, **Indonesia**, and **India**. In most of these cases, the signals are encrypted, and pirates must circumvent or hack in order to access the content. Regulations and enforcement must therefore focus on prohibiting the trafficking in pay-TV or signal theft devices or technologies; the unlawful decryption of encrypted cable or satellite signals; and the onward use of the signals already decrypted (whether lawfully or not) without the authorization of the rights holders of the content or of the signal. Such laws can help foster licensing of broadcasters and cablecasters, and weed out unlicensed television distributors.

An emerging global threat are illegal Internet protocol television (IPTV) services that provide stolen telecommunication signals and channels via dedicated web portals, third-party applications, and Piracy Devices configured to access services. There are now over a thousand illegal IPTV services worldwide, offering hundreds of channels sourced from multiple providers, along with VOD content of unauthorized movies and television programs. Many of these illegal services are subscription-based for-profit services, with monthly or yearly user packages. The technical infrastructure of these services is often vast and complex, making the identification of content sources and service operators extremely challenging. The marketing and sale of these services is often carried out by a network of global IPTV re-sellers who purchase subscriptions at wholesale prices and re-sell them for a profit, further complicating investigations. These services rely on infrastructure and support services including from hosting providers, media servers, and panel hosts, sometimes without the knowledge or approval of the legal services or product (but sometimes in cooperation with these services).

C. MARKET ACCESS BARRIERS

In addition to the key challenges noted above pertaining to copyright protection and enforcement, which constitute *de facto* market access barriers, the U.S. copyright industries also suffer from a variety of formal market access barriers in some crucial foreign markets. All efforts to address copyright infringement will be unavailing if legitimate American products and services cannot be brought into a market in a fair and equitable manner to meet consumer demand. Market access barriers take many forms, including:

- discriminatory restrictions on the ability to fully engage in the business of development, creation, production, distribution, promotion, and publication of copyright materials;
- high tariffs (such as through inclusion of royalties in the calculation of duties), taxes, or fees on core copyright businesses and their products and services;
- the maintenance of quotas on audiovisual programming, including screen time and broadcast quotas, or complete bans on broadcast of foreign programming or advertising;
- ownership and investment restrictions on 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);
- other forms of government interference with the exercise of rights or contractual freedoms by rights holders.

Many of these formal market access barriers are discussed in detail in several of the Country Reports in [Appendix A](#). Whatever form they take, all market access restrictions that impede the entry of legitimate products make it easier for pirate operations to fill the void, and cement strong loyalties with consumers, making them harder to dislodge. U.S. officials should continue to strive to open markets and to eliminate or phase out market access barriers, including those identified in this year's IIPA submission.

IV. POSITIVE DEVELOPMENTS

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

Chile: In October 2018, Chile enacted a new law aimed at deterring satellite signal theft. The long-awaited law criminalizes the sale or importation of devices or software that decode encrypted satellite signals. The law provides for fines of up to US\$70,000 for those caught importing, selling, or installing illegal devices; there are no sanctions for purchasers or users of these devices. The law is a welcome step to combat the proliferation of these devices, which undermine the legitimate pay-TV market in Chile. There is, however, a question as to whether the law is fully compliant with the FTA because it does not sanction users who "willfully" receive or distribute pirated signals.

Italy: The government continued to employ and streamline the antipiracy framework under the Italian Communications Regulatory Authority (AGCOM) taking positive and prompt actions against online infringers

(including against some of the foreign infringing sites most popular in Italy). In November 2018, AGCOM adopted regulatory amendments (Resolution 490/18) to further improve existing AGCOM procedures, including the coverage of cyberlocker and stream-ripping sites. In addition, the new regulations allow the filing of a complaint (by broadening the scope of permissible complaints) to cover infringements occurring through the advertising, promotion or description of copyright and related rights infringements. Rights holders are reporting quicker responses by AGCOM, and already (since the adoption of the new procedures), five heavily-trafficked pirate websites containing audiovisual materials were blocked in Italy. The music industry reports that four stream-ripping sites were blocked by AGCOM last year, including two of the world's most popular sites (*Flvto.biz* and *Convert2mp3.net*).

Mexico: A long-recommended change in the Mexican legal regime was finally adopted in 2018. Mexico amended its Copyright Law (Articles 213 and 215) to provide for preliminary injunctions (“precautionary measures”) in civil cases. The absence of these remedies, until 2018, has hindered effective enforcement, especially against pre-release piracy. The 2018 law also permits *ex parte* preliminary injunctions, provided rights holders give infringers 72 hours written notice. It is hoped that this important remedy will now be used to improve enforcement.

Columbia: In July 2018, Colombia's legislature passed amendments to the Copyright Law to update Colombia's copyright framework. Changes include: extending copyright term for sound recordings and corporate rights holders to 70 years; adding a making available right; adding civil liability for the circumvention of TPMs; providing statutory damages for copyright infringement and TPM violations; and, authorization to destroy seized infringing goods. The law provides for regular triennial reviews of copyright exceptions by the Copyright Office. In addition to these positive changes, there are some concerns: there are broad exceptions for the anti-circumvention (TPM) provisions, and generally for copyright uses. Last, it criminalizes the retransmission or reception of illegally decrypted satellite signals, but the provision has a requirement to show a profit motive, which will render this otherwise positive development, difficult to enforce.

India: In 2018, India acceded to the WIPO Internet Treaties, signaling a commitment to properly protect and enforce copyright in the digital age. In 2016, India issued its seven-point IPR report (the “National Intellectual Property Rights Policy”) aimed at protecting India's vibrant creative industries, improving the legal regime for domestic and foreign copyright owners, pledging to strengthen enforcement (especially online), and modernize the government's management and services related to IPR. Despite the size of the country and the enormous challenges of a decentralized federal system with 29 states, enforcement on balance has significantly improved for some copyright industries, due to a combination of initiatives taken by both government and industry. IIPA is encouraged by the shift of copyright administration to the Department of Industrial Policy and Promotion (DIPP). Other positive developments include: ongoing actions undertaken by the Maharashtra Cyber Digital Crime Unit (MCDU), Telangana Intellectual Property Crime Unit (TIPCU) and National Internet Exchange of India (NIXI), resulting in the suspension or cancellation of hundreds of domains which were providing access to pirated material; and, the Delhi High Court ordered the disabling of access to ten major audiovisual piracy sites (including *thepiratebay*, *rarbg*, *bmovies/fmovies*, and *yts*).

Israel: Israel amended its law to extend the term of sound recording protection to 70 years. At the close of 2018, the Parliament adopted a bill to improve digital enforcement. Its provisions include: (i) website blocking orders (a new Section 53A); (ii) the imposition of criminal sanctions in cases of for-profit commercial-scale broadcasting or making available (amending Sections 61 and 62); (iii) imposing direct liability for facilitating access to infringing material (if for-profit), so, including linking (a new Section 48(a)); and (iv) procedures for “disclosure orders” against anonymous online infringers (a new Chapter H1, Section 60(a)–(h)). After giving serious consideration to proposed legislation that would have explicitly authorized third parties to retransmit copyrighted content via the Internet without the rights holders' consent, the government ultimately decided not to proceed with the proposal, which would have been an unprecedented violation of Israel's international obligations.

Thailand: In 2018, the IP and IT Court in Thailand issued the first-ever order for ISPs to disable access to *nungmovies*, a blatant pirate audiovisual site, using the Computer Crime Act against copyright infringing activity. The Digital Economy Ministry of the Government of Thailand then ensured compliance by all the major ISPs, and additional orders were granted with respect of several more sites.

Brazil: The establishment of a cybersecurity police task force with jurisdiction to address copyright piracy, as well as other types of cybercrime, gives hope for improved enforcement action. In January 2019, the Brazilian federal authorities launched “Operation Copyright” executing raids against the operators of *Speedshare* and the private server service *speedboxBR*, resulting in both services being taken down, along with over twelve other illegal file-sharing sites. Unfortunately, there has otherwise been little improvement on enforcement overall, and a number of promising bills to address copyright protection and enforcement are languishing in Congress.

The above are examples of 2019 positive developments in these particular countries. However, for several of these countries, despite these positive developments, serious additional legal reform and/or enforcement issues remain. The details of these issues can be found in the respective Country Reports in [Appendix A](#).

V. CONCLUSION

As detailed in the December 2018 Siwek Report, the U.S. economy depends on a thriving copyright sector to create revenue, jobs, and exports. Likewise, the health and competitiveness of the economies of our trading partners also depends on promoting and respecting intellectual property rights and opening markets to products and services that depend on copyright. Open markets foster jobs in the creative industries, increase cultural diversity, promote international trade and exports, increase tax revenues from legitimate businesses, and attract more foreign direct investment. It is essential to the continued growth and future competitiveness of the U.S. creative industries that our trading partners provide high standards of protection for copyright; more effective policies and tools to enforce that protection; and more free and open markets. IIPA continues to urge USTR and the Administration 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 actions to bring real commercial gains for the U.S. creative industries, by strengthening copyright protection and enforcement regimes worldwide.

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

Respectfully submitted,
/Eric J. Schwartz/
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International Intellectual Property Alliance

APPENDIX A

COUNTRY SURVEYS

PRIORITY WATCH LIST

ARGENTINA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Argentina be maintained on the Priority Watch List in 2019.¹

Executive Summary: After assuming the G20 Presidency for 2018, and announcing a commitment to international cooperation, the Government of Argentina failed to make copyright protection and enforcement a priority in 2018. While there were some positive developments in 2018, including an agreement by DAC, an Argentine collective management organization representing directors of audiovisual works, to accept and pay claims for royalties asserted by U.S. directors, long-standing deficiencies in IPR protection persist. Digital piracy remains a serious concern, with no significant enforcement actions reported in 2018 and problematic legislative proposals reappearing in a bill impacting creative content. The lack of inter-agency cooperation, especially between prosecutors and police cybercrime agents to address the issue, continues to allow pirate sites to adapt and grow in resilience. The Government of Argentina should apply its existing Civil and Commercial Code provisions to enforce the liability of online service providers for infringing content stored on their services. In the area of criminal law, the government should also create a round table for the private sector to discuss potential cross-industry cooperation to tackle online piracy more effectively. In addition, a specialized IP Prosecution Office should be created to promote and encourage cross-agency law enforcement cooperation in both the offline and online arenas, and to ensure that copyright cases will be investigated and prosecuted. The government should also support increasing awareness amongst the judiciary of using existing powers of injunctive relief to tackle various types of copyright infringement. Awareness of foreign best practices should be increased both in the area of enforcement and in the area of application of copyright concepts, such as the right of making available or communication to the public, to various types of online services.

Hard goods piracy remains rampant, with little to no action taken on enforcement, including seizures or investigations by federal or local authorities. Notwithstanding the high-profile arrests of two alleged leaders and many associates of the notorious open-air market, *La Salada* in 2017, the market remained operational in 2018 and there was a significant growth in the number of locations and vendors across the entire city of Buenos Aires. The Government of Argentina must undertake routine inspections and raids of physical markets, and *ex officio* actions to stop physical piracy. Active involvement by the AFIP, the Argentinian Customs Office, is also needed to reduce hard goods piracy, including the broad and open importation of counterfeit high value products, such as illegal video game devices. Overall, the government should, at the highest levels, commit to developing and implementing a coordinated anti-piracy campaign that addresses hard goods and online infringements as a matter of national priority.

Market access obstacles persist. A 2018 regulation updated content quotas for movie theaters, requiring that domestically produced films represent 30% of the volume of content shown for the entirety of one week per quarter where there is a dedicated screen, and increasing that time period should the exhibitor share the screen with another movie. IIPA urges the Government of Argentina to remove such quotas which distort the market, discriminate against U.S. audiovisual content, and are likely to result in increased piracy because Argentine consumers are unable to obtain sought after U.S. content.

¹For more details on Argentina's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Argentina's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2019

- Devote increased resources to fighting online piracy, and develop a coordinated antipiracy campaign (including the judiciary), and long term agenda at the federal and local level to address online piracy.
- Undertake routine inspections and raids of physical markets, and *ex officio* actions to stop physical and online piracy.
- Continue to apply the Civil and Commercial Code to ISP liability cases.
- Improve market access by removing quotas for motion pictures and electronic devices.
- Engage customs authorities to monitor and perform border operations against counterfeit high value products (such as modified game consoles) entering the country via airports and land borders.
- Create a round table for the government and the private sector to discuss potential cross-industry cooperation to tackle online piracy more effectively and support local digital economy development.
- Create an IP-specialized Prosecution Office and establish a federal jurisdiction over copyright crimes.

THE NATURE OF PIRACY IN ARGENTINA

Piracy in Argentina is pervasive and takes many forms.

Online Piracy. Digital piracy is endemic and continues to increase. Both online and on mobile phones, digital piracy in Argentina takes many forms, including torrent sites, downloading, streaming, cyberlockers, and linking sites. The prevalence of piracy fundamentally undermines the emerging digital economy in the country.

The U.S. Government has said that Internet piracy rates have reached extremely high levels in several content areas, citing the example of the Argentine-run notorious market *Cuevana*, which offers pirated movies and TV shows and has expanded to include a mobile streaming application. Enforcement against *Cuevana* gained momentum in December 2017, with the indictment of a key figure in the case, but this has taken years to accomplish and the market remains operational. The lack of a level playing field in the digital content market stymies the growth of legitimate services, which struggle to compete when vast quantities of copyright material are available from a multitude of sources. Argentina has the highest Internet penetration rate in the region, but its prospects for a robust legitimate online content market will remain bleak until the government makes concerted efforts to address rampant piracy issues.

Argentina is a heavy consumer of BitTorrent and pirate streaming websites. Following a regional trend, Argentina continues to see an increase in the usage of Piracy Devices (PDs), in particular, dedicated Android boxes such as the HTV box and Kodi boxes, which are used to stream illicit copies of films and television. The creative industries report that in 2018, there was also an increase in consumption of films and television through pirate streaming websites, piracy mobile apps and add-ons.

The illegal distribution of video game content continues to grow and damage the creation and consolidation of a digital economy in the country. Online marketplaces offering illegal video games and entertainment software, from video game titles to consoles and other counterfeit devices is a growing trend among pirates because it provides a better environment for business to reach a bigger audience and reduce operational costs and risk for the illegal activity. Online piracy is supported by social media platforms that enable pirates to target wider audiences in a more effective way. Linking sites are the most popular piracy channel for video game products among Argentinean users, monetized by advertisements and available in Spanish language. Several local infringing sites in Argentina are very popular abroad, including in Spain, Mexico, and Colombia.

There are currently 13 legal digital music services in Argentina, including Spotify, Apple Music, Tidal, Personal Música, Claro Música, Napster and Deezer. While Argentina has a relatively large physical and public performance rights market, demonstrating the country's appetite for music consumption, digital sales are currently

well below potential. For example, in 2017, digital music accounted for only 31% of sales revenue by trade value, which is much lower than the global average. Direct download and stream-ripping are the most widely used piracy tools, and are undoubtedly having the highest negative impact on the market, followed by free music access through mobile apps. Despite promising growth in streaming revenue (78% in 2017) in recent years, it is clear that the digital market cannot flourish while widespread piracy undermines. Tellingly, more than 50% of the market growth in 2017 came from traditional performance rights, the largest contributor to the music market in Argentina.

Physical Piracy. According to local reports, there are more than 490 illegal open-air markets in the country, and hard copy piracy is still rampant in major public markets and by street vendors, especially in Buenos Aires. By some estimates, hard copy piracy accounts for 60% of the illegal market for some industries. While hard copy piracy is not a concern for some industries, such as the music industry which is heavily digital for both legitimate and illegal source consumption, for many, it remains a significant concern.

A bright spot in enforcement has been an increased enforcement against piracy in several open-air markets in Buenos Aires, including *La Salada*, one of the largest black markets for pirated goods. As reported by USTR, in January 2017, Buenos Aires city authorities, with the support of Argentina's national government, evicted 2,000 illegal street vendors from the Once neighborhood.² These street vendors were relocated to nearby commercial facilities and provided with a stipend and a two-month business-training course organized by the Argentine Confederation of Small and Medium-Sized Enterprises. The high profile arrests of two alleged leaders and many associates of notorious market *La Salada* in June and October 2017, followed by largescale enforcement operations in December 2017, show a renewed governmental interest in cracking down on marketplaces known for counterfeit and pirated goods. Unfortunately, however, the market remained operational in 2018 and there was a significant growth in the number of locations and vendors across the entire city of Buenos Aires. By some estimates, there were 112.8% more illegal street vendors in Argentina in 2018, even if fewer stalls have been detected in illegal open air markets.

Camcording. While no illicit recordings of MPAA member films were sourced from Argentine cinemas in the period of January—November 2018, and only two camcords have been sourced to Argentina since January 2015, Argentina is home to a number of release groups which source camcorded material from all over the region and resell it online.

COPYRIGHT ENFORCEMENT

The creative industries report that, as in previous years, there were no significant enforcement actions in 2018. As seen in previous years, only a few basic actions (such as small street raids) took place, despite the government being in a better position to do more. Greater protections are especially needed online for IP and should be given more attention to help support the country's economic development.

In its April 2018 Special 301 Report, the U.S. Government noted long-standing deficiencies in Argentina's IPR protection, and especially the lack of effective enforcement by the national government. The report noted that Argentine police do not take *ex officio* actions, prosecutions can stall, and cases may languish. In addition, it observed that even "when a criminal investigation reaches final judgment, criminal infringers rarely receive sentences that deter recidivists or other potential infringers." In addition, the U.S. Government said that "criminal enforcement for online piracy is nearly nonexistent." The U.S. Government cited weak laws, leaving rights holders dependent on trying to persuade cooperative Argentine online providers to agree to take down specific infringing works as well as seeking injunctions in civil cases. These problems persist.

²USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

Some of the weakness in Argentina's copyright enforcement regime is attributable to a lack of resources during a persistent economic crisis, but much rests on failings in procedures not making use of the existing laws to tackle the challenge. A lack of sustainable action and public policies at the federal and provincial levels directed to combat piracy online and offline allow for multiple markets and sites to adapt and grow in resilience. There has been little to no action taken on both the online and physical enforcement, including seizures or investigations by federal or local authorities. In addition, *ex officio* action by enforcement agencies remains non-existent; the police fail to comply with search warrants in a timely manner; and prosecutors fail to take criminal cases forward. Moreover, few cases are being brought to the courts because the pre-trial judicial investigation (*instrucción del sumario*) tends to be lengthy and extensive and the piracy crimes are not a priority for the investigative authorities. All of this makes enforcement very difficult and the overall IP protection status in the country very low.

The general perception is that while enforcement actions remained at the same, very low level as in previous years, there is improved government initiative to (1) tackle organized crime; and (2) promote a legitimate digital market in Argentina that could be used to improve IPR protections generally. However, law enforcement agencies lack human and technical resources, and without adequate resources, agencies have a difficult time investigating and enforcing against IPR crimes.

Online Piracy. Particularly as to online piracy, there is a noticeable lack of action by either federal or local law enforcement. Thus, online infringement remains a major problem. Difficulties persist in the investigations of copyright violations, evidence gathering procedures, and the assessment of monetization structures based on advertisements by infringing sites, and a general perception of tolerance, including judicial tolerance, for online copyright infringements presents obstacles to law enforcement efforts and to rights holders' own civil litigation. There is also a jurisdictional issue between local and federal police forces when it comes to online piracy cases. Both local and federal authorities suffer from a lack of technical support and human resources able to tackle the problem on a large-scale level.

While there are agreements related to U.S.-based companies with DMCA-style requirements for content removal, ISPs typically ignore takedown notices submitted by rights holders. The agreements require much-needed improvement in order to counter rampant piracy levels, especially for repeat infringers.

To address digital piracy, the government should: (i) facilitate the bringing of civil cases based on the Civil and Commercial Code concepts of liability where liability in the online environment is concerned; (ii) encourage the development of processes that enhance cooperation between rights holders and online intermediaries; (iii) establish voluntary best practices or codes of conduct to facilitate dealing with copyright piracy over Internet services and to increase the application of measures once a relevant order has been issued; (iv) ensure that the law establishes sufficient liability for knowledge or inducement of, or material contribution to, infringement, and permits courts' access to incriminating data regarding online piracy; (v) create and train special working groups on federal and local levels for police and prosecutors and the judiciary; (vi) encourage and promote the engagement of prosecutors on a wider agenda of online activities against cybercrime in Argentina to generate the necessary framework for future cases;³ and (vii) create an IP-specialized Prosecution Office and establish a federal jurisdiction over copyright crimes. Currently, there is no official initiative with respect to Argentina's huge Internet piracy problem, and there has been no significant progress or evidence of political will in this area.

Physical Piracy. As for piracy of hard goods, there are simple measures that the Government of Argentina can take to reduce piracy. Market organizers should be required to restrict licenses to vendors selling legitimate products. Routine inspections followed by raids are needed for markets in Buenos Aires that offer counterfeit goods,

³In December 2018, a nine year piracy-related judicial procedure against *Taringa!*, the Argentine information exchange platform, resulted in an acquittal. In 2009, several legal publishing companies initiated a claim stating that copyright-protected material was being uploaded to the *Taringa!* site without proper authorization. According to the court, even though its users shared links to pirated material, given that the material was not stored on the *Taringa!* platform, obliging them to stop its publication would be tantamount to committing an act of prior censorship. See <https://www.lanacion.com.ar/2204758-la-justicia-absuelve-fundadores-taringa-9-anos>.

including illegal copies of video games, film and television DVDs, and pirated sound recordings, especially the markets located in the city center which are more accessible to customers. The enforcement of the existing laws on IP protection by local and federal authorities, including active participation by prosecutors on such actions, would create a positive impact in the short term on the local market and also allow for more long term cases, such as those to pursue organized crime groups behind many of these markets. Authorities should receive institutional support and training, including training on organized crime activities, to effectively deal with these cases. Active involvement by the AFIP is needed to reduce hard goods piracy, including the broad and open importation of illegal video game devices, consoles, and video cards, many of which come into Argentina from Paraguay.

Civil and Criminal Prosecution. In a positive development, the Administration's draft Penal Code Reform bill includes a number of provisions that will improve enforcement, including: (i) a provision prohibiting the commercialization of PDs; (ii) the making of IP theft equivalent to the theft of physical objects; and (iii) making illegal the incorrect reporting of pay-TV subscriber numbers. The Administration is expected to send its proposal to the legislature in March 2019. Rights holders encourage Argentine lawmakers to maintain these helpful provisions during the legislative process.

In June 2018, the Argentine Prosecutors Office successfully removed the site, *DescargasMix*, after two years of investigation. The site contained illegal links for the download of multiple media, including music, movies, and video games, and it had 15 mirror sites and over 1.8 million monthly visits. The *Cuevana* case, filed in August 2013, regained movement in 2018, with a positive decision determining the indictment of the service operator and the freezing of operators' assets up to US\$270,000. The criminal courts also determined that blocking *Cuevana* and all *Cuevana*-related domains served the purpose of deterring copyright infringement.

Notwithstanding these developments, criminal and civil prosecution of pirates continue to present significant procedural hurdles in the criminal and civil courts, and criminal prosecution of cases remain relatively non-threatening due to a very slow criminal prosecution process. For example, criminal cases can take up to six years to reach a final verdict. Thus, reform is needed to help cases move through the system. Providing authorities with information on digital piracy could potentially improve the duration and success of criminal prosecution. The Criminal Code needs reform, including legislation to clearly criminalize camcording activities.

In addition, Argentina does not have a prosecution unit dedicated to IP crimes, and law enforcement in general does not prioritize IP cases. The creation of that unit is absolutely indispensable to develop enforcement of IP rights in the country. Similarly, the judiciary should be exposed to the international best practices in this area. Moreover, jurisdictional rules concerning online copyright infringement remain unclear, and the effects of that can be seen on the enormous length of cases presented to the judiciary system in Argentina. One attainable solution is the federalizing the prosecution of copyright infringement in Argentina, exactly as it is done with brand infringement.

Civil action is often the only available recourse, particularly for obtaining preliminary injunctions. Procedural hurdles persist here as well, such as the high cost of conducting civil cases, high cost for obtaining a bond, and very long processes. In 2014, the *Pirate Bay* case seemed to set a positive precedent for site blocking. A 2018 survey revealed that the *Pirate Bay* site was still blocked by ISPs and that the blocking was active with respect to all domains, except one which still could be accessed. This was brought to the attention of the court, which in turn, requested the National Entity for Communications (ENACOM) to take action. Authorities should take *ex officio* initiative and also implement international best practices on site blocking.

A Civil and Commercial Code, entered into force in 2015, provides for general principles of secondary liability and due care. Applied effectively to online infringement cases, this Code has the potential to activate cooperation by various intermediaries whose services are used by pirate operators who otherwise risk liability. While most cases so far have concerned the liability of search engines, it is notable that judges often link the liability of ISPs to the injunction to remove the illegal content, and not to negligent actions of ISPs.

Working Group. Finally, IIPA welcomes and encourages continued dialog between the U.S. Government and the Government of Argentina under the Creativity and Innovation Working Group, including on how best to address digital piracy issues in Argentina.

COPYRIGHT ACT AND RELATED LAWS IN ARGENTINA

In April 2017, the Government of Argentina launched a public input process to gather views on how, if at all, Argentina should update its copyright law. After receiving submissions from various stakeholders, it does not appear that any legislative changes will be proposed. Should the Government of Argentina proceed with any reform of the copyright law, the Government of Argentina should ensure adequate opportunities for relevant stakeholders to contribute to the process, and insist on adherence to international agreements. IIPA urges the U.S. Government to closely monitor this process.

There have also been recent legislative proposals that, if enacted, would be a step backwards for Argentina's protection of creative content. Draft bills S-1865/15 and S-942/16, together known as the "Pinedo Bill," aimed to establish overbroad ISP liability limitations. They were approved by the Senate in December 2016, but fortunately were rejected by the Chamber of Representatives in November 2018. A troubling new bill establishing expansive safe harbors to protect a wide range of online intermediaries from content-related liability is expected to be presented to Congress in March 2019, by the Internet Chamber (CABASE). Like its predecessor, the new bill is expected to define "ISP" broadly enough to include nearly any company with an online or cloud presence, and would severely compromise the ability of rights holders to remove infringing content quickly from websites, by requiring them to initiate judicial proceedings and obtain a court order before a service provider is required to remove illegal content. The bill would make online copyright enforcement unworkable in Argentina. IIPA urges the U.S. Government to be vigilant to ensure that the troubling provisions of this draft legislation do not resurface. If such a bill were approved, there would be serious consequences to the local digital market and Argentina would risk becoming a safe harbor for even greater numbers of infringing sites and platforms. While rights holders appreciate the willingness of Argentine lawmakers to start fresh on this initiative, any future iteration of this proposal must be significantly modified to protect copyright.

In addition, IIPA members are concerned about proposals granting total immunity to ISPs and other platforms from any civil or criminal liability, and urge foreign governments to include in these proposals exceptions for IP enforcement, which must then be properly implemented. Additionally, there are concerns with overly broad copyright immunity, for example, provisions that immunize parties who induce or facilitate infringement. Such troubling proposals are also occurring in Brazil and broad immunities are in operation in Chile. Legal incentives that ensure cooperation of ISPs and other online intermediaries with rights holders, are important for online enforcement.

Within the former Ministry of Communications, a Commission was set up for the drafting of a bill to amend, update and unify Law No. 26,522 regarding Audio-visual Communication Services and Law No. 27,078 regarding Digital Argentina. The Convergent Communications bill, drafted by ENACOM, has not yet been submitted to the National Congress for debate. Chapter IV of the bill incorporates the net neutrality principle indicating that users enjoy the right to access, use, send, receive, and offer content, and banning ISPs from engaging in any conduct resulting, among other things, in content blocking. However, technical steps relating to traffic management and network administration required to comply with a court order or a user's express request are listed as exceptions. The bill could have an impact on anti-piracy actions carried out by phonogram producers and/or the Argentine Chamber of Phonograms and Videograms Producers (CAPIF). The bill's developments are being monitored to ensure that, if it is passed into law, right holders will be entitled to take blocking actions against unauthorized content. Although the latest version of the bill establishes net neutrality for all types of content, *i.e.*, it does not distinguish between legal and illegal contents, the above-noted two exceptions to this general rule apply: court order restrictions, and user express requests.

MARKET ACCESS

Local Content Quotas. Resolution 4773 E/2017 went into effect on January 1, 2018, and mandates certification of compliance with the screen quota provisions set forth in Section 67 of the Media Law and accompanying regulation (Decree 1225/10). The quota regime requires free television licensees to show eight Argentine feature films per calendar year, or, for certain licensees, to pay 0.50% of the previous year's annual turnover to acquire, prior to filming, the broadcast rights to locally-produced Argentine film and TV movies. Likewise, non-national (retransmitted) subscription television services that show primarily fiction programs are required to allocate 0.50% of the previous year's annual turnover to acquire the broadcast rights to independent Argentine film and TV movies. Regulatory Decree 1225/2010 established that the National Film and Audiovisual Arts Institute (INCAA) would create a registry of national films to be purchased (Art. 67), but that list has not yet been finalized and produced.

The article and regulations might be applied retroactively, meaning that the motion picture industry could be held accountable for screen quota compliance, including investment and screening, for the entire year 2017. The quota mandate was incorporated in the 2009 Media Law but has not been previously enforced. As of this writing, the status of content quotas for pay-TV and streaming services remains unregulated in relation to content quotas. U.S. stakeholders are engaging ENACOM to explore ways in which this resolution may be mitigated, or postponed pending further consultation. In December 2018, Resolution 131/2018 of Modernization Secretariat was published in the Official Gazette, establishing a fifth drafting extension for the still pending Convergent Communications bill. The new draft is to be presented one year after the publication of this Resolution, or 90 days after the "Short Law" is sanctioned, whichever happens first. The new bill is expected to address critical and controversial matters such as content quotas and advertising quotas; industry incentives; as well as new platforms.

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 the quotas distort the market, discriminate against U.S. audiovisual content, and are likely to result in increased piracy because Argentine consumers are unable to get sought after U.S. content.

Temporary Export Tax and Import Tax. The motion picture industry reports that content produced in Argentina for regional export will likely be negatively impacted by Argentina's temporary export tax, the extent to which is currently unknown. The Government of Argentina has called for a withholding tax on exports in response to Argentina's IMF package, as Argentina is under pressure to have zero public deficit in the wake of rampant inflation, rising interest rates, and plunging currency. The new tax was included in the 2019 Budget Bill passed in the Senate on November 14, 2018. The law modifies the Customs Code and provides for "services rendered in the country whose use or effective exploitation is carried out abroad" to be included in the concept of "merchandise," including "copyrights and intellectual property rights." The law also provides that services suppliers can be considered exporters. The temporary tax to be set at 12% on the billing value would be applied from January 1, 2019 to December 31, 2020. However, key definitions remain pending, including the services exports to be taxed and how the billing will be controlled by the local Federal Administration of Public Revenue (AFIP). The temporary export tax threatens to raise costs and make it difficult for U.S. producers to operate in the country.

In December 2017, the government passed a tax reform law that imposes a 35% customs duty on imported video game consoles, which will have a negative impact on the video game industry as well as on consumers who

resort to “unofficial importation” to avoid paying the extra charges. Moreover, the law will also impose a 21% VAT on over-the-top (OTT) services as well as on a range of services provided by companies in the “collaborative economy.”

COLLECTIVE RIGHTS AND COLLECTIVE MANAGEMENT ORGANIZATION ISSUES

In May 2018, a new Defense of Competition Law (LDC) became fully effective. The purpose of the LDC is to make significant changes to Argentina's anti-competition regulations and enforcement procedures. The new law seeks to foster competition, fairer market practices and prevent cartelization. It also creates the National Competition Authority and a Competition Defense Authority with a tribunal that will investigate and penalize practices that threaten market competition, a responsibility that will no longer depend on just one government official's perspective. There is a concern, however, that the law has been used to undermine collective licensing practices of rights holders' CMOs who are considered to be in the dominant position.

In connection with the amendment to the LDC, the Secretary of Commerce issued a resolution on June 26, 2018 imposing a fine on SADAIC (the Collective Management Organization representing Authors and Composers in Argentina) for charging abusive prices in the collection of performance rights to hotels. This resolution is not yet final, as SADAIC has filed a motion for appeal which is currently under review by Panel III of the Federal Civil and Commercial Court of Appeals. Two bills introduced in 2018 (S-537/18 and S-2884) would amend Section 36 of Law No. 11,723 for hotel rooms to be considered royalty-free areas, *i.e.*, exempting hotels from paying performance rights for the music played in their establishments. Such proposals would be inconsistent with Argentina's international obligations under the WPPT. In November 2018, the Federation of Gastronomic Hoteliers of the Argentine Republic (FEHGRA) repeated a request for a decree exempting them from paying royalties, on the understanding that it is an “abuse” to pay those tariffs for the mere possession of a television in a hotel room. Several CMOs request that royalties be paid assuming that access to a TV set in the bedroom implies that each passenger consumes copyrighted material. The Administration has not yet responded.

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2019.¹

Executive Summary: The U.S.-Chile Free Trade Agreement (FTA) entered into force on January 1, 2004, but Chile has yet to establish, implement, and maintain a copyright law and enforcement regime in line with 21st century norms and fit to combat the rampant piracy in the country. Chile's copyright law contains major gaps, including: failure to protect against circumvention of technological protection measures; failure to implement clear and comprehensive secondary copyright liability standards; meaningless notice-and-takedown obligations that require a court order for an ISP to take down content, thereby posing a legal obstacle to standard takedown practices accepted elsewhere in the world; a lack of deterrent remedies; and overly broad exceptions to copyright. These issues remain unresolved, even after Chile adopted amendments to its copyright law in 2010, and prevent a fruitful collaboration with ISPs to combat online piracy because of the lack of necessary mechanisms to encourage participation. Moreover, a new legislative initiative at the Ministry of Justice contemplates a "reform" of the Penal Code whereby all copyright infringement penalties would be reduced and all infringement would become misdemeanors.

Chile continues to have a serious online piracy problem, including significant levels of stream-ripping, file sharing of infringing content over peer-to-peer (P2P) networks, and illegal use of cyberlockers. Additionally, although there has been a slight improvement in illicit camcording, it remains an issue, and Chile does not have a law directed at illicit camcording in theaters. Moreover, Chile continues to be a hub for trafficking in circumvention devices and services. Unfortunately, Chile's enforcement regime is ill-equipped to handle such piracy, causing its police and court personnel to ineffectively bring cases even in the areas where Chilean law is adequate to bring action against certain copyright crimes. Video game companies, in particular, are limited in enforcement options with respect to circumvention devices and can only pursue such enforcement actions through other avenues, such as unfair competition. Furthermore, Chile remains the only country in Latin America that does not have a dedicated and centralized national copyright authority. This has profound effects on the ability to achieve progress on copyright matters and fight piracy, especially as piracy moves to the digital environment. Making matters more challenging, when cases are successfully brought before the court, judges continue to impose insufficient and non-deterrent remedies, and procedural requirements are often ill-suited to the realities of online infringement and digital evidence gathering. As Chile continues to work to build its local creative industries, a vibrant legitimate online market for creative content, and an international reputation as a reliable trading partner, it must address the issues in its copyright enforcement regime.

PRIORITY ACTIONS REQUESTED IN 2019

- Adopt technological protection measures (TPMs) legislation and enforce anti-circumvention provisions (both criminal and civil).
- Further amend the copyright law to (i) distinguish clearly between neutral and passive service providers, who might be eligible for the (amended) ISP safe harbors, and services that cannot benefit from the ISP safe harbors; (ii) enable and meaningfully incentivize service providers to enter into voluntary cooperation with rights holders against online copyright infringement; (iii) overhaul the current meaningless notice-and-takedown system to ensure that the removal of copyright infringing content, or the disabling of access to it, does not require court

¹For more details on Chile's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Chile's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



orders; (iv) introduce deterrent civil and criminal sanctions for copyright infringement, the establishment of statutory damages, improved injunctions, including against foreign-based websites, and an effective civil *ex parte* search remedy; and (v) provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent.

- Refrain from reducing copyright infringement penalties currently provided in the Criminal Code.
- Implement and maintain a copyright enforcement regime that is appropriately staffed and trained and is equipped with adequate resources to effectively combat online piracy.
- Ensure that any contemplated “digital services” tax does not create a sales tax on subscriptions to, or purchases of, digital copyrighted content and does not result in unwarranted discrimination in favor of “free to end consumer” business models (as used by certain, already dominant online distribution services) over services that offer paid access to copyrighted content. Care should be taken that any regulatory measure of this sort does not entrench current market failures, which affect the legitimate market for online copyright content.

COPYRIGHT PIRACY IN CHILE

The piracy in Chile remains consistently prevalent as in past years and involves various modes of infringement such as Piracy Devices (PDs), high levels of stream-ripping, file sharing of infringing content over P2P networks, hosting of unauthorized material on websites, illegal use of cyberlockers, hyperlinks to infringing materials, online sales of circumvention devices for use with illegal video game files, and, increasingly, illegal mobile downloads. The most popular piracy sources in Chile are foreign based stream-ripping sites, linking sites, and P2P networks. In other words, piracy sites affecting the Chilean market are largely foreign, which highlights the need to strengthen Chile’s national law to protect against outside infringers. In 2018, *thepiratebay.org*, fully operational in Chile, received approximately 25 million visits from Internet users within Chile, and the top 180 Spanish-language audiovisual piracy websites received 300 million visits from Internet users within Chile. Such consumption of pirated content harms the legitimate market in Chile.

Chile remains active in the sale of circumvention devices such as video game copier devices and modified consoles with free games for pre-street-date titles made available through online auction sites, such as *Mercado Libre*. The modified consoles include the Nintendo Switch, Nintendo 3DS, Sony PSP and PS3, and Xbox 360. The commercial area of Providencia in Santiago, *Paseo Las Palmas*, is well known for the sale of video games and related products. Stores offer handheld consoles for sale at different prices, depending on whether the consoles have been modified or not. Known hackers have identified their “official reseller” in Chile for the sale of Nintendo SX Pro/SX OS as *chile-server.cl*. The site *NeoGames.cl*, which is hosted and operated in Chile by a local, Santiago ISP, *Magnetizarte Ltd.*, continues to be a leading purveyor of circumvention devices and “unlocked” or modified consoles, against which there are no means of enforcement. *NeoGames.cl* deceptively bills itself as an “authorized reseller” in Chile for handheld video game consoles and offers bundle packs, which are consoles pre-loaded with video games. Although this website now redirects to *Neutronics.cl*, it still offers “unlocked” consoles and services and is based in Santiago. Traffic to *Neutronics.cl* increased by 20% over the last six months, totaling over 25,000 monthly visits. Withdrawal of legitimate payment services for this site has been difficult as credit card companies have faced challenges verifying payment methods. In 2018, Chile placed 15th in the world in terms of the number of peers participating in the unauthorized file-sharing of select video game titles through personal computers on public P2P networks. Notably, Chile ranked 5th in the world in P2P infringement of console-based video games.

The recording industry continues to be heavily affected by Internet piracy, including significant levels of stream-ripping, file sharing of infringing content over P2P networks such as *BitTorrent*, and illegal use of cyberlockers such as *Mega*, *Mediafire* and *4shared*. As stated above, the pirate sites affecting the Chilean music market are largely foreign-based. Stream-ripping websites, which are the major piracy issue facing the music industry in Chile, circumvent TPMs used on popular and legal music streaming services such as YouTube and enable the illegal conversion of streams into permanent downloads. Such activity undermines the revenue models of licensed streaming services, especially those with premium, paid service tiers that offer users the option to cache streams for offline listening. The recording industry, independently of the government, recently conducted an Internet anti-piracy

enforcement campaign with promising, but modest, results. While the recording industry has had some success working together with foreign ISPs, the official system in Chile is inadequate to deter bad actors from hosting infringing content, as outlined below.

The unauthorized camcording of films in theaters has a significant negative impact on both U.S. and Chilean filmmakers. Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. Chile has improved in this arena. As in 2017, there were no illicit camcords of MPAA member films traced to Chilean theaters in 2018. Even with this positive turn around, IIPA continues to urge the Chilean Government to enact specific legislation that would criminalize illicit camcording in theaters, including deterrent penalties, and to strengthen its enforcement regimes so that these positive gains can be sustainable in the face of ever-changing criminal behaviors. Such measures should not include any requirement of proof of the camcorder's intent to profit, which would significantly hamper enforcement and prosecution of camcording activity.

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

LEGAL REFORM

Chile's FTA with the United States entered into force January 1, 2004, and it was intended to achieve a higher level of copyright protection and enforcement in Chile;² yet, Chile's copyright law regime remains inadequate. IIPA has repeatedly voiced concerns regarding its deficiencies, and the urgency for reform is as strong as ever. Chile adopted amendments to its copyright law in 2010 to attempt to modernize its copyright law.³ However, in comparison with the modern best practices in the protection and enforcement of copyright online, significant gaps still remain in the following areas:

Protection of TPMs and Criminalization of Circumvention Devices: In October 2018, Chile enacted a new law attempting to crack down on and criminalize the sale and/or importation of devices or software that decode encrypted satellite signals. The law provides for fines of up to \$70,000 for those caught importing, selling, or installing the illegal devices, but spares users from any sanctions. While the law is a welcomed step toward combatting the proliferation of these devices, which undermine the legitimate pay-TV market in Chile, a question remains as to whether the law is fully FTA compliant because the sanctions do not apply to users who willfully receive or distribute the pirated signals. Additionally, more information is necessary to understand whether fines of up to \$70,000 are sufficient to deter future infringement.

Even in light of its new 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 on online marketplaces is increasingly prevalent. Also, music rights holders are left without support to tackle the problem of stream-ripping sites that allow for users to download content, without authorization, through circumvention of TPMs. Chile should amend its law to provide adequate legal protection for all forms of TPMs. Moreover, Chilean authorities should take action against the provision of music stream-ripping services.

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

³These legal requirements and the 2010 copyright law amendments, including Chile's notice and notice infrastructure, have been examined in greater detail in IIPA's previous filings. See, e.g., <https://iipa.org/files/uploads/2017/12/2013SPEC301CHILE.pdf>.

Content Removal: Current law in Chile is inadequate for the 21st century online economy because service providers are only required to remove copyright infringing content or disable access to it following a court order.⁴ This legal requirement can be an excuse for ISPs unwilling to take down content and can even be a legal obstacle for ISPs who would otherwise react to rights holders' take down requests. The law also does not provide any consequences for an ISP that fails to act after gaining knowledge of infringement through a notification. Moreover, the notice-plus-notice architecture under Chile's copyright law is entirely inadequate because it merely encourages ISPs to engage with users regarding instances of infringement, but lacks the threat of any real consequences with respect to repeat infringements for typical online piracy. The system is simply too costly and time consuming with very ineffective results. Rights holders' only option is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users. In the past, the recording industry worked together with ISPs to test a large-scale notice sending scheme. More than 12,000 notices were sent to P2P users engaged in the exchange of unauthorized music files, but this experiment confirmed that the legal framework is unworkable in practice, as there were no meaningful legal consequences or sanctions against users or ISPs and rights holders were not in a position to bring court cases against each individual uploader. The experience in Chile shows that such a system does not produce results. Unfortunately, since Chile's adoption of the 2010 amendments attempting to establish ISP liability and deterrent criminal penalties, the government has failed to come back to the table to develop a meaningful strategy for tackling copyright infringement online.

Additionally, there is no definitive legal mechanism for website blocking under current law. Article 85R provides that a court can order an ISP to block access to clearly identified infringing content only if the blocking does not involve blocking access to other content. This provision creates infinite scope for abuse (as the posting of a single non-infringing work can be relied on to oppose blocking measures) and significantly limits the power of Chilean judges to order effective remedies to limit and prevent online infringement.

Safe Harbors: One key component to defeating online piracy is the collaboration with and cooperation of intermediaries, ranging from traditional passive ISPs, to search engines, advertisers and domain registrars. In Chile, the struggle with ISPs is not their lack of cooperation, as they are quite willing to work with rights holders to fight against piracy, but rather it is the Chilean law that hinders the effectiveness of this working relationship. The law should be amended to ensure that safe harbors are only available to technical, automatic, passive ISPs. Currently, Article 85Ñ of the Copyright Act sets out broad safe harbor protection for hosting service providers and search engine, linking or reference services who do not have "*effective knowledge*" of IP infringement, which can only be established by a court order. This provision significantly limits the circumstances where a hosting, search or linking service provider can be liable for infringements committed by its users.

IIPA members are concerned about proposals granting total immunity to ISPs and other platforms from any civil or criminal liability, and urge foreign governments to include in these proposals exceptions for IP enforcement, which must then be properly implemented. Additionally, there are concerns with overly broad copyright immunity, for example, provisions that immunize parties who induce or facilitate infringement. Such troubling proposals are also occurring in Brazil and Argentina. Legal incentives that ensure cooperation of ISPs and other online intermediaries with rights holders, are important for online enforcement.

Statutory Damages and Civil Remedies: Under 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 nor does it provide injunctions against intermediaries and an effective civil *ex parte* search remedy.

⁴The Internet Service Provider (ISP) liability provisions of the 2010 legislation provide a means by which rights holders may seek a court order for the removal of infringing material by an ISP (Article 85Q of the Copyright Act), which can result in the removal of infringing material, but only after a lengthy court process. Meanwhile, the mechanism for a voluntary system by which ISPs are to forward notices of infringement to users within five working days of their receipt (Article 85U) has had some positive impacts, as discussed in the text, but lacks incentives for compliance; thus, standing alone, it is simply an inadequate response to widespread Internet piracy.

Concerning proposals for a reform of the Criminal Code: The Ministry of Justice is currently working on a legislative proposal to reform the Criminal Code of Chile, and the substance of the proposal is concerning. The Ministry is contemplating a reduction in the level of penalties for copyright infringement and converting all forms of copyright infringement into misdemeanors. Such a change would be incompatible with the FTA and the requirements of the TRIPS Agreement. Thus, the government should refrain from carrying out these unhelpful amendments to the existing criminal law.

Exceptions to Protection: The law contains certain exceptions that appear to be incompatible with the FTA. These include: a reverse engineering exception that is not restricted to achieve 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 the FTA to ensure that exceptions and limitations are not overbroad.

Collective Management Organizations: In 2008, Chilean law introduced unwaivable and unassignable remuneration rights for various acts of exploitation of audiovisual works in favor of audiovisual performers, which threatens the freedom to contract. In 2016, Chile implemented the Larrain Bill, which extended the reach of the 2008 law to include audiovisual authors (directors and script writers). The remuneration rights introduced by this legislation apply to audiovisual works communicated to the public by TV broadcasters, cinemas and possibly ISPs through on demand services, as well as performances in public venues and public lending. In 2017, following implementation of the Larrain Bill, a national collective management organization (CMO), ChileActores, began contacting local distributors of U.S. audiovisual works to demand remuneration in the form of a 2% tariff on box office revenues. This is done with respect to the remuneration rights of performers only. IIPA has no knowledge as to whether any author remuneration demands have been asserted thus far. While ChileActores may validly represent remuneration rights of Chilean performers and performers of other nationalities, ChileActores does not represent any members of U.S. performer guilds or unions. Moreover, the Chilean law, as implemented, does not require mandatory collective management of these remuneration rights. This means CMOs such as ChileActores are not automatically deemed to represent performers, but rather they must have a specific mandate to do so. Thus, attempts by ChileActores to claim remuneration on behalf of U.S. performers are not supported by any valid representation or other authorizations. MPAA is collaborating with the U.S. Government's regional IP Attaché to challenge any invalid or unsubstantiated claims and to educate the Chilean Government about the contractual frameworks U.S. producers of audiovisual works employ to provide ongoing, equitable and contractually agreed upon remuneration to performers, authors and directors. Collective rights management legislation (Artists Copyright Bill/11927-4) recently approved in Chile's Congress would shift the burden to pay from the distributors to the exhibitors, but does not make collection mandatory for U.S. works.

COPYRIGHT ENFORCEMENT IN CHILE

IIPA's commentary on Chile's copyright enforcement remains the same. Chile remains the only country in Latin America without a dedicated, centralized authority responsible for copyright matters, including copyright enforcement. Copyright matters are handled by four entities, operating under different ministries, and remain poorly coordinated.⁵ Several specific and significant impediments to effective criminal enforcement in Chile are: (1) the IPR Prosecutor's Office does not dedicate the time and resources to understand and build online piracy cases, (2) the National Prosecution Office lacks a special branch to investigate intellectual property cases, (3) the *Carabineros*, the prosecutor's office, and the judicial police suffer from a lack of sufficient human resources, (4) judges continue to impose the minimum available penalties, which are non-deterrent, even with higher penalties available under the 2010 amendments, and (5) the Criminal Procedures Code and the Penal Code treat copyright piracy as a misdemeanor, empowering prosecutors to enter into agreements with the accused to substitute inadequate punishments such as community service and probation for criminal penalties.

⁵1) *Departamento de Derechos Intelectuales en la Dirección de Bibliotecas, Archivos y Museos*, Ministry of Education; 2) Minister of Education; 3) *DIRECON – Dirección de Economía, Departamento de la PI*, Ministry of Foreign Affairs; and 4) general IP prosecutor.

On a positive note, police and customs officials continue to involve rights holders in legal procedures. The copyright industries maintain good cooperation with Chilean criminal and civil enforcement authorities (within the confines of an inadequate legal regime) and with Chile's National Institute of Industrial Property (INAPI). While the copyright industries report a reduction in *ex officio* actions against physical format pirated products, which may be as a result of the shift towards online piracy, in 2017, one video game company had three sizeable seizures totaling 8,300 products. The products included fake Wii U tablets and infringing hardware consoles with built-in video games. This is a positive result and such actions should continue; however, because of the shift to online piracy, authorities should redirect most enforcement energy to pursue enforcement actions against Internet sites distributing infringing products and content. Civil actions are often delayed by procedural obstacles, so increased criminal enforcement is welcomed.

In early January 2016, Chilean Police took action against one of the world's largest release groups, which had been in operation since 2008. This group was responsible for the physical and online release of at least 80 identified infringing copies of feature films made by illegal camcording in a theater; operated FTP servers in Chile, the United States, and Europe; and managed at least ten different distribution websites. The operator of group was convicted in April 2017 and sentenced to 71 days in prison. This sentence was replaced with a one-year obligation to pay a monthly fine to the state, attend weekly meetings at the reformation unit in his home city, and keep the local police informed of his whereabouts. Failure to fulfill any of these obligations would result in an immediate reinstatement of his initial imprisonment sentence.

MARKET ACCESS

Screen Quota Bill: Bill 8620-24, modifying Law No. 19.981 on Audiovisual Promotion, would impose a 20% theatrical quota for Chilean films. The U.S.-Chile FTA does not permit screen quotas on theatrical exhibition of films. Moreover, this quota legislation appears to potentially violate fundamental rights afforded by the Chilean Constitution such as economic freedom and freedom of expression.

Digital Services Tax Bill: Bill 1871/5000 would impose a 10% tax rate on digital services. This bill, which is being reviewed by the Chamber of Deputies (the first stage in Congress), would encompass entertainment services for digital content such as images, movies, series, videos, music, and games accessed through downloading, streaming, and/or other technology. While nobody is seriously opposing the idea that digital services should be subject to tax laws, the recording industry is following this bill with great attention because if the proposal goes too far (some are proposing up to 20%), it may bring an unreasonable added cost to legal access to music content in Chile and/or further distort the online marketplace for content that is already struggling with the market failures represented by piracy and lack of enforcement. Care should be taken to ensure any tax would not favor "free-to-end consumer" business models over paid access business models.

CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2019 and that China be monitored under Section 306 of the Trade Act.¹

Executive Summary: China's ascendant marketplace for creative works has yet to reach its commercial potential. Supported by the largest Internet user base in the world, China's online marketplace continues to expand, providing consumers with access to a vast array of legitimate music, movies, TV programming, and other works available through an increasing number of licensed digital services. In addition, China now leads the world with over 60,079 movie screens, most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen. While past improved enforcement efforts, particularly against unlicensed music services, have contributed to accelerated gains for certain sectors, China's market for legitimate content continues to be hampered by a combination of rampant piracy, discriminatory market access policies, and long-standing unfulfilled international obligations.

Problems abound, including piracy apps and devices, illegal camcording, dissemination of pirated content through cloud storage services (such as Baidu Pan) and social media platforms (such as baidu tieba, wechat and weibo). New emerging problems include the growing number of online platforms that facilitate piracy of scientific, technical, and medical (STM) journal articles and academic texts, and the proliferation of thousands of "mini Video On Demand (VOD)" locations that show unauthorized audiovisual content. Criminal enforcement efforts remain stunted by thresholds that are too high and do not cover all "commercial scale" piracy as required by the WTO TRIPS Agreement, and civil litigation, even when successfully brought against blatant piracy services such as Xunlei, is generally ineffective due to a lack of meaningful injunctive relief and low damage awards. The National Copyright Administration of China (NCAC), in cooperation with rights holders, has taken action against significant online services that facilitate audiovisual piracy, but has reduced enforcement in other sectors, including against pirated music. In 2019, NCAC should enhance its enforcement efforts regarding all copyright sectors. Overall, much more is needed to tackle China's growing piracy problems identified above and described in this report.

The Copyright Law amendment process, which is at a critical stage, is vital because a positive outcome would lay the foundation for a successful future for the creative industries in China. To achieve that goal, China must not weaken the protections outlined in the most recent public draft, particularly regarding rights for broadcast and public performance for sound recordings. Instead, China should strengthen those protections, including by providing a term of protection in line with international trends; effectively address its evolving piracy challenges, including by ensuring that services that facilitate piracy are held liable (regardless of whether the content is stored on their servers) and prohibiting unauthorized Internet retransmission of live broadcasts; and bring its standard of protection and enforcement into compliance with international norms and best practices.

China should abandon recent proposals that would erect additional barriers to its online marketplace, and should eliminate current impediments to its market, which exacerbate its piracy problem by impeding access to sought-after U.S. creative content. For example, China should reconsider the 2016 Online Publishing Rules prohibiting foreign involvement in online publishing activities, and revoke recent measures that discriminate against the production, distribution, and broadcast of foreign film and television content.

¹For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of China's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



IIPA seeks further reforms and enforcement of China's existing obligations to improve access for U.S. film producers to China's well-established theatrical film market, which leads the world in the number of screens and will soon surpass the U.S. in total box office. Pursuant to the nearly decade old WTO settlement, China must fully implement the 2012 U.S.-China Film Agreement, including, among other key issues, permitting private Chinese distribution companies to engage in theatrical releases of imported films without the interference of State-Owned Enterprises (SOEs), increasing the revenue share for producers of imported theatrical films, eliminating written and unwritten quotas on imported films, and ensuring the timeliness and transparency of the censorship process. In addition to committing to provide additional meaningful compensation in 2017, China also committed in the Agreement to consult on other key issues. China has not met these requirements, nor fully implemented its other obligations under the Agreement. Instead, China has created new barriers to authorized online distribution of imported films and TV programming, and imposed significant restrictions on foreign investment in online platforms, production and distribution companies. Lack of access to the Chinese market by U.S. producers has created a fertile environment for widespread piracy of films sought by Chinese viewers. It is urgent that China immediately fulfill its commitments under the Agreement (including, e.g., cracking down on the under-reporting of box office revenues), and participate in ongoing consultations on the Agreement in order to meet international standards for a market of its size and sophistication.

PRIORITY ACTIONS REQUESTED IN 2019

Enforcement:

- Take further effective action, with increased transparency, against the online piracy ecosystem, including against: piracy websites, such as *zimuzu.tv*, *dytt8.net*, *666c.com*, *sacdr.net*, *yyp3.com*, *musicool.cn*, *dy2018.com*, *xh127.com*, *b9good.com*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bttt99.com*, *80s.tw*, *meijutt.com*, *ygdy8.com*, *dysfz.vip*, *panduoduo.net*, *btbtdy.net*, and *lbldy.com*; piracy facilitated through the cloud storage service Baidu Pan, through the Xunlei thunder service, and on *miaopai*, and other similar user-uploaded content (UUC) video services; plugin player *xigua* and its related piracy ecosystem; and apps such as *Renren Shipin*, *KuaiKan*, *Today Vido*, *XF Play*, *Haiyao Music*, and *Tian Lai K Ge*.
- Bring more targeted and deterrent enforcement actions, with transparency, against Piracy Devices (including against dedicated piracy apps), unauthorized movie broadcasts in mini VOD locations, unauthorized camcording, unauthorized broadcasting of movies and music, and hard goods piracy (including against production and supply of high quality counterfeit optical discs and USB flash drives containing high volume of infringing sound recordings).
- Improve effectiveness of administrative enforcement, including by imposing enhanced penalties against repeat infringers and infringers that make available massive amounts of infringing content; increasing transparency (e.g. notifying rights holders of the results of administrative actions); facilitating more efficient transfer of copyright cases between administrative and criminal authorities, making clear that such transfers are required upon "reasonable suspicion" that the criminal thresholds are met; expanding resources and capability at NCAC, local Copyright Administrations (CAs), and Cultural Law Enforcement Agencies (CLEAs), especially after the government restructuring across the country, commensurate with the scale and complexity of the piracy problem; and improving the performance of local cultural enforcement departments to ensure effective action is taken against infringement reported by rights holders.

Legislation:

- Enact comprehensive copyright law reform to enhance the development of the creative industries in China, incorporating changes recommended by IIPA and member associations in various past filings including, in particular, ensuring a remedy against apps facilitating infringement (especially where infringing content is hosted remotely); adopting clear rights of public performance and broadcast for works and sound recordings; prohibiting unauthorized Internet retransmission of live broadcasts; clarifying ISP safe harbor requirements to ensure that safe harbors only apply to passive and neutral intermediaries that do not contribute to infringing activities;

providing a term of protection in line with the international trend; and ensuring that exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope.

- Improve enforcement framework by, *inter alia*, revising the criminal threshold to ensure criminal penalties are available against all instances of commercial scale piracy, separately defining criminal violations regarding circumvention of technological protection measures (TPMs) or trafficking in circumvention technologies, and rejecting the “server principle” in cases involving apps and indexing/linking sites that provide unauthorized access to copyrighted contents hosted remotely.
- Ensure proper implementation of the e-commerce law, including ensuring that implementation of Article 43 does not result in sellers of infringing products avoiding responsibility by merely objecting to rights holders’ notice of infringement.

Market Access:

- Open key elements of the audiovisual market to foreign investment, particularly in online video services, audiovisual production, and movie distribution; reconsider the Online Publishing Rules prohibiting foreign involvement in online publishing activities; and revoke all other measures—including the Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats, and content approval regulations for mobile games—that discriminate against foreign content by imposing requirements such as registration, onerous, opaque, and *de facto* discriminatory censorship procedures, restrictions on foreign content on broadcast, pay TV, and online video, and strict quotas on foreign films and television programming.
- Abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content, including the recent proposals by China’s National Radio and Television Administration (NRTA) for regulating the production and distribution of foreign audiovisual content.
- The U.S. Government should press China for immediate, full, and transparent implementation of all the terms of the 2012 U.S.-China Film Agreement, including the obligation to provide further meaningful compensation on revenue share and other issues in 2017, by: 1) liberalizing the distribution market for private third party Chinese distributors to engage in theatrical distribution without the interference of SOEs, in accordance with China’s commitment in the Agreement and at the June 2015 Strategic and Economic Dialogue (S&ED); 2) substantially increasing 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) fulfilling its commitment for Box Office audits under the Agreement by adopting internationally recognized methodologies; 4) allowing U.S. producers more control over release dates, addressing the problem of the Chinese locking out U.S. films from the prime release dates, and ending the practice of “double booking” theatrical releases; 5) eliminating informal restrictions on the number of imported “flat fee” films so that more independent producers have unimpeded access to the Chinese market; 6) further relaxing the quota for revenue sharing films so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films in China; 7) ensuring U.S. producers receive timely responses to quota allocations and censorship determination, and effective access to ticketing system information to ensure proper reporting of revenues; 8) providing a timely and transparent censorship process for imported content; and 9) refraining from imposing any other barriers or discriminatory restrictions that hinder the ability of U.S. producers to engage in or conduct business with Chinese distributors or the Chinese Government.

COPYRIGHT PIRACY UPDATES IN CHINA

Prior IIPA submissions in the Special 301 docket, as well as IIPA filings in WTO compliance reviews and other fora, have provided detailed accounts of the many piracy and enforcement challenges and issues in China. This year’s Special 301 filing serves as a supplement to those, and is not meant to provide an exhaustive review of all issues.²

²See, e.g., IIPA’s 2018 Special 301 submission on China (“IIPA 2018”), available at <https://iipa.org/files/uploads/2018/02/2018SPEC301CHINA.pdf>; IIPA, *China’s WTO Compliance – Notice of Intent to Testify, Summary of Testimony, and Testimony regarding: “Request for Comments and Notice of Public Hearing*

Online Piracy Remains a Problem: China's online piracy problem persists, and takes a variety of forms. Piracy websites include illegal download sites; peer-to-peer (P2P) piracy sites; deep linking sites; "hybrid" sites, such as *3dmgame.com*, which offer both hosting and torrenting services; cyberlockers; BitTorrent indexes or trackers; forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods, Piracy Devices, high quality counterfeits, and USB flash drives containing high volume of infringing sound recordings. For example, Xunlei Thunder is a BitTorrent service that makes available unauthorized motion picture and television content to users. In addition, large quantities of infringing content are stored in cloud storage services in China, such as Baidu Pan, to which links are disseminated through social media platforms (e.g., baidu tieba, wechat and weibo) and piracy linking sites. Applications (apps) facilitating piracy are available on a myriad of devices. And China is the hub of technologies proliferating around the Asia-Pacific region and worldwide by which Piracy Devices (e.g., media boxes, set-top boxes, or mobile devices) allow users to access infringing content using apps or add-ons, through a smart television or directly through the mobile device screen itself.

The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile and handheld devices and televisions) has been expanding at an alarming rate. Apps that aggregate infringing content hosted on remote servers are proliferating. Examples of such apps include *KuaiKan* (listed by U.S. Trade Representative (USTR) in its 2017 Out-of-Cycle Review (OCR) of Notorious Markets)³ *Renren Shipin*, *Today Vido*, and *XF Play*, which facilitate infringement of audiovisual content; and *Haiyao Music*, which facilitates infringement of music. Sometimes, apps are advertised and distributed through traditional websites that provide a portal allowing users to download the app to their devices. App operators may also advertise and distribute their apps through bulletin boards, social media, or other chat functions through apps. However they are distributed, these apps provide access to a variety of pirated content, including motion pictures and television programming. In 2017, the music industry reported 243 infringing apps to mobile app marketplaces in China. One app in particular that is extremely popular in China as well as Hong Kong is *Tian Lai K Ge*, a set of infringing Karaoke apps; unfortunately, while the app has been taken down from the app store at least eight times, each time it has been taken down it has quickly reappeared with the same content but under the names of different developers. Chinese enforcement authorities have been reluctant to take appropriate action.⁴ In 2018, rights holders sent complaints to NCAC and the Ministry of Culture and Tourism (MOCT), but did not receive any response; and a civil case was filed in early 2018, but it has not yet been heard or adjudicated. China must do more to combat the growing threat of the app piracy ecosystem.

Traditional website piracy remains a major issue in China, causing significant damage to rights holders. Notorious piracy sites that disrupt the music and audiovisual marketplaces include *zimuze.tv*,⁵ *dytt8.net*, *666c.com*, *sacdr.net*, *yymp3.com*, *musicool.cn*, *dy2018.com*, *xh127.com*, *b9good.com*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bt99.com*, *80s.tw*, *meijutt.com*, *ygy8.com*, *dysfz.vip*, *panduoduo.net*, *btbtdy.net*, and *lbldy.com*. An increasing number of pirate sites use CK Player, an online media player that facilitates infringement of audiovisual content, including video games. The video game industry reports that three popular Chinese websites largely ignore takedown requests: *soft5566.com*, *wuguicili.com*, and *btclillian.net*.⁶ The number of streaming sites continue to increase. Some music streaming services, including *yymp3.com*, were hosted in China but now use a U.S.-based reverse proxy service to obscure their location and have stopped responding to takedown request notices. Other sites, such as *666c.com*, *cdbao.net*, *88liu.com*, and *mu6.me*, have begun to adopt the same strategy. Infringement of audiovisual materials (i.e., music videos) is also a problem. The music industry reports that based on their monitoring, 64% of the

Concerning China's Compliance with its WTO Commitments (83 Fed. Reg. 42968, August 24, 2018), September 18, 2018, available at https://iipa.org/files/uploads/2019/01/2018_Sep18_IIPA_Comments_on-China_WTO_Compliance.pdf.

³For the most recent report, see USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

⁴The Beijing Culture Enforcement Team has not taken any action to investigate this repeated infringement. This raises the prospect that infringing services will make use of these weak links and, for example, move their activities to Beijing to evade enforcement. National Copyright Administration of China (NCAC) should investigate this issue to improve the performance of the local enforcement teams, particularly the team in Beijing.

⁵According to Alexa, *zimuze.tv*, a linking site, is currently ranked as the 117th most popular website in China, and SimilarWeb recorded 22.1 million visits to the site in December 2018.

⁶These sites are all registered business entities in China, and host content and link to other sites with infringing video game content. Over 87% of the traffic to *soft5566.com* originates in China. In response to takedown notices from the video game industry, *soft5566.com* and *btclillian.net* take down only 1% of infringing content, and *wuguicili.com* takes down 17% of infringing content.

406,089 infringing links they discovered in 2018 were to infringing audiovisual content. For the music industry, licensed streaming and digital piracy compete side by side, with nine in ten Internet users consuming licensed audio streaming and nine in ten users engaging in piracy. Music piracy consists mainly of illegal downloads through cyberlockers (such as Baidu Pan)⁷, international P2P sites (such as PirateBay and Nyaa), and streaming of pirated content, including short videos, from user-uploaded content (UUC) sites (such as *weibo.com*, *miaopai.com*, and *bilibili.com*). As discussed below, the misapplication of safe harbors to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on these sites. The music industry reports that the takedown rate of infringing links is high; however, infringing content reappears quickly as there is no requirement for ISPs to ensure this content stays down permanently.⁸

Chinese enforcement authorities should investigate and take action against “clone pyramid” piracy websites, a network of thousands of sites created by users of piracy websites who are enticed to create their own derivative sites to generate revenue for themselves and for the mother site. The users download a proprietary video player (often malware, which links the user’s computer to the website), which provides applications allowing users to access infringing content over a proprietary P2P network or a content delivery network (CDN). An example is the *xigua* plugin player. A Content Management System (CMS) website helps users to easily create their own derivative websites embedded with the video player, and a Video Collection Resource (VCR) website provides these derivative sites with access to the infringing content. These user-created piracy websites generate traffic (and income) for their owners, and the video player embedded into these websites links back to the original website, generating traffic (and income) for its owners. Chinese enforcement authorities should focus on the producers of the proprietary video players and the CMS and VCR websites that facilitate the expansion of this network.

Piracy Devices: Piracy Devices are media boxes, set-top boxes, or other devices that allow users, through the use of piracy apps (as discussed above), to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes in China, as well as elsewhere in Asia and increasingly around the world. China is a hub for the manufacture of these devices. The devices may be promoted and/or advertised to enable infringement of copyright or other illegal activities. These activities include facilitating easy access, through apps, to online sources of unauthorized entertainment content including music, music videos, karaoke, motion pictures and television programming (including encrypted content), video games, published materials, and TV content. The devices are loaded with apps that facilitate infringement. These apps may be pre-installed, either prior to shipment, prior to sale by the vendor, or as an after sale service. Alternatively, users themselves can obtain instructions on where and how to access and install the apps required to access the infringing content.

Piracy Devices are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials, and enforcement against them presents complex challenges. If the retailer/distributor takes steps to facilitate infringement, including by pre-loading apps or offering the apps as an after-service, or otherwise breaks the law (e.g., through the circumvention of TPMs protecting the content), this may provide a legal basis to hold the retailer/distributor liable. Furthermore, an additional avenue for copyright liability would be against the app developer. As noted above, the apps allow users to connect to a supporting over-the-top (OTT) online infrastructure that provides users with instant access to infringing audiovisual content. However it is done, the Chinese Government should increase enforcement efforts, including cracking down on piracy apps and on device retailers and/or distributors who preload the devices with apps that facilitate infringement. The appropriate administrative authority in China should set copyright protection rules for app stores, including a takedown mechanism for removal of apps that have the primary function of facilitating access to unauthorized content. Moreover, because China is the main originating source of this problem spreading around the world and is a key middleware provider for Piracy Devices operating throughout Asia, the Chinese Government should take immediate actions against key distribution points, including for export, for devices whose primary purpose and function is to facilitate copyright piracy.

⁷As previously reported, three cyberlockers continue to provide for file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *vdisk.weibo.com*.

⁸In 2018, 1655 notices with 35,687 links were sent to Baidu, and all were removed.

Worsening Online Journal Piracy: The problem of online journal piracy remains a significant challenge. The unfortunate lack of deterrence in the marketplace continues to encourage journal piracy services to operate.⁹ These infringing services generate increasing revenues, and their operators profit from their illegal activity, thus encouraging these entities to provide more sophisticated, user-friendly forms of their services, such as through mobile apps. In addition, a growing number of online platforms have emerged that facilitate access to unauthorized copies of journal articles and academic textbooks, including *syyyj.com*, Keyandi, and Baidu Paperhelp. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. They also facilitate access to infringing content online in a number of other ways, including by providing users with search tools, through the use of Internet bots, and by bypassing TPMs to gain unauthorized access to legitimate online services. For example, Baidu Paperhelp appears to facilitate the exchange of copyright protected academic papers among its users, and awards credits for providing unauthorized copies of the copyrighted works. China must do more to combat this unlawful activity. In a case underscoring the importance of enforcement officials engaging with rights holders, in June 2017, following a referral by the publishing industry, the Beijing Copyright Enforcement Department took down the UReader platform, finding it was infringing, and imposing a fine of RMB 400,000 (\$58,000). Unfortunately, this type of meaningful engagement with industry has been more the exception than the rule.

Pirated print publications and compromised log-in credentials unfortunately continue to be widely available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit textbooks market and sell their illegal products to overseas buyers. Furthermore, in part due to China's inadequate online enforcement framework, sending notifications of infringement remains unduly complicated. E-commerce sites rarely act upon notifications from rights holders, unless they are a "trusted party." Becoming a "trusted party" is extremely burdensome, requiring a rights holder to submit business registration licenses and copyright registration documents.¹⁰

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

Unauthorized Camcording Remains a Concern: Unauthorized camcording of movies in theaters—a key source for online audiovisual infringements—remains a significant problem in China for the film industry.¹¹ Also fueling the growing camcording problem is the increasing problem of people in Chinese movie theaters using cameras, including those on handheld mobile devices, to live-stream theatrical broadcasts of films online. The motion picture industry has raised the camcording issue with relevant Chinese Government agencies, e.g., China Film Administration (CFA) (formerly State Administration of Press, Publication, Radio, Film and Television (SAPPRFT)), NCAC, and the China Film Distribution and Exhibition Association (CFDEA). Criminal convictions for camcord piracy in Hefei in November 2014 and in Hubei in September 2016 were positive signs. Moreover, in 2015, SAPPRFT issued notices that recognized the threat camcording poses to the film industry, calling for Chinese cinema owners to

⁹In July 2015, the publishing industry filed an administrative complaint with NCAC, which was subsequently delegated to the Guangdong Provincial Copyright Bureau, against an entity, Metstr, which appears to have ties to the operators of the now defunct KJ Med. While the KJ Med site was taken down, the failure to prosecute the site's operator(s) has contributed to the continuing emergence of copycat services that provide unauthorized access to copyright protected journal articles. Although the Metstr case remains under investigation by Chinese enforcement authorities, there has been no progress.

¹⁰On a positive note, an e-commerce site that proved the exception was *DHgate.com*. Following its inclusion in USTR's 2017 Out-of-Cycle Review (OCR) of Notorious Markets, the site proactively contacted and worked with publishers to address the sale of counterfeit and infringing copies of textbooks on the site. *DHgate.com* continues to address infringement that re-occurs on the site.

¹¹In 2017, a total of 36 audio and video camcords were forensically matched to cinemas in China, a significant increase from 2016. In 2018 China produced 16 video camcords, although 13 of those were of relatively poor quality.

more effectively address camcording incidents, and requiring all film post-production units to enable digital watermarking to aid enforcement efforts. The Film Industry Promotion Law, which took effect in 2017, allows cinema personnel to take action to stop camcording. Unfortunately, the law fails to expressly provide any authority to undertake enforcement actions and impose sanctions, thus limiting its effectiveness. IIPA is encouraged by these developments, but a more comprehensive solution requires enactment of a specific criminal law against using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of a cinematographic/audiovisual work, from a performance in an exhibition facility. Furthermore, as discussed below, to address livestreaming the Copyright Law should be revised to prohibit the unauthorized retransmission of content online. In addition, the Chinese Government, theater owners, and others associated with the chain of theatrical distribution of films must make still stronger efforts to deter unauthorized camcording under current law.

Pirate/Counterfeit Books and Hard Goods, Including for Export, Remain Problematic: The copyright industries continue to report piracy of hard goods, which harms both the domestic Chinese market and markets outside of China. Pirate/counterfeit production of textbooks, consumer books, and trade books is a substantial problem. Reports indicate that pirated (largely consumer and religious) books printed in and exported from China are showing up in parts of Africa. China needs to follow through on commitments made in the Joint Commission on Commerce and Trade (JCCT) for transparent, comprehensive, and verifiable progress for strengthening IP protection for published materials and other copyrights in university (including library) settings. Although physical piracy at universities is no longer a significant problem, the use of unauthorized services to access text books and journal articles unfortunately continues to grow. The Ministry of Education should do more to inform and educate university personnel, librarians and students regarding appropriate use of and legitimate sources of copyrighted content. Similarly, the Ministry of Science & Technology should also be more proactive in addressing pirate document delivery services. Production of pirated and counterfeit copies of academic textbooks has increased in recent years, with these illicit goods marketed and sold through e-commerce sites, and exported to several markets, including the U.S. China remains an export center for pirate music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese music products, including High Quality Counterfeit (HQC) box sets of music content, often through e-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical discs, sold through popular Chinese and international online marketplaces.¹² Online sales of USB flash drives containing high volume of infringing sound recordings have become a new problem in China. On major online shopping platforms, such as *Taobao.com*, *jd.com*, and *pinduoduo* (a mobile shopping app), more than 2000 sellers are selling an estimated 500,000 USB flash drives per month containing unlicensed music content, including 500 to 1000 tracks in a single flash drive. These flash drives are also exported from China to other Asian markets, including Taiwan and Hong Kong.

Unauthorized Mini VOD Locations: On March 6, 2018, SAPPRFT (now abolished and renamed the CFA) issued the “Regulations on the Management of Mini VOD Theaters and Chains” to regulate an estimated 10,000 mini VOD locations spreading across China. The new regulations went into effect on March 30, 2018, but due to government restructuring (which began in March 2018 and is still ongoing), the regulations have not yet been implemented. Prior to implementation of the regulations, the Chinese Government should crack down on these mini-VOD locations that are showing unauthorized content in violation of the copyright law.¹³

ENFORCEMENT UPDATES IN CHINA

IIPA remains encouraged by China’s past actions to combat piracy and an overall improvement in the climate for enforcement, which have contributed to improved protection and development of the legitimate marketplace for some creative sectors; but much more should be done. China’s growing Internet user base creates potential opportunities for rights holders; but a historic toleration for piracy, and resulting overlapping consumption of

¹²Shenzhen Optical Media Lab has previously worked with rights holders to help identify the source of seized products, but on-going changes in management structure have made communication difficult so it is presently not clear what its operational and enforcement capabilities are.

¹³MPAA members have not licensed any content to these entities.

legal and illegal content, have kept the creative marketplace from reaching its potential, and hampered the development of legitimate services.¹⁴

Some Progress, But Still Many Challenges: As we have highlighted in recent submissions, there were some notable recent improvements in enforcement against online piracy in China, particularly regarding efforts to combat unlicensed music. For example, NCAC's 2015 Notice required online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, and Operation "Sword Net," an annual anti-piracy campaign, has resulted in enforcement against piracy services, apps, and the take down of significant amounts of unlicensed work from music platforms.¹⁵ In the 2017 Sword Net Campaign, Chinese enforcement authorities inspected 63,000 websites, shutting down 2,554 of them, deleting 710,000 infringing links, and confiscating 2.76 million items used to facilitate piracy. Chinese enforcement authorities also investigated 543 cases related to online infringement; 57 of these cases involved business volume of RMB100 million and were referred for criminal investigation. In 2018, MOCT increased its administrative enforcement actions against music piracy; on the other hand, NCAC significantly reduced enforcement actions against infringing music content. Regarding piracy of film and television content, pursuant to the 2018 Sword Net Campaign, which is still ongoing, NCAC summoned representatives from online video platforms such as Douyin, Kuaishou, Pear Video, and Bilibili to demand that they improve their copyright protection efforts. As a result, 15 platforms collectively took down 570,000 infringing videos within a one month period, but significant issues still remain with many of the major platforms.

As previously reported, innovative industry approaches to the problem included China's Capital Copyright Industry Alliance (CCIA), which included more than 400 organizations and individuals. But, despite some good results, Baidu decided to end the "Qingyuan Action" in December 2018. In addition, the advertising alliance program previously pushed for by NCAC involving major advertisers, including Baidu, Alimama (of Alibaba Group), 360, Tencent, Sugou, and Netease, to help eliminate illegal advertising revenue to rogue sites, is presently stalled due to government restructuring. These programs should be resumed and strengthened as soon as possible to reduce the flow of advertising money to pirate services in China. Meanwhile, direct enforcement actions by the Chinese Government should be improved to a level commensurate with the scale of copyright infringement online.

As noted above, dozens of notorious piracy websites and infringing services remain, disrupting the legitimate market for creative content. For example, Baidu, the most popular search engine in China, also provides a popular cloud storage service, and has long prospered while facilitating infringement of copyrighted materials. Baidu is a powerful intermediary and platform that should cooperate better with rights holders to set the right example for other Internet businesses in China. Although Baidu has in recent years provided a tool for taking down motion picture and television content, and demoted infringing video listings of new release titles on Baidu search results, takedown rates and timeframes for removal of infringing links vary. Baidu should be encouraged to do more, including improving implementation of its takedown tool to ensure all rights holders are treated equally and infringing content and links are removed expeditiously. A growing concern is the popular cloud storage service known as Baidu Pan. A local rights holder group recently won a lawsuit against Baidu Pan for copyright infringement, and a local stakeholder, Sohu, is currently suing it for copyright infringement of its licensed materials.¹⁶ Problems clearly remain with the Baidu Pan service, and Baidu should do more to ensure infringing materials are not made available to users.

While China's progress in cracking down on unlicensed music services has helped contribute to growth of the music industry, the legitimate music market in China is still nowhere near its potential. Unlicensed music is still available on a large number of sites, services, and mobile apps. Despite boasting the largest number of Internet users in the world, China's music market is ranked just 10th globally, behind much smaller markets such as South Korea and Australia. Revenues remain a small fraction of what they should be, even when compared to revenues

¹⁴It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels, and numerical and monetary thresholds triggering criminal liability remain difficult to reach and are not high enough to encompass all "commercial scale" piracy.

¹⁵For additional details, see IIPA 2018 at 17-18.

¹⁶In 2017, Sohu successfully sued Baidu Pan for indirectly facilitating copyright infringement of third parties.

seen in comparably developed markets. Furthermore, online music piracy sites and hard goods shipments from China continue to negatively affect other marketplaces, e.g., in Hong Kong, Taiwan, Japan, Singapore, and Malaysia, among others.

More Sustained, Holistic Enforcement Approach Needed: While the Operation Sword Net actions are often effective to address infringing sites, apps, or services notified to the Chinese Government, more must be done beyond the campaigns. Simply put, a more holistic approach is needed—including enhanced administrative enforcement by the NCAC and improvements to the legal framework, including the Copyright Law and Criminal Law (as detailed below)—to better allow the government and rights holders to work together to defeat the piracy menace and open the market to legitimate services. One persistent problem is that China’s enforcement authorities do not do enough to identify those responsible for Internet piracy. Many infringers use fake registration information to register their websites, making it very difficult to locate those responsible for piracy sites.¹⁷ Rights holders can do only so much under the law to identify the operators of these piracy sites. ISPs only provide this identification information in response to government requests. Once alerted to the problem, government enforcement authorities, including the People’s Procuratorates, should take action to bring about meaningful results. While rights holders bring infringement actions in civil courts against piracy services, civil suits are insufficient to address major piracy problems, and damages awards are too low.¹⁸ And with criminal enforcement inadequate mainly because criminal thresholds are too high,¹⁹ it is clear that China’s enforcement framework is simply not up to the challenge of its enormous piracy problems, notwithstanding its administrative enforcement efforts.

In 2018, the music industry filed 117 administrative cases with MOCT and the National Administration of Press and Publication (NAPP) which, thus far, have yielded the following results: closure of eight infringing services (including websites, mobile apps, and online physical sellers); punishment against two of these services (i.e., fines imposed or servers confiscated); eight services changed to non-music content; deletion of infringing tracks with warnings issued by local law enforcement in 44 cases; and 98 cases remain under investigation. In 2018, the music industry reported 248 infringing mobile apps to mobile app marketplaces, mostly Android Markets.²⁰ The motion picture industry similarly has reported key piracy services to NCAC, and NCAC has investigated and fined pirate operators and, in some cases, demanded that they cease infringing activities. These actions are helpful, but enforcement authorities should do more, and the Chinese Government should ensure its enforcement authorities are, as necessary, provided with greater resources to take additional proactive actions.

IIPA urges the Chinese Government to undertake the following measures:

- Ensure deterrent-level penalties against operators of piracy websites that make available a massive amount of infringing content.
- Enhance transparency of administrative enforcement, including by providing rights holders with information regarding the process and the results of administrative actions
- Ensure that an effective remedy exists against apps, websites, or services that facilitate copyright infringement, even if the infringing materials are located on remote servers.²¹

¹⁷All websites in China must register with *milbeian.gov.cn*, and the owners of websites can be identified through searches using their registration numbers, domain names, IP addresses, or “Whois” data.

¹⁸As reported last year, in August 2017, in decisions stemming from civil actions launched in January 2015 by the motion picture studios against Shenzhen Xunlei Networking Technologies Co. (Xunlei) for infringement of 28 studio titles, the Shenzhen Nanshan District People’s Court found Xunlei, a large online content and Internet service provider in China, liable for copyright infringement. The court found Xunlei infringed by providing the studios’ titles to the public without authorization on its websites *f.xunlei.com* (the “Fangzhou” service) and *kuai.xunlei.com* (the “kuaichuan” service); enjoined Xunlei from further infringing activity; and awarded damages totaling RMB1.4 million (US\$210,000) and litigation costs of RMB162,400 (US\$24,350) to the studios. Both services are now defunct, but, as indicated above, Xunlei continues to run a service called Thunder, through which unauthorized motion picture and television content remains available in and outside China. Xunlei has been sued multiple times for copyright infringement by various stakeholders, but low damage awards and lack of meaningful injunctive relief hinder the effectiveness of civil enforcement against Xunlei and other platforms that facilitate piracy.

¹⁹Currently, in cases of Internet piracy, the criminal threshold of “500 copies” is interpreted as 500 *titles*. As a result, a single television episode is not considered a “title”; rather an entire season or even all seasons of a television program is calculated as a single title.

²⁰The music industry reported 15 infringing Apple apps, and 239 infringing Android apps.

²¹Certain Chinese IP judges have unfortunately embraced the “server principle,” interpreting current law to require that infringement only occurs when the infringing content resides on the server or device of the operator of the app.

- Provide a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and ensure courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply.
- Streamline procedures for civil and criminal enforcement, including by reducing documentation requirements to establish copyright ownership and infringement, and ensuring timely enforcement of monetary damages.
- Enhance expertise among police throughout the country to effectively bring criminal piracy investigations. There is an urgent need in China for police investigators who have the technical understanding and expertise necessary to investigate online piracy cases.

COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including copyright and criminal law reform efforts.²² These reform processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

Copyright Law Amendments Should Be Strengthened, Not Watered Down: After years of IIPA and other stakeholders pressing for progress on amendments to the copyright law, the process appears to be at a critical stage. The Ministry of Justice (which has taken over the functions of the now-abolished State Council Legislative Affairs Office) is expected to publish a revised draft of the bill, followed by a short public consultation. The bill can then be entered on the legislative agenda for the National People's Congress (NPC). IIPA understands that the NCAC has been instructed to assist the Ministry and the NPC with shortening the current draft, purportedly "to remove the most controversial elements."

There are a number of significant provisions in the last publicly available draft that we hope will remain in any draft released by the Ministry and NPC. These include provisions that would establish a framework for cooperation to remove online infringements, specifically, by adopting principles of potential joint liability of service providers that knowingly and actively encourage infringement, including the creation of aiding and abetting-type liability for services that abet or instigate infringements (presumably including non-hosted infringements) of third parties. Such provisions would make it possible to efficiently remove infringing materials from the Internet as well as to halt operators from engaging in massive infringements, although much would depend on implementation.²³ Many other important topics are taken up in the draft. In particular, the NCAC has proposed introduction of the rights of producers of sound recordings for public performance and broadcasting, a much needed reform 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 critical for the future of the music industry in China, including both foreign and domestic rights holders, that these important provisions remain in the bill.

Furthermore, we hope that any alteration of the draft addresses certain deficiencies. First, it is critical that the legislation clarify China's Copyright Law to ensure adequate and effective enforcement against apps and websites that facilitate unauthorized access to copyrighted works. The Copyright Law amendment should confirm that the existing right of "communication over information networks" clearly permits action against an app or site that makes available content to users without authorization, regardless of where the content is stored. Clarifying the law,

²²See, e.g., IIPA 2018. Previous developments included the National People's Congress passing legislation to establish IP Courts in Beijing, Shanghai and Guangzhou. These IP courts handle civil and administrative cases related to patents, computer software, technology secrets, trademarks, and some copyrights (when cases meet certain thresholds), according to the Supreme People's Court (SPC). The IP court in Beijing opened in November 2014, and the IP courts in Shanghai and Guangdong opened in December 2014. According to the SPC, from their opening day until June 2017, these three IP courts accepted 46,071 cases, of which 33,135 have been closed. A new IP court opened in Shenzhen in December 2017. China launched its first cyber court in Hangzhou in August 2017, and additional cyber courts opened in Beijing and Guangzhou in September 2018. These courts accept all Internet-related civil and/or administrative cases (including online copyright infringement disputes) within their respective jurisdictions, as well as those cases assigned by the higher people's courts. The courts have the potential to increase convenience, efficiency and cost-effectiveness mainly by using the Internet to handle much of the litigation process; however, as we note in this and in prior reports, without adequate legal tools to combat infringement, enforcement will be inadequate.

²³The draft had deleted the reference to "blocking" which was in previous drafts, but retained the request that Internet Service Providers (ISPs) "delete, disconnect the links, etc." to infringing content. It is believed the concept may still be included, both in the terminology that remains, and the fact that the list of measures is non-exhaustive (with reference to the word "etc.":).

in line with international standards including the WIPO Internet Treaties, to reject the “server principle” is necessary because these illicit apps and streaming and indexing/linking sites typically facilitate unauthorized access to content stored on remote servers. Furthermore, liability should attach when an app or service circumvents TPMs used by legitimate rights holders to prevent unauthorized access to their content (again, regardless of where that content is stored). Article 48(6) of China’s Copyright Law should be clarified to ensure liability for app developers who circumvent TPMs that control access to content (i.e., access controls), without the need to prove a copyright infringement occurred, and to ensure that copyright owners have standing to bring suit in cases in which the TPM was employed by a licensee platform. Apps, websites, or other services that allow a user to access unauthorized content undermine business models that are essential to a healthy online ecosystem. Therefore, to the extent current law on the right of “communication over information networks” and access controls does not clearly permit action against apps that facilitate unauthorized access to copyrighted works, the amendment should address these deficiencies, and judicial interpretations should be issued to provide clear guidance to the judiciary.

In addition, some of the proposals in the last publicly released draft may require revisions before enactment to avoid conflicts with China’s WTO obligations, or inconsistencies with current international or best commercial practices.²⁴ For example, the ISP liability provisions should be revised to ensure that only passive and neutral intermediaries that do not contribute to infringing activities are eligible for the limitations on damages for infringements (i.e., safe harbor). As previously reported, the 2012 Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (Network Rules) established the current ISP liability framework in China,²⁵ and IIPA hopes that much of this framework will be reflected in the amended Copyright Law. Unfortunately, UUC sites that are not neutral or passive intermediaries have been able to avail themselves of the Network Rules’ safe harbors, which has negatively impacted the music market and contributed to the proliferation of pirated content, such as music videos, available for streaming on these services. The Network Rules should be clarified to ensure that the safe harbors are only available for online services that function as neutral and passive intermediaries and that, upon notice or otherwise obtaining knowledge of infringement, promptly take reasonable steps to limit, stop, and prevent the infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement. These requirements should similarly be reflected in the Copyright Law amendment.

Other changes that should be made to the draft include providing protection against unauthorized retransmissions of copyrighted content over the Internet (including live streaming), and updating China’s outdated term of copyright protection to bring it in line with evolving global norms.²⁶ It is also crucial to ensure that proposed exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope, and are otherwise consistent with the WTO TRIPS three-step test. The Copyright Law should also include a legal basis for injunctions against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content in cases where the content is hosted outside of China or where the identities or locations of the website owners are unknown. Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties.

²⁴The 2015 IIPA submission identified a more comprehensive list of concerns and suggestions regarding the draft legislation including, notably, regarding the collective management provisions, which include the fraught concept of “extended collective management” and improper limitations on rights holder remuneration and compensation. See IIPA 2015 at 21-22 available at <https://iipa.org/files/uploads/2017/12/2015SPEC301CHINA.pdf>. Also, as noted in the 2015 submission, copyright law revisions provide an opportunity to improve China’s civil compensation rules, which are riddled with uncertainties and often result in inadequate compensation to rights holders.

²⁵See IIPA 2013 at 42 available at <https://iipa.org/files/uploads/2017/12/2013SPEC301CHINA.pdf>.

²⁶China should bring its term of protection in line with the majority of the Organization for Economic Cooperation and Development (OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 75 years). Not only would this ensure Chinese creators receive the full global benefits from their creations, it would provide greater incentives for the production and dissemination of creative works, and provide all producers with a stronger incentive to invest in local industry. This in turn would spur economic growth and tax revenues and enable producers to continue offering content to local consumers in the latest formats. More than 80 countries protect some or all creative materials in line with the international trend, including 30 out of the 32 member countries of the OECD, and nine out of the top ten music markets.

Criminal Code Reform: China's Ninth Amendment to its Criminal Law ("Ninth Amendment") in 2015 added a potentially helpful secondary liability provision: the offense of "assisting criminal activities over information networks." According to this new law, "knowing others are using information networks to perpetrate crimes, providing technical support such as Internet access, server hosting, web storage, or communication transmission services, or providing assistance in advertising or processing payments, where circumstances are serious," is subject to criminal liability. This is an important development in Chinese criminal jurisprudence, but it has not been tested yet. This provision's implementation should be monitored closely to ensure it provides effective secondary liability for criminal copyright infringement. Unfortunately, the intellectual property provisions of the Criminal Law (e.g., Articles 217 and 218 and accompanying Judicial Interpretations) and other related provisions were not included in China's Criminal Law reform process. This was a major missed opportunity, and we urge the Chinese Government to adopt further reforms that address shortcomings in China's criminal enforcement framework that IIPA has identified in previous reports.²⁷ In particular, China should meet its international obligations by revising the criminal threshold to ensure that criminal penalties are available for all online piracy on a "commercial scale," and separately defining criminal violations regarding circumvention of TPMs, or trafficking in circumvention technologies.

E-Commerce Law: On January 1, 2019 China's first "e-commerce" law entered into force. The new law is wide in scope, intending to broadly regulate e-commerce activities, but does not cover the online dissemination of "audiovisual programs, publications, cultural products, and other content provided through information networks." Therefore, we understand that the copyright liability limitations for digital content platforms continue to be decided exclusively in the framework of the existing copyright law and related regulations, and subsequent amendments thereto. Regarding intellectual property rights, the new e-commerce law appears to apply to online transactions of physical infringing goods. The law requires platform operators to take "necessary measures" against infringing goods or services. Importantly, the law indicates that the required 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 of the new law 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 the rights holder's notice of infringement. The Chinese Government should interpret and implement the law to prevent this outcome.²⁸ High-quality Chinese counterfeit goods remain a problem for some creative industry sectors internationally, and effective enforcement action is required to prevent the supply of such goods to online market places. Likewise, Piracy Devices and circumvention devices, both used primarily to access pirated content, remain a significant problem in China. It is critical that the new e-commerce law support rights holder action to prevent the illegal trafficking on e-commerce platforms of these illicit goods, and for those rights holders that already experience good cooperation with some e-commerce platforms through voluntary arrangements, any implementation of this e-commerce law should not upset those existing arrangements. The interpretation and implementation of this new law should be monitored closely, including with respect to its stated scope of coverage as well as any expansion of such explicit coverage.

Property Rights Protection Guidelines: As previously reported, in November 2016, the Central Committee of the Communist Party of China and the State Council jointly released "opinions" on "improving the property rights protection system and lawfully protecting property rights," which include a number of guidelines

²⁷See, e.g., IIPA 2017 at 15. Shortcomings include: (1) Thresholds are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold); (2) Some critical commercial scale infringements are without a criminal remedy because of the requirement to show that the infringement is carried out "for the purpose of making profits," an undefined phrase, and, thus, it is often difficult for law enforcement authorities or rights holders to prove that the infringer is operating for the purpose of making profits in cases of Internet piracy; (3) Criminal violations related to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are not separately defined, for example, regarding circumvention of TPMs, or trafficking in circumvention technologies, software, devices, components, and services; (4) Presumption of copyright ownership is inadequate and creates unnecessary substantial burdens on rights holders, impeding effective enforcement; (5) Criminal accomplice liability with respect to imports and exports is limited (with lower penalties available); (6) There are uncertainties regarding increased penalties against repeat offenders; and (7) There is a jurisdictional bar limiting foreign rights holders from commencing a private "civil claim" against those being prosecuted for copyright crimes in local district courts.

²⁸ IIPA has just recently learned that China is presently considering amendments to its tort law that also include notice and takedown provisions. While IIPA has not fully analyzed the amendments, the notice and takedown provisions appear to include many of the same shortcomings as those in the e-commerce law, including a failure to adopt effective practices for handling counter-notices, raising the concern that sellers of infringing products could avoid responsibility by merely objecting to the rights holder's notice of infringement.

regarding IPR.²⁹ IIPA views these guidelines as an extremely positive step, and we are hopeful that China will implement them swiftly.

Administrative Criminal Transfer Regulations Need Significant Improvements: The amended Criminal Transfer Regulations are well intentioned, but do not adequately address existing challenges to the effective transfer of administrative cases to criminal investigation and prosecution. The regulations leave unclear whether transfers are required upon “reasonable suspicion” that the criminal thresholds have been met, and thus, some enforcement authorities believe “reasonable suspicion” is insufficient, requiring proof of illegal proceeds before transferring. However, administrative authorities do not employ investigative powers to ascertain such proof. The amended transfer regulations should expressly include the “reasonable suspicion” rule, and they should ensure this rule is consistently applied by both transferring administrative authorities and receiving criminal authorities.³⁰

Enhanced Administrative Copyright Enforcement: The amended draft Detailed Measures on Implementation of Administrative Penalties for Copyright Infringement (Detailed Measures) could be a positive step forward for copyright administrative enforcement in China if brought into force. Although it remains to be seen how the Detailed Measures will be interpreted in practice, the amended draft, among other things, provides for punishment of ISPs for acts of infringement they know or should know about. IIPA hopes the Detailed Measures are brought into force and implemented.

MARKET ACCESS UPDATES AND RELATED ISSUES

The Chinese Government continues to pursue some policies that have the effect of impeding foreign creators from accessing the Chinese marketplace. The direct relationship between the fight against piracy in China and the need for liberalized market access to supply legitimate product, to Chinese consumers was a motivating factor when several IIPA members, believing that China was not living up to its WTO obligations, urged the United States to bring a case against China regarding many market access barriers in music, audiovisual products, and publications. The United States prevailed in that case, and, after the case concluded in 2009, China eased several market access restrictions.³¹ Yet many core activities of copyright industries remain restricted or prohibited. For example, the Negative Investment List, which was revised in 2018, prohibits, among other things, foreign investment in the “publication and editing of books, newspapers, journals, audiovisual products and electronic publications,” and foreign investment in television VOD services. While IIPA has been hopeful China would address longstanding market access barriers, the Chinese Government has recently been moving in the opposite direction.

Increasing Online Market Access Barriers: As we have noted in prior reports, SAPPRT’s Online Publishing Rules, which took effect in March 2016, appear to expand the scope of longstanding restrictions on the involvement of foreign entities in online publishing activities.³² The full impact of these measures on activities newly covered under the revised regulations remains unclear; unfortunately, these measures can have a chilling effect on

²⁹The guidelines include the following: (1) raise penalties for IPR infringement, and explore establishing a system for punitive damages; (2) mark the credit record of entities found to infringe IPR, and improve the transparency of administrative sanctions in IPR infringement cases; (3) combine judicial procedures (civil, criminal and administrative) regarding IPR infringement into one tribunal to improve coordination and cooperation between enforcement authorities, and improve procedures for transferring cases from administrative enforcement agencies to criminal enforcement authorities; and (4) enhance international cooperation in criminal enforcement and intensify criminal investigations of foreign-related IPR infringement.

³⁰Presently, even when administrative authorities do seek to transfer a case, the local Public Security Bureau (PSB) does not necessarily accept it. Practices vary among different PSB offices, but too often the PSB adopts strict acceptance criteria, effectively requiring complete or nearly complete evidence that a crime has been committed, rather than using a reasonable suspicion standard.

³¹China eased investment restrictions for some sectors in amendments to the Catalogue of Industries for Guiding Foreign Investment. In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution (although confirmation that distribution of “music videos” is permissible, and that a foreign-invested entity established in the Shanghai FTZ may distribute music throughout China, would be helpful, as it remains unclear whether these activities are permitted). In 2015, China eliminated most restrictions on gaming consoles, paving the way for video game companies to manufacture consoles in all of China, although manufacturers and publishers must still comply with strict regulations including those for pre-sale content review. China also agreed to allow foreign entities to choose their licensees for online music distribution, and to engage in content self-review of music for the first time. New incentives were also introduced for more film co-productions in China.

³²The rules appear to expand the definition of “online publishing” to include maps, games and online databases, and a “catch-all” provision to cover new types of digital works to be determined by SAPPRT.

foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.³³ Furthermore, in July 2017, China revised the Foreign Investment Catalogue, lifting certain restrictions, but production of audio-visual products and “network publication services” remained on the “Prohibited” list. Also in 2017 Ministry of Industry and Information Technology (MIIT) regulations became effective that, among other things, would require all Internet domain names available in China to be registered through a licensed, domestic service provider.

China has also introduced a raft of alarming draft measures that, if implemented, would clearly discriminate against U.S. producers and distributors of creative content. For example, in September 2018, the CFA proposed two draft regulations regulating the production and distribution of foreign audiovisual content. The “Administrative Provisions on the Importation and Broadcasting of Overseas Audiovisual Programs” would further tighten regulations on foreign broadcasting, banning foreign films, TV dramas and animation from broadcasting during prime time, putting a 30% maximum cap on foreign audiovisual content in certain circumstances, and restricting content that can be disseminated online. The “Administrative Provisions on Overseas Personnel Participation in the Production of Radio and Television Programs” seeks to regulate the participation of foreigners in the production of radio and TV programs by, for example, banning the employment of foreigners as broadcast TV presenters or newscasters, and banning programs having both a foreign screenwriter and a foreign director. In May 2016, SAPPRT proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.³⁴ While this proposal was suspended due to significant opposition from online platforms, there is concern that it may reemerge. In April 2016, China published a set of administrative measures on e-commerce that would discriminate against foreign suppliers; and in June 2016, China published new content approval regulations for mobile games that would make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

This flurry of discriminatory measures follows other measures China has introduced in the last couple of years to restrict the online distribution of foreign audiovisual content. The September 2014 SAPPRT Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas caps the online distribution of foreign films and TV dramas at 30%, and requires online distributors to register content, obtain permits, submit content for censorship review. There are only two opportunities to submit content for registration and censorship per year, which, because of the nature of television production, does not allow for submission of a full season of a television series. A 2017 SAPPRT notice further restricted the 30% cap by requiring that it be applied by genre. Consequently, the rules significantly delay and curtail the legitimate access of Chinese consumers to the most valuable current U.S. television content. The Notice also has had a damaging effect on Chinese websites and the licensing of audiovisual content, and has made “day-and-date” releases³⁵ impossible. Chinese distributors have delayed or decreased licensing activity, pointing to the uncertainty of the Notice, and have cited conflicting reports on the corresponding requirements. There is serious concern that these systemic delays and limitations on Chinese consumers’ ability to access legitimate content will lead to increased piracy.

Additional Audiovisual Market Access Concerns: China maintains a number of longstanding discriminatory restrictions in the audiovisual sector that harm the U.S. industry, limiting its ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market.³⁶ Among other barriers, China prohibits 100% foreign-owned investment in audiovisual production studios, movie distribution, and online video services. Each of

³³For example, media reports around the time of the measures entering into force noted that the Online Publishing Rules were used to shut down Apple’s online book and movie services. See, e.g., <https://www.nytimes.com/2016/04/22/technology/apple-no-longer-immune-to-chinas-scrutiny-of-us-tech-firms.html>.

³⁴The proposal was for leading online video platforms to sell up to a 10% “special management stake” and cede at least one board seat to a selected state-owned media company.

³⁵“Day and date” release refers to releasing a film in theaters and making it available on a Video on Demand service the same day.

³⁶For example, China limits foreign investment in cinemas and in-home video distribution companies to 49% and prohibits all foreign investment in television. Local cable networks cannot carry foreign satellite channels without government approval or landing permits, which are limited to Guangdong and a handful of foreign channels. Foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform, may only be shown in three-star hotels and above and in foreign institutions, and the annual fee for each channel remains excessively high (\$100,000). Foreign television and film programming are limited to no more than 25% of total airtime, and other foreign programming to no more than 15% of total air time. Foreign programming is banned during prime time and may not constitute more than 30% of pay television channels. Foreign TV series and movies are limited to 50 episodes. Foreign animation is restricted to no more than 40% of total airtime, and importers of foreign animation must produce a like amount of domestic animation.

these are sectors in which U.S. firms are highly competitive globally. Moreover, China continues to introduce additional impediments to its market for U.S. film and television content. In June 2016, SAPPRFT issued a Statement and Rules on Importing TV Formats that was clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content. Among other things, the rules established a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a “major guiding role” in production if the Chinese party does not “fully obtain intellectual property rights” in the program. Only two of these “foreign” programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year. This distortion of China’s market for television and radio content has negatively impacted U.S. producers and appears to contravene China’s WTO obligations.

Another market impediment is that private Chinese distributors, including VOD platforms, arbitrarily, without clear explanation, request from U.S. producers an excessive and particularly burdensome amount of legalized documentation regarding production and distribution in order to complete a license agreement or obtain government approvals that permit access to China’s online marketplace. These types of documentation requests (unique to China’s marketplace) cause uncertainty and additional expense that slow or kill negotiations for licensing films to China, and have become yet another obstacle for U.S. producers to access the Chinese marketplace. Overall, there is an urgent need to improve transparency of all processes affecting the importation, exploitation, remuneration, and license payments of foreign films and programming.

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

U.S.-China Film Agreement Implementation: To settle a decade old WTO dispute, China agreed to, but still has not implemented, certain key provisions of the 2012 U.S.-China Film Agreement, including its obligation to provide further meaningful compensation on revenue share and other issues in 2017. Swift, robust implementation of the Agreement is critical to bring broad reforms and introduce competition. This would benefit both revenue sharing films and flat fee films imported into China. Despite the establishment of China as the world’s largest theatrical market in terms of number of screens and the second largest in terms of total box office, the market is still distorted to limit the access for imported films. In the case of “flat fee films,” which are imported outside of the box office revenue sharing quota system, China has enforced restrictions, including an informal cap on the number of these films that can be imported and limits on the ability of private Chinese distributors to import and distribute them. China committed in the Agreement (and reconfirmed part of that commitment at the June 2015 S&ED) to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported films without the involvement of any SOE, including China Film Corp (CFC) and Huaxia. Although CFC held an initial public offering in 2016, the majority of its shares are still owned by the Chinese Government. Inadequate implementation of this commitment has resulted in many U.S. producers (principally independents) having very limited export opportunities to China, and imported releases have seen a decline in market share to a historical low.

The U.S. Government should, therefore, press China for immediate, full, and transparent implementation of all the terms of the 2012 U.S.-China Film Agreement, including the obligation to provide further meaningful compensation on revenue share and other issues in 2017, by 1) liberalizing the distribution market for private third party Chinese distributors to engage in theatrical distribution without the interference of SOEs, in accordance with China’s commitment in the Agreement and at the June 2015 S&ED; 2) substantially increasing 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) fulfilling its commitment for Box Office audits under the Agreement by adopting internationally recognized methodologies; 4) allowing U.S. producers more control over release dates, addressing the problem of the Chinese locking out U.S. films from the prime release dates, and ending the practice of “double booking” theatrical releases;

5) eliminating informal restrictions on the number of imported “flat fee” films so that more independent producers have unimpeded access to the Chinese market; 6) further relaxing the quota for revenue sharing films so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films in China; 7) ensuring U.S. producers receive timely responses to quota allocations and censorship determination, and effective access to ticketing system information to ensure proper reporting of revenues; 8) providing a timely and transparent censorship process for imported content; and 9) refraining from imposing any other barriers or discriminatory restrictions that hinder the ability of U.S. producers to engage in or conduct business with Chinese distributors or the Chinese Government.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

As noted above, China is still not in full compliance with the WTO’s ruling in the landmark market access case (DS 363) brought by the U.S. in 2007 and concluded in 2009.³⁷ In particular, China must do more to open its market to U.S. films, and take further steps to implement the WTO ruling regarding all the sectors of its online marketplace. Moreover, the new online publishing rules are also inconsistent with the WTO’s ruling, and raise concerns regarding China’s obligations under the General Agreement on Trade in Services (GATS), particularly Article XVI on market access and Article XVII on national treatment.³⁸ Similarly, the Statement and Rules on Importing TV Formats, the Notice and Measures on Administration of Online Foreign Films and TV Dramas, and the other longstanding discriminatory restrictions on audiovisual content may also be inconsistent with China’s GATS commitments. The Statement and Rules on Importing TV Formats also raises questions regarding TRIPS Article 3 on national treatment, as it appears to favor Chinese rights holders over foreign rights holders.

Regarding copyright protection and enforcement, the deficiencies outlined above regarding criminal enforcement procedures (e.g. failure to use a “reasonable suspicion” standard for criminal transfers, thresholds that are too high or unclear, inadequate presumption of ownership, limited criminal accomplice liability, uncertainties regarding increased penalties against repeat offenders) are inconsistent with enforcement obligations under TRIPS, including Articles 41, 42, and 61. Furthermore, the jurisdictional bar against foreign rights holders bringing a claim against those prosecuted for copyright crimes implicates TRIPS Article 3 on national treatment. Also, the fact that commercial scale infringements are without a criminal remedy because of thresholds that are too high and the requirement to show that the infringement is carried out “for the purpose of making profits” is inconsistent with the requirements of both TRIPS Article 41 and Article 61 on criminal procedures. And China’s civil compensation rules, which result in inadequate compensation for rights holders, run afoul of TRIPS Article 45 on civil damages.

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

³⁷China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.int>.

³⁸In the 2018 Report to Congress on China’s WTO Compliance, USTR acknowledged that the Network Publishing Service Management Regulations raise concern “relative to China’s GATS commitment.” See p. 157, report available at <https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf>.

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2019.¹

Executive Summary: India plays an important role in the future growth of the U.S. creative industries, thanks to its growing population of consumers and its status as the second largest market for Internet services and smartphones.² The promise of growth, however, is threatened by copyright piracy and a legal system that is sometimes difficult to employ to handle the problem. The effects of this cannot be underestimated: in December 2014, the U.S. International Trade Commission, addressing U.S.-India trade, found that “if tariff and investment restrictions were fully eliminated and standards of IP protection were made comparable to U.S. and Western European levels, U.S. exports to India would rise by two-thirds, and U.S. investment in India would roughly double.”³

Unfortunately, piracy problems still abound in India and take many forms—such as torrent, linking, streaming, and stream-ripping websites and services; businesses manufacturing and distributing illegal textbooks; illegal camcording syndicates; pirate mobile applications (apps) and chat apps; signal theft; and infringing broadcasts or retransmission services—all of which undermine the growth of the Indian marketplace for creative materials. To address the known challenges, the Government of India has taken significant steps in the past two years. Despite the size of the country and the enormous challenges of a somewhat decentralized federal system with 29 states, enforcement has significantly improved due to a combination of initiatives taken by both government and industry. IIPA is encouraged by the shift of copyright administration to the Department of Industrial Policy and Promotion (DIPP). Other positive developments include ongoing actions undertaken by the recently-formed Maharashtra Cyber Digital Crime Unit (MCDU), Telangana Intellectual Property Crime Unit (TIPCU), and the National Internet Exchange of India (NIXI), in addition to favorable orders by the Delhi High Court to permanently disable access to ten major piracy sites in India (under laws allowing for temporary and permanent injunctions to disable access to infringing sites). However, the country does not yet provide for administrative site blocking. To further improve enforcement, cybercrime officers and the centralized units should receive training on IPR enforcement, including a focus on online transactions, cybercrime, and evidentiary requirements in relation to electronic evidence. Efforts in this regard have begun, but must be consistently applied throughout the country. Training programs by industry experts have also yielded encouraging results.

Beginning on December 25, 2018, the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) (the WIPO Internet Treaties) went into force in India, signaling the country's commitment to properly protect and enforce copyright in the digital age. Though the Government of India claims that current laws are fully compliant with the treaties, further reform in key areas is necessary. For example, the current technological protection measures fall short of treaty requirements. Additionally, in May 2016, the government released its National IPR Policy, a promising first step towards a national IPR strategy, but it needs to follow up with concrete steps to improve both the legal and enforcement regimes.

Some significant market access challenges also remain, including: impractical and outdated regulations related to cinema construction, contributing to India's appallingly low screen density; local body tax issues in the states of Tamil Nadu and Madhya Pradesh over and above the new Goods and Services Tax (GST) rolled out on July 1,

¹For more details on India's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of India's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.

²<http://www.thehindu.com/sci-tech/technology/india-now-second-largest-smartphone-market-in-world/article19926744.ece>.

³USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, Publication No. 4501, Investigation No. 332-543, December 2014, available at https://www.usitc.gov/publications/332/pub4501_2.pdf.



2017; mandated rates for pay-TV providers that inhibit the ability of rights holders to properly exercise their exclusive rights; pesky “must provide” requirements, which further hinder rights holders’ ability to exercise their exclusive rights with respect to how the pay-TV market operates; and a problematic 2016 DIPP Office Memorandum concerning the scope of the existing statutory license for broadcasting organizations broadcasting literary or musical works and sound recordings.

PRIORITY ACTIONS REQUESTED IN 2019

The copyright industries recommend the following to the Government of India as priority enforcement steps and legal reforms for 2019:

Enforcement

- Ensure that site blocking court orders at the Delhi High Court are being fully and properly implemented by all Internet Service Providers (ISPs) nationwide, and encourage cooperation with ISPs to combat infringing activities occurring over their services.
- Encourage MCDCU and NIXI to continue in their excellent work suspending domains engaged in infringing activities.
- Strengthen and standardize the national IP enforcement regime and establish a uniform, state-level cybercrime law and enforcement procedures and a state-level, centralized IP crime unit (similar to the enforcement initiatives started by the TIPCU and MCDCU) across the country to ensure proper investigation of IP crimes, including Internet piracy. Some priority states are Tamil Nadu, Punjab, Andhra Pradesh, Karnataka, and Kerala.
- Establish a national Infringing Website List (IWL) and focus on engaging Digital Crime Units in copyright enforcement actions according to the IWL.
- Reform the judicial processes to: (i) decrease court costs, especially in the Delhi High Court; (ii) allow electronic filings and evidence sharing (and dispense with the signing requirements); and (iii) encourage courts to expedite the final adjudication.

Legislation

- Having acceded to WCT and WPPT, India must amend the Copyright Act and Criminal Procedure Codes to fully comply with the Internet Treaties by: (i) defining technological protection measures (TPMs) and providing civil and criminal penalties, ensuring sanctions apply to both acts of circumvention and trafficking in devices, components, and services that circumvent; and (ii) adopting definitions and sanctions for the unauthorized removal of rights management information (RMI).
- Amend the law to permit administrative *suo moto* actions to block infringing websites (i.e., allowing these actions at the instigation of government agencies based on rights holder complaints) without costly and time-consuming judicial actions.
- Enact the Cinematograph Bill making it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording). Public comments on the bill were due February 2, 2019.
- Repeal the statutory license for broadcasters under Section 31D of the Copyright Act, or at minimum withdraw the September 2016 DIPP administrative Office Memorandum, which interprets the statutory license as extending to internet transmissions.
- Ensure the private use exception is compatible with the three-step test.
- Amend Section 52(1)(c) of the Copyright Act to ensure that only neutral service providers are eligible for the safe harbor provisions, and to ensure ISPs engage in takedown measures that have been demonstrated to be effective in preventing or restraining infringement.
- Ensure that the proposed draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018: (i) clarify that safe harbors apply only to services whose activities are of a technical, automatic and passive nature;

and (ii) do not, as currently proposed in the draft 2018 Rules, delete Rule 3(4) of the 2011 Rules, which provides for notice and takedown.

Market Access

- Eliminate market access barriers, including: (i) the “must provide” rules in the pay-TV sector; and (ii) high tariffs on video game software and hardware.
- Eliminate local body entertainment taxes (LBET) and other related taxes imposed over and above national GST, and simplify compliance rules.
- Simplify the rules and procedures for cinema construction to encourage private operators to build cinemas nationwide.

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Digital Marketplace: India is the second largest Internet market in the world. Under the government’s initiative (*Digital India*) to speed up Internet accessibility across the country, the current annual rate of growth is 8% to 9% with 512.26 million current users.⁴ Increased Internet speeds and accessibility open opportunities for the creative industries to provide consumers in India with online access to even more copyrightable content. The shift to online consumption of content, and notably, the leap-frogging of Indian consumers to mobile (as opposed to fixed Internet access) has resulted in hundreds of unauthorized websites and services that offer unlicensed content, generating revenue from advertisements and subscriptions. Until blocked recently, torrent sites such as *thepiratebay.org* were among the most popular in India because torrents can be accessed without the need for higher speed Internet connections needed for streaming sites. Services offering higher Internet speed have resulted in the proliferation of illegal linking and video streaming sites, as well as stream-ripping websites such as *youtube-mp3*, which offer Internet users the ability to make free permanent downloads of music from streaming video services. The increased Internet speeds have also resulted in the growth of pre-release piracy of copyrighted content that is especially harmful to rights holders. Other means of accessing pirated motion picture and television content have also emerged around the world. One such example, which has been an issue in India over the past several years, is Piracy Devices (PDs). PDs are devices that come pre-loaded with apps that allow users to access infringing content without authorization by circumventing subscription services and by other means.

Hosting sites, such as *Hostpalace* (whose main office is in India), are particularly problematic and, to date, have been immune from any law enforcement activity, even after rights holder complaints. *Hostpalace* should be a target for enforcement, which would also allow further investigations into the pirate services hosted on its servers. Other forms of piracy include mobile phone downloading on memory cards; SIM card pre-loading; and mobile apps. Some websites advertise a variety of apps to access infringing content. In 2018, 29 mobile apps were found to be distributing pirated content (which included U.S. and regional films and TV series), and 15 of these were found on unauthorized platforms such as *9apps*, *apkpure*, and *rawapk*. No action was taken against the apps. The video game industry reports that India remained fifth in the world in 2018 in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public peer-to-peer (P2P) networks. India also placed first in the world when it comes to mobile infringement of games (up from second in 2017) and fifth when it comes to infringement of games for PCs.

Unauthorized Camcording: Video camcording incidents in India have declined since 2015. In 2018, there were two camcorded videos sourced to Indian theaters, down from ten in 2017. There were 23 illicit audio recordings sourced to Indian theaters last year, down from 36 in 2017. Most of the camcording in India is part of criminal operations and thus needs a criminal enforcement response. There have been arrests by some state enforcement authorities, but illegally camcorded copies of new releases sourced from Indian theaters continue to leak online, especially during opening weekends, which is very damaging to rights holders. This is why it is critical that the Government of India

⁴<https://trai.gov.in/sites/default/files/PIRJune03102018.pdf>.

follow through on its announced plans to pass the Cinematograph Bill, which will provide a new, welcomed remedy against the unauthorized camcording of movies. The Cinematograph Bill draft has been issued by the Government of India, and public comments were due February 2, 2019.

Signal Theft: The audiovisual industry continues to experience signal theft by cable operators, namely, illegal transmission/retransmission of broadcast signals by cable operators. Local industry stakeholders have filed several complaints across various Indian states, which led to several raids on the premises of cable operators and resulted in arrests and seizure of equipment. Restraining orders issued by the Delhi High Court against entire networks as a result of civil actions brought by industry have proven to be a deterrent. However, the constant monitoring, initiation of new criminal prosecutions for copyright violations, and contempt of court proceedings are costly and time consuming.

Unauthorized Book Copying: Unauthorized commercial-scale photocopying⁵ and unauthorized reprints of academic textbooks and professional books (for both the domestic and export markets) remain the primary piracy problems for the publishing industry in India. Market-specific, lower-priced editions of textbooks continue to be available in the domestic market and are also exported to more developed markets. The longstanding system of providing less expensive reprints exclusively for the Indian market is also jeopardized by the increase in the number of counterfeit academic and professional textbooks being produced in India and shipped into the U.S. market. Customs officials should be empowered to take *ex officio* actions with respect to illegal exports of lower priced textbooks (similar to how imports are addressed).

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

Domain Registry Outreach: Many of the pirate sites in India have *.in* country code domains. The NIXI, the agency in charge of the *.in* domain registrations and state-based enforcement units, can either suspend the *.in* domains, or cancel their registrations. The music and film industries have good cooperation with NIXI and MCDCU on this issue. In 2017, the Motion Picture Association (MPA) agreed to a voluntary arrangement with DIPP and NIXI to suspend infringing websites based on false *whois* information; it focused on domains in breach of statutory and contractual obligations to maintain accurate and complete *whois* information. This has led to disruption of dozens of websites in India and should be considered an additional enforcement tool to traditional enforcement or site blocking.⁶ In addition, since 2017, the MCDCU has suspended 203 domains impacting approximately 160 million users accessing these sites per month. In conjunction with fighting to suspend these domains, convicting those involved in content theft is also under the MCDCU’s jurisdiction. The most notable case was that of *Game of Thrones*, Season 7, Episode 4, which leaked in India two days prior to its U.S. release. The unit promptly took action and made four arrests.

Producers’ Rights: The collection of public performance royalties by Phonographic Performance Ltd (PPL) had been problematic, as highlighted in a recent government report. Following PPL’s reorganization and application for an operating license, DIPP should re-register PPL as a collecting society to license public performance and broadcasting rights.

⁵Unfortunately, the decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

⁶Since July 2017, MPA has reported 44 domains containing infringing content to NIXI. NIXI has so far suspended 36 out of the 44 domains with the help of registrars. Further, 26 domains reported by MCDCU have been suspended so far by NIXI. MCDCU’s actions are based on a state-level infringing website list (IWL); it sent an advisory to the 34 top Indian brands to refrain from advertising their services and products on these infringing websites. In 2018, the MCDCU set up an enforcement program. Actions include: (i) disrupting piracy operations by issuing notifications to domain registrars, web hosts, advertisers, and payment gateways; (ii) working with the Central Government on outreach to ISPs to encourage voluntarily blocking of infringing websites; and (iii) registering criminal cases against infringing websites. Because enforcement is a state issue, these initiatives should be replicated across other Indian states, including creating a national IWL list, and state laws against organized crimes should clearly cover films, television and over-the-top content, books, music, and video games.

Standardizing State and National Enforcement Strategies: In 2016, a National IPR Policy was announced by the DIPP, Ministry of Commerce and Industry, intending to provide a comprehensive federal plan for copyright protection and enforcement. While receiving support from rights holders (and the WIPO) for its plan, without proper implementation, no significant improvements will take place in the market and discrepancies in the handling of enforcement cases in India will continue.⁷

IIPA recommends the following implementation steps: (i) a focus on inter-state operations of organized crime units engaged in piracy and establishment of state-level enforcement task forces that are coordinated, systematic, and efficient; (ii) the establishment of a National Copyright Enforcement Task Force (NCETF), including the Enforcement Directorate and CBI, that is overseen by DIPP and directed at online and mobile copyright infringements; (iii) the establishment of a centralized IP crime unit within the CBI Cyber Crime Detective Unit; and (iv) training prosecutors and police officers on the seriousness of IP offences, linkages to organized crime, and the importance of investigating up the chain.

India's Cell for IPR Promotion and Management (CIPAM) has done a noteworthy job thus far, but needs additional resources to expand its activities beyond educational programs and, in particular, to give CIPAM backing for broader interaction with state governments. Moreover, the NCETF should be unencumbered by usual jurisdictional enforcement boundaries, and instead permitted to collaborate across state lines to ensure proper enforcement. Thus far, two state-level crime units (the TIPCU in 2016 and the MCDCU in 2017) have been established to improve cooperation among industry stakeholders, ISPs, policy makers, and enforcement agencies, aided by legal and technical experts, to address digital piracy problems.

Criminal and Civil Enforcement Reforms: In the past couple of years, the motion picture industry has brought cases against piracy websites, seeking no-fault injunctions against ISPs to disable access to such sites. In October 2017 and April 2018, the Delhi High Court ordered ISPs to block ten major piracy websites, including *thepiratebay*, *bmovies/fmovies*, *rarbg*, *yts*, *yify*, *extratorrent*, *1337x.to* and *torrentz2.eu*. The industry also impleaded the Department of Telecommunications (and the Ministry of Electronics and Information Technology (MeitY)) to ensure proper implementation of the blocking orders. The court orders apply to the entire websites, as opposed to only specific titles or events. Additionally, the orders allow the addition of variants (new domains directing to the same piracy websites, redirects or proxies or mirror sites) of the sites. These cases represent a positive precedent in India, and stand in sharp contrast to prior court decisions that ordered sites blocked temporarily to protect specific titles.

In other instances, unfortunately, some rights holders have had their civil claims dismissed, so as to deter them from initiating cases. Those rights holders report that some cases can take many years in the Indian court system, and they further report that there are problems with respect to retaining electronic evidence (and a lack of familiarity with the related evidentiary requirements). Additionally, they experience difficulty with enforcing civil court orders. Those industries also report that civil awards are most often wholly inadequate to compensate the rights holder for the harm or deter further infringing activity. Two ways Indian courts have tried to deal with backlogs are imposing high damage claim requirements and charging exorbitant court filing fees. This may have led to some relief in backlogs, but places huge burdens on rights holders who have legitimate claims; indeed, it is inappropriate for courts such as the Delhi High Court to charge excessive court filing fees when the relief sought is injunctive only. Finally, the Indian courts have not yet come to terms with electronic filing, thus archaically requiring thousands of pages of physical filings to be made, duplicated, and filed with the courts in person, with each page being individually signed. For copyright cases that may contain thousands of pages of evidence, the process of signing and filing the cases can take days. The Indian

⁷For example, publishers report that district police departments have different requirements for pre-raid documentation to lodge complaints, as well as for gathering evidence during raids, safeguards during raids, and post-raid recordation. These divergent procedures invariably lead to different results, often a duplication of efforts and low conviction rates. Defendants can often resume business shortly after the initial arrest. If and when charge sheets are finally presented in court, cases are routinely dismissed. A more detailed explanation of the enforcement issues some of our members face because of the lack of a national IPR policy can be found in the 2018 India report: <https://iipa.org/files/uploads/2018/02/2018SPEC301INDIA.pdf>.

courts should reform their requirements to 1) lower court filing fees; and 2) allow for electronic filings while dispensing with the need to sign each page.

Additionally, given the scope of the piracy challenges discussed above, the Government of India should prioritize online and mobile piracy cases and ensure appropriate tools are in place to address hosted and non-hosted infringements of domestic and foreign sites. Because online copyright infringements in India are often large-scale and organized cybercrime, commercial operations, the most proper approach is criminal enforcement. However, some rights holders find that criminal copyright cases in India generally do not yield effective and deterrent results. Further, while copyright piracy is a non-bailable offense, bail is often secured on the first day after arrest. Also, there are no provisions for forfeiture of pirated product, although equipment used to manufacture such goods may be seized. Criminal prosecutions often take years, and during this time relevant witnesses become untraceable and seized evidence is compromised, leading to acquittals. In plea bargains or even convictions, fines remain low and non-deterrent, and India lacks enhanced penalties for pre-release piracy. These experiences differ by region and across copyright industries, but overall, training and retaining a cadre of police officers for cybercrime investigations, as well as appointing properly trained IP judges and dedicated IP expert prosecutors and investigators, would be helpful.

TREATY OBLIGATIONS AND COPYRIGHT LAW REFORM

India is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO TRIPS Agreement, and last year India acceded to the WIPO Internet Treaties. This is a very positive development that demonstrates the Government of India's willingness to make the political commitment needed to better protect copyright in the online space, but the priority now is for the government to make changes to the existing law to bring it into full compliance with the WIPO Internet Treaties. While the Government of India believes the law is currently compliant, rights holders (including IIPA members) believe the current law falls short of full compliance in some respects, so efforts should be made to further strengthen the law. To fully implement the WIPO Internet Treaties, 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: (i) clarifying the TPM circumvention provisions, plus implementing civil and criminal penalties applicable to acts of circumvention and trafficking in circumvention devices, components and services; and (ii) adopting definitions and sanctions for the unauthorized removal of RMI. Additionally, the extension of new compulsory licenses for foreign audiovisual works, favoring local broadcasters, as well as the extension of such licenses to the Internet, is of concern and is inconsistent with India's treaty obligations.

Regarding technological protection measures, Section 65A of the Copyright Act provides protection against circumvention of effective technological measures. The 2012 amendments intended to meet the minimum threshold requirements of the Internet Treaties were inadequate. Under current law, the phrase "effective technological measure" is undefined and, thus, does not expressly cover common technological protection measures, such as access controls. Moreover, the section fails to expressly prohibit the manufacture, importing, trafficking and dealing in circumvention devices. This is a necessary enforcement measure against piracy organizations whether applicable to access or copy controls. Also, the current requirement of proof of a nexus between the circumvention and copyright infringement needs to be revised—it makes technological protection measures ineffective (and superfluous to infringement actions), which is inconsistent with the Internet Treaties. Section 65A makes circumvention a criminal offense, but excludes a civil cause of action and civil remedies. We suggest that civil causes of action also be included in the provision. Lastly, the exception provided under Section 65A(2)(a), namely "doing anything referred to therein for a purpose not expressly prohibited by this Act," is overly broad and vague.

In addition to the specific changes above related to compliance with the WIPO Internet Treaties, the Government of India should also: (i) repeal the statutory license for broadcasters under Section 31D of the Copyright Act, or at a minimum, withdraw the September 2016 Office Memorandum opining that Section 31D applies to all online transmissions; (ii) amend the term of protection to be consistent with international minimum standards; (iii) amend Section 52(1)(c) of the Copyright Act to bring it in line with international standards pertaining to transient copies and to clarify that the services eligible for "safe harbor" protection are those services whose activities are of a merely technical,

automatic and passive nature; and (iv) revise its law to ensure the private use exception is compatible with the Berne and WTO TRIPS three-step test.

Administrative Website Blocking: Currently, the industries have sought website blocking through the courts, with good successes to date, particularly, blocking ten major piracy websites in 2017 and 2018. A more expeditious and less-costly remedy may be possible if the Copyright Act is amended to allow for administrative blocking orders. Such a provision would allow the government to commence administrative actions based only on complaints by rights holders. To date, the federal government has been reluctant to take on this role. Currently, the recording industry has sought website blocking through the courts, but delays and backlogs have made this an ineffective remedy (injunctions can take years to obtain—current cases are scheduled for initial hearings in 2022). A more expeditious and less-costly remedy is needed. India is considering further amendments to the Copyright Act or the Information Technology Act (IT Act) (Section 69A) in order to obtain administrative *suo moto* action by the Government of India. Such a provision would allow the government to commence administrative actions based only on complaints by rights holders, which would include actions by various enforcement units (e.g., TPCU and MCDCU) without the need for costly and time-consuming judicial orders. To date, the federal government has been reluctant to take on this role; in its place, rights holders have to seek web-blocking orders from the courts. Unfortunately, ISPs have been unable to limit the reemergence of the blocked websites through proxy domains that use redirection, and some sites that were blocked for years on court orders, like *songs.pk*, have re-emerged, meaning the implementation of block orders by ISPs is ineffective.

Statutory License for Broadcasting Under Section 31D of the Copyright Act and 2016 DIPP Office Memorandum: Section 31D was enacted as part of the 2012 amendments to the Copyright Act. It created a statutory license for the use of musical works and sound recordings by broadcasting organizations “desirous of communicating to the public by way of a broadcast or by way of performance.” Section 13 of the Copyright Act treats sound recordings as objects of copyright protection and grants rights holders a number of exclusive rights, including in Section 14, for the act of “communicating the sound recording to the public.” However, Section 31D has reduced this exclusive nature of the broadcasting right to a remuneration right (requiring no authorization from a rights holder for a broadcast). The licensing rate for such activities is not determined by the rights holder, but instead by the Copyright Board. This legal license scheme is inherently incompatible with Sections 13 and 14 and undermines the value of rights holders’ broadcast rights.

As written, any broadcasting organization (radio or television) could apply to the Copyright Board for a statutory license, affecting the negotiating power of rights holders. Additionally, the rate fixed by the Copyright Board may not (and does not) reflect the market rate. India is globally ranked as the IFPI’s 19th market, but falls short on producer and performer revenues from broadcast music (for example, 32nd if judged by performance rights revenue). According to IFPI’s 2018 Global Music Report, the new regime for broadcast licensing has led to significant declines in broadcast licensing revenues. This happened despite the fact that the Indian broadcasting industry continued to grow during this period. Section 31D, gives rights holders no choice but to allow broadcasters to use their works, even though they have the exclusive property rights, and for very low revenue returns. Section 31D should be deleted and replaced with an exclusive right allowing for negotiations between rights holders and broadcasting organizations, and the Copyright Board’s jurisdiction should be limited to collective administration (and tariff challenges for such uses).

In 2016, the DIPP issued an Office Memorandum providing an interpretation of the Section 31D statutory licence that would seem to extend it, contrary to WCT and WPPT, and contrary to the express wording of Section 31D, to apply also to all internet transmissions of literary or musical works and sound recordings by any type of service provider. The Office Memorandum states that the statutory license in Section 31D is “not restricted to radio and television broadcasting organizations only, but [also] cover[s] Internet broadcasting organizations.” Not only is this Office Memorandum incompatible with the legislative provision it seeks to interpret and with the treaties recently acceded to by India, but it also poses a major threat to the growth and sustainability of India’s digital music industry.

The Office Memorandum, while not legally binding, is harmful to the music industry and has created confusion in the market. As such, it should be withdrawn. It implies that this broad exception applicable to the exclusive broadcast

right also applies to any online transmissions of “literary or musical work[s] and sound recording[s].” Some prospective licensees have already sought to rely on the Office Memorandum to influence licensing negotiations and mischaracterize the relevant uses as “broadcasting.” It is also claimed that the Office Memorandum means interactive transmissions fall within the Section 31D statutory licence, which would contravene WCT and WPPT. India’s accession to the WCT and WPPT underlines the urgent need to withdraw the Office Memorandum.

Term of Protection: Under Section 27 of the Copyright Act, the term of copyright for sound recordings is 60 years from first publication for sound recordings. This is shorter than the U.S. term, or the 70 year term in the UK and the EU—which should serve as an international minimum standard.

Clarification of the Safe Harbor Provisions: There are safe harbor provisions in both the Copyright Act and the IT Act. Section 79 of the IT Act exempts from liability an intermediary for any third party information, data, or communication link made available or hosted by the intermediary. Applicable conditions include that the intermediary does not initiate or modify the transmission, and observes due diligence while discharging its duties (as set out in the Information Technology (Intermediaries Guidelines) Rules, 2011). At the time of writing, MeitY has released amendments to the IT Rules that give effect to the “due diligence” requirement for intermediaries under Section 79(2)(c) of the IT Act. Section 79 does not apply if: (i) the intermediary has conspired, aided, abetted, or induced the commission of an unlawful act; and (ii) upon receiving actual knowledge or notice of copyright infringement, the intermediary fails to expeditiously remove or disable access to that material. Section 79 of the IT Act is sufficient for some of the copyright industries. Others seek additional remedies and recommend the following amendments: (i) clarify that safe harbors apply only to services whose activities are of a technical, automatic and passive nature; and (ii) reinstate Rule 3(4) of the 2011 Rules, which provides for notice and takedown but which is deleted in the present draft.

India should strengthen statutory provisions addressing online infringements to facilitate timely and effective enforcement against unlicensed content distribution, including requiring expeditious take down or disabling access to infringing content. As noted, the Copyright Act currently includes a safe harbor provision for ISPs engaged in the transient or incidental storage of works, with requirements mandating takedown notices, disabling of access, and liability of such persons providing “access, links or integration” (Section 51(1)(c)). The rules provide for takedown within 36 hours of a notice, which is too long a period when dealing with online infringement, especially in cases of pre-release piracy. Additionally, the takedown mechanism in Section 52 of the Copyright Act essentially requires the rights holders to obtain an injunction, and Rule 75 of the Copyright Rules sets out cumbersome requirements for rights holders to comply with complaint notices. ISPs are generally cooperative with takedown notices for hosted content, but have not been as cooperative regarding non-hosted infringements, including rogue sites or services targeting Indian consumers from outside of India. The Copyright Act should be amended to resolve these issues, but no amendments are currently pending.

Data Protection White Paper: In 2017, the MeitY issued a “White Paper on Data Protection framework for India.”⁸ The stated objective of the review was to “ensure growth of the digital economy while keeping personal data of citizens secure and protected.” IIPA recommends that any data protection legislation arising from this consultation contain exceptions to allow IP rights holders to exercise their rights and to enforce their rights (in criminal and administrative actions), where retention of certain data of infringements is important for enforcement authorities. No known legislation is pending as a result of the white paper.

MARKET ACCESS ISSUES

Market access barriers, especially in the motion picture and video game industries, have been a focus of attention, including during high level U.S. Government and Government of India meetings in October 2017. Those meetings were intended to highlight the need for India to liberalize its economy to facilitate foreign (U.S.) exports and focus on IPR protection, enforcement, and market access restrictions. Reducing these barriers allows for more

⁸<http://meity.gov.in/white-paper-data-protection-framework-india-public-comments-invited>.

legitimate material to be available to consumers, with a diversity of pricing and other terms. Some of the more egregious market access barriers in India include:

- The TRAI “must provide” rules in the pay-TV sector: These rules prohibit broadcasters from granting exclusive contracts to certain distributors and impose “must provide” channel programming requirements for any distributor who requests them on a non-discriminatory basis, thereby eliminating competition among distributors and defeating incentives to develop exclusive programming. A recent Supreme Court ruling confirmed that TRAI can direct what packages of channels are available, which is an impingement of rights holders’ abilities to fully exercise their commercial rights.
- Rate regulations: The TRAI tariffs mandate that broadcasters offer their pay channels on a stand-alone or a-la-carte basis, and specify that no pay channel, which is part of a package, be priced above INR 19 (US\$.27). The discount on a package of channels is capped at not less than 85% of the sum total of the individual channel prices.
- Foreign direct investment caps for radio and news and current affairs TV channels, as well as pre-approval requirements for investments in other broadcasters.
- Local body entertainment tax (LBET): In 2017, India rolled out a unified GST nationwide, applicable to the film value chain in different parts, based on a four-tier structure (5%, 12%, 18% and 28%). On December 22, 2018, the GST Council decided to cut the GST rate on cinema tickets effective January 1, 2019. All indirect taxes (including entertainment tax, service tax, and VAT) were subsumed into the GST—with one exception, the LBET. In 2018, two states—Madhya Pradesh and Tamil Nadu—introduced the LBET on top of the national GST, and accorded different rates of LBET depending on the language of the film, which is discriminatory and has significantly increased the costs of cinema tickets. India should eliminate the longstanding discriminatory ticket pricing for regional films versus films in other languages.
- The rate of GST applicable on physical and digital formats of music, i.e. 18% on physical (GSTN Code HSN 8523) and 12% on digital (GSTN Code HSN 00 44 0613), is too high and is harming sales of musical works and the development of the music industry.
- Price fixing on motion picture theater tickets in South India, as well as quotas on the number of screenings per title per day.
- Onerous regulations on the uplinks and downlinks of satellite signals beaming into India.
- 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.
- Cinema licensing laws: For years, the construction of cinemas in India has been hampered by impractical and outdated regulations, contributing to India’s low screen density. To obtain approval for cinema construction, an exhibitor has to go through approximately 70 different clearances for approval of a single theater/multiplex. In addition, India’s 29 states each have different regulations for cinema construction. This needs to be simplified to encourage private sector cinema construction.
- Conflicting jurisdiction: Broadcasters have been subjected to orders from the TRAI which conflict with the Copyright Act; the latter should supersede any TRAI or other agency rules.

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be placed on the Priority Watch List in 2019.¹

Executive Summary: In 2018, much of the attention on improving the Mexican IPR regime focused on securing legal reform and enforcement obligations in the U.S.–Mexico–Canada Agreement (USMCA). While the now-concluded USMCA IPR chapter will require Mexico to make significant improvements in its current IPR protection and enforcement regime, the problems in Mexico are long-standing, and cannot wait for USMCA ratification and implementation. First, the IPR legal regime is at least two decades behind international norms. Second, the problems of enforcement are procedural and structural, and further exacerbated by a lack of resources, gaps in expertise, and government will power (by prior administrations). This combination of legal and enforcement shortcomings has stifled the growth of the digital marketplace, to the detriment of U.S. and other foreign rights holders.

Mexico has yet to fully implement the 1996 WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), which it ratified in 2002. Nor has it adopted the full panoply of necessary legal provisions and procedures commonplace in most other countries necessary for legitimate digital markets for copyrighted material. The USMCA, when (or if) it is ratified, would require Mexico to fully implement these treaties, which is an important step forward, but it gives Mexico four additional years to do so, while in the meantime, markets are suffering. For example, protection against the circumvention of technological protection measures (TPMs) and rights management information (RMI)—two key components of the digital treaties that allow streaming and on-demand services to function properly—are neither defined nor clearly protected in the current Copyright Law of Mexico.

Civil cases are expensive and difficult for rights holders to undertake, even against clear infringers, because there are no explicit provisions providing compensatory remuneration (e.g., pre-established or additional damages), making damages hard to prove and collect. The USMCA includes pre-established damages, but unfortunately, as a permissive rather than a mandatory obligation of the agreement. Proving copyright ownership, an unnecessary starting point of litigation, is also an obstacle in Mexican civil and criminal cases. Even when prosecutors are willing to commence criminal cases—a difficulty by itself due to a shortage of resources—success depends on proving a “direct economic benefit” to the infringers, instead of showing the harm caused to rights holders by the infringement; this is a difficult hurdle to overcome.

Other hurdles persist for commencing civil cases, such as burdensome presumptions of authorship and procedural formalities for commencing cases—these procedures are far afield from international practices. There was one positive legal reform in 2018. An amendment to the Copyright Law of Mexico (amending Articles 213 and 215) now provides for preliminary injunctions (“precautionary measures”) in civil cases. The absence of these remedies, until 2018, has hindered effective enforcement, especially against pre-release piracy. The 2018 law also permits *ex parte* preliminary injunctions, provided rights holders give infringers 72 hours’ written notice before the order goes into effect.

A long-recommended enforcement step is the development and adoption of a high-level national anti-piracy plan to target major piracy and counterfeiting operations, and to coordinate federal, state and municipal enforcement activities. This would help in many regions of the country where state and municipal government anti-piracy efforts

¹For more details on Mexico’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Mexico’s Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



continue to be weak overall, including in local entities that rarely work on combating piracy at all. There continues to be no coherent or coordinated plan to address online piracy, as the focus of enforcement efforts continues to be on hard goods piracy. Thus, while the copyright industries report ongoing good cooperation with some of the Mexican federal authorities, there is frustration that enforcement actions and resources have not also been directed to online enforcement, despite two decades of digital piracy, and the actions that are undertaken do not target major distribution networks.

Nationwide budget cuts in recent years in various agencies, including several IPR enforcement agencies, have further hampered enforcement efforts against digital infringement. In 2015, the Government of Mexico created an IP crime sub-unit within the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI), to focus on improving digital enforcement. Unfortunately, the sub-unit was never properly staffed or resourced, and it was disbanded in late 2016. UEIDDAPI overall has also suffered from staffing and resource problems, even though it had pledged to replace the sub-unit with two or three specialized prosecutors dedicated to online cases. Another example is the Institute of Industrial Property (IMPI), the specialized agency for intellectual property, authorized to take administrative actions against infringers, which is severely under-resourced and hampered by outdated procedural rules.

Basic tools for cooperation between rights holders and website owners and service providers are lacking. For example, there are currently no clear principles of third party liability for those inducing or promoting copyright infringement, which would incentivize Internet Service Providers (ISPs) to take preventive actions. There are currently no mandated provisions for notice and takedown of infringing content, and no penalties for non-compliance with such notices even where infringing content is identified.

Additionally, there are administrative provisions for taking down infringing material and blocking infringing sites. However, these remedies are now in limbo after the Supreme Court reversed an agency ruling blocking a clearly infringing site, because the site contained legitimate content (a blog), and the court required very onerous procedures to prove ownership of the infringed material. The music industry commenced a test case (in November 2018) in an attempt to reverse this very harmful ruling, but the site went offline before that case could proceed. The industry plans to file other cases to reverse the Supreme Court ruling.

The USMCA does require Mexico to fix another of its long-standing problems: adopting effective criminal provisions for camcording motion pictures, many of which find their way online. This legal reform cannot be delayed awaiting ratification of the USMCA. That is because Mexico is the number two foreign source for unauthorized camcords (behind Russia) in the world, and the number one source in Latin America. In 2018, 44 American (MPAA-member company) feature films were sourced from illicit camcords in Mexico, plus an additional 54 audio-only recordings (by comparison there were 55 video and 44 audio-only camcords in 2017 of MPAA-member company films). The USMCA also contains strong commitments from Mexico to address cable and satellite signal theft, which once enacted, along with the now-required sanctions against camcording, should significantly improve the market for the film industry.

PRIORITY ACTIONS REQUESTED IN 2019

The copyright industries recommend the following to the Government of Mexico as priority enforcement steps and legal reforms for 2019:

Criminal Actions, Raids and Prosecutions

- Implement a national *ex officio* anti-piracy campaign with a consistent year-round focus on major targets (e.g., online sources of infringing content including suppliers, traffickers and distribution chains), emphasizing coordination of the police and prosecutorial resources, and a strategic approach, with a prominent role for the UEIDDAPI, within the Attorney General's Office (PGR); and, properly resource UEIDDAPI. The PGR also needs

to improve its forensic standards for digital enforcement; and, mandated registration (as a practice, if not a legal requirement) for criminal cases needs to be eliminated.

- Ensure timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market.
- Address the importation of circumvention devices used in video games that are entering Mexico in small consignments and via courier packages.

Administrative Enforcement

- Provide IMPI with: (i) *ex officio* authority to investigate infringement; (ii) additional resources and political directives to issue decisions more expeditiously, including actions to takedown and block infringing websites; and (iii) allow its regional officers to conduct local raids. Provide INDAUTOR (the National Author's Rights Institute) with more resources to increase and strengthen its mediation capabilities. Improve IMPI's coordination with the Federal Police to allow IMPI to take enforcement actions in difficult or risky areas with police security.
- Support the Coalition for the Legal Access to Culture (CLAC) initiative to spur active cooperation between Internet services and rights holders as a starting point to develop clear third party liability rules, proper injunctive relief, and incentives for an efficient notice and takedown system with ISPs.

Prosecutions, Judges and Courts

- Encourage prosecutors to: take *ex officio* actions against online piracy (as well as hard copy piracy); focus on prosecuting online service operators, repeat infringers, and seek deterrent sentences, including jail time and fines. PGR should be encouraged to reverse its current refusal to investigate and prosecute IPR infringement cases absent proof of actual lost profits, rather than based on the harm to rights holders. PGR also needs to improve its forensic standards—especially for online piracy. Lastly, there needs to be increased prosecutorial training in IPR cases, with a focus on digital enforcement matters.

Legal Reforms

- Fully implement the WIPO Internet Treaties—in the Copyright Law, and the Industrial Property, Criminal and Criminal Procedure Codes (as detailed in this report), including by:
 - (i) adopting definitions and provisions on TPMs, as well as civil and criminal penalties, with criminal sanctions for the importation and distribution of devices used for the unauthorized circumvention TPMs. This should include sanctions for “acts” as well as the distribution, marketing or trafficking in anti-circumvention devices, components and services. Mexico's existing criminal law concerning TPM protection (Penal Code, Article 42) has proven ineffective because it only applies to the domestic manufacture of circumvention devices; more commonly these devices are made abroad and imported into Mexico;
 - (ii) adopting definitions and sanctions for rights management information (RMI);
 - (iii) removing the proof-of-profit (“direct economic benefit”) requirement (and onerous authorization standards) as a prerequisite to criminal liability for large-scale copyright infringements; and, removing any such limitations on the making available right which is barred by the WIPO Internet Treaties;
 - (iv) granting customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that PGR and Customs can and will act against so-called “goods in transit.”
- Enact an amendment to Article 189 of the Industrial Property Law allowing IMPI to notify defendants via e-mail for administrative IPR violations online; several legislative proposals to do this have to date failed.
- Enact legislation (now required by the USMCA) to impose criminal penalties for the unauthorized camcording of films in theaters, and eliminate any required proof of commercial intent—making the act itself illegal. The law should mandate a prison term of three to ten years, and fines.
- Enact legislation to provide clear rules establishing third party liability, including for parties contributing, inducing or promoting infringement of copyright and related rights.

COPYRIGHT PIRACY IN MEXICO

Online Market Outlook: In the past two decades, there has been an explosive growth of online access in Mexico, including the use of mobile phones and smartphones. The music industry reports (IPSO Connect Report 2018) that in 2017, 68.8% of recorded music industry revenue in Mexico was from digital music services, including subscription services (as physical format revenue declined significantly). Unfortunately, even though revenue is increasing, the per capita spending on music in Mexico is only US\$1.10 per year, compared with US\$18.11 per capita in the U.S. According to a 2017 study conducted by CLAC, more than 37 million people consumed pirated music in Mexico in 2016.²

Weak enforcement, including by PGR and its experts (*peritos*), and outdated copyright and related laws are stifling the growth of legitimate distribution sites and services; instead, illegal websites and services continue to flourish in Mexico. There are a wide variety of popular pirate services available in Mexico, including cyberlocker services, stream-ripping services, sites offering unauthorized downloading and streaming of music, film and videogames, MP3 search engine sites that provide links to enable the downloading of film, music and video game content hosted on cyberlocker platforms, BitTorrent index sites, and online markets offering video game-related digital goods. Although there are some local websites, many of the infringing sites and services are hosted outside of Mexico (e.g., in Peru, Chile, Columbia and Argentina), but are routinely accessed by individuals in Mexico. Even so, the Mexican authorities can use effective remedies and regulations against large-scale infringers when local or off-shore (with site-blocking and other measures), and they should also direct more attention to mirror sites. For some video game companies, Mexico is now among the top countries for peer-to-peer (P2P) sharing of infringing video game files and in-game digital goods, which has slowed the growth of the legitimate online marketplace in Mexico. In addition, illegal sales of subscriptions, as well as account usernames and passwords, is rampant for video games.

The most common type of music piracy in Mexico is stream-ripping (including music videos posted on YouTube and other similar platforms), as well as “linked” piracy MP3 search engines (indexes). Social networks (including Facebook and Twitter) have also been used to provide links to infringing content, a trend that has been increasing in recent years. These platforms are also very popular distribution channels for pre-release piracy.

The Motion Picture Association (MPA) reports that subscription television piracy and the use of piracy devices are a growing problem in Mexico. Piracy devices are media boxes, set-top boxes or other devices (i.e., illicit streaming devices (ISDs)) that allow users through the use of illegal software applications (apps), to stream, download, or otherwise access unauthorized content from the Internet. The use of hardware devices, and software, to pirate television programming, including subscription streaming services, is getting more sophisticated and more ubiquitous, with these devices becoming widely available in Mexican electronic hardware grey markets. This includes the use of web browsers and video apps to allow playback of files of films and television programming. There are over 170 websites with film and television materials harming the Mexican market, including some with over 13,000 illegally reproduced titles. One site, *pelispedia.tv* has 50,000 links and offers over 8,000 film and television titles; another, *pelisplus.tv*, has 10,000 links and over 1,700 film and television programs. These illegal sites are some of the regions’ most popular for streaming Spanish-language films and television programs, with a huge audience in Mexico. The independent sector of the film and television industry (IFTA) is especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services that provide revenue for financing the development of new creative works worldwide. In 2018, Mexico ranked 11th overall in the world (up from 15th in 2017) in the number of connections by peers participating in unauthorized file sharing of video games on public P2P networks. Mexico ranked third (up from 5th in 2017) in unauthorized file-sharing using consoles, 11th using mobile devices (up from 12th in 2017), and 14th using PCs (up from 18th 2017).

²See: http://docs.wixstatic.com/ugd/5b1d95_00c541f17c1f4af99e3fb21c5d1d90d9.pdf. The study consisted of interviews with 1,200 participants nationwide to get an accurate snapshot of Internet piracy in Mexico.

Hard goods piracy: Hard goods piracy continues in manufacturing and distribution networks on the street and at markets (even as digital piracy far eclipses hard copy piracy). In the last Notorious Markets Report in January 2018, as it has since 2012, the U.S. Government named two Mexican physical markets to its list: (1) Mercado San Juan de Dios in Guadalajara which is the largest indoor market in Latin America with close to 3,000 vendors selling pirated films, music and videogames, and videogame circumvention devices (sold by a majority of the market's vendors); and (2) El Tepito in Mexico City, an open-air 80 square block market in the middle of Mexico City selling video games, modified consoles and game circumvention devices, and which, as the U.S. Government acknowledges, has become too dangerous for rights holders to enforce their rights. In 2018, two facilities (one in Mexico City, one in Puebla) replicating camcorded films, were raided by the PGR, and the merchandise seized by UEIDDAPI officials.

The widespread availability of circumvention devices and technologies in many markets, and, increasingly, from online auction and e-commerce sites, underpins and facilitates the growing problem of mass online infringement of entertainment software in Mexico. Circumvention is accomplished by the installation of “modification chips” in consoles, which bypass the technological protections embedded in the hardware and enable the play of pirated video games, or by modifying the video game platform’s operating system to facilitate the play of pirated video games (so-called “soft modding”). Circumvention devices are typically manufactured overseas and shipped in component pieces which are then assembled in Mexico. Vendors, and online marketplaces such as Mercado Libre, sell circumvention devices for approximately 350 to 500 Pesos (US\$18 to US\$26), often with memory cards containing up to 400 unauthorized copies of video games as part of the sale. Top sellers on Mercado Libre offer dozens of different mod chips and mod services, and sell thousands of units of each, an indication of their high-volume business. Cheaper offerings are now available for “virtual chip” installation (an alternative version of soft mods) for 150 to 250 Pesos (US\$8 to US\$13) for installation services and pre-loaded games. Enforcement against distributors of circumvention devices is unavailable, because Mexican criminal law prohibits only the domestic manufacture of such devices, but not their distribution or sale—the obligations of the USMCA require Mexico to correct this deficiency. Even when infringing online listings are removed, sellers continue to relist their offerings with little deterrence.

Camcord piracy: Enforcement against camcording has been ineffective for two reasons: (1) the current law is very weak; and (2) that law is rarely utilized—the few criminal convictions that have been successful in recent years were the result of prosecutions based on an array of other crimes, not just camcording. Under the flawed current law, a successful prosecution of a camcorder requires evidence of intent to distribute, that is, proof of a profit motive, which is very difficult to obtain. To do this, investigators have to watch the thieves actually camcord the movie, walk out of the theater, hand a copy to the people who hired them, and then wait for the film to be widely distributed; by that time, grievous harm has resulted. By comparison, in the U.S. or Canada, the laws recognize the act of unauthorized camcording in a cinema as a crime by itself. The USMCA requires Mexico to correct its law, but it must be done properly. A draft bill in 2017 would have amended Article 424 of the Criminal Code for camcording activities; but that bill contained the “for profit” language found elsewhere in the code for IP criminal violations, which would have undermined the efficacy of the law. An alternative 2017 camcording bill would have eliminated the “for profit” requirement, but it did not advance in the Congress.

Other issues: Satellite and signal piracy remain a concern in Mexico. The current Criminal Code (the Federal Penal Code, Article 426) covers only encrypted-program-carrying satellite signal theft. There is no law prohibiting the theft of encrypted program-carrying cable signals. Nor are there current civil remedies for parties harmed by the decryption of encrypted program-carrying satellite signals or its content, or for cable systems. Mexico thus needs to amend its Criminal Code (and the Copyright Law or Civil Code) to cover cable systems, and to eliminate the “for profit” requirement for acts of decryption of satellite and cable systems, as well as to provide criminal and civil remedies in the Criminal Code and the Civil Code, for such activities.

Another major concern, already noted, is the increased availability of piracy devices (i.e., ISDs), including media boxes, set-top boxes or other devices that allow users—through the use of illegal software applications (apps)—to stream, download, or otherwise access unauthorized content from the Internet. These devices are part of

a sophisticated online ecosystem facilitating access to pirated audiovisual materials; they are promoted or advertised as facilitating easy access to remote online sources of unauthorized entertainment content, using these devices with apps. The devices are imported into Mexico either pre-loaded with the apps (prior to shipment, by vendors prior to sale, or as an after-sale service), or users can easily obtain the apps themselves to access infringing content. Enforcement authorities should take criminal actions against vendors and the operators of infringing apps used on these devices.

COPYRIGHT ENFORCEMENT IN MEXICO

Mexico does not have a centralized coordinator for copyright enforcement; instead, there are three federal agencies engaged in copyright enforcement in Mexico. The PGR is responsible for federal criminal enforcement. The Mexican IMPI takes administrative actions under the Industrial Property and Copyright Law. INDAUTOR is responsible for registering copyrights, and can conduct mediation proceedings for aggrieved rights holders.

In addition to these federal-level agencies, the Scientific Police (part of the Federal Police) of the Secretary of the Interior (*Secretaria de Gobernacion*) have also assisted rights holders by providing information on illegal software websites (and have also moved to seize domain names of infringing sites). In 2016, the Scientific Police ordered the Network Information Centre Mexico (NIC.mx), the agency responsible for the .mx top level domain registry, to suspend the domain *kickass.mx*, a popular mirror site for *kickasstorrents* (*kat.cr*), and a criminal case was commenced. In the past, an inter-agency committee (COIDAPI) periodically prepared strategic national enforcement plans, but this process has now been replaced by informal discussions between various IP enforcement agencies and rights holders.

Criminal Enforcement

Mexico transitioned to an adversarial justice system in the past five years; this has required judges to undergo training to improve the adjudication of IPR criminal cases. Under this system, criminal copyright cases are not prosecuted *ex officio*, but only upon the filing of a complaint against an infringer. This transition has resulted in prosecutorial delays of IP related crimes, including at PGR. Good cooperation continues to exist between rights holders and IMPI and PGR, as well as with the Mexican Tax Administration (SAT); some industries also report improved cooperation with INDAUTOR as well. Yet, in spite of this, IPR prosecution at PGR is hampered because it is not a priority, and PGR suffers from outdated procedures, insufficient resources, inadequate training of new agents, long delays (years) for cases to resolve, and the lack of deterrent sentences. And, with the formation of the new government in December 2018, PGR prosecutors and department heads need to be re-appointed, which will further stall any progress. The number of cases is still far below what is needed to have any significant effect on the marketplace. A formal coordination process between the government agencies (PGR, SAT, IMPI, and local police forces) is needed to improve the government's ability to efficiently address the distribution of infringing content.

A complicating element in combatting video game, music, and motion picture piracy in Mexico is the cumbersome requirement (by PGR) that each copy of an infringing game must be accompanied in prosecution files by a physical copy of a legitimate original for comparative examination by experts (*peritos*); this is done as a general practice even though the law does not explicitly require it. Under the existing system, when the comparison involves multiple copies of the same infringing game, music, or film rights holders must submit an equal number of legitimate game, music, and film DVD copies to the experts for comparison. The *peritos'* reports take too long to complete; to compound the problems, the *peritos* are not sufficiently trained in digital issues and are often reluctant to cooperate with investigations and prosecutions. The law should recognize and apply a clear presumption of ownership in civil (and criminal and administrative) matters, based on the copyright notice that appears on a product or on the screen, without the need for a mandatory (and certified) registration. In practice, copyright registration certificates are required by Mexican prosecutors to commence criminal cases.

Structural reforms and jurisdictional issues: IIPA continues to recommend several “structural” reforms or agency actions to improve criminal enforcement. An overarching priority is to implement a national *ex officio* anti-piracy campaign. Such an effort would seek to coordinate the various police agencies (including the Federal Police, the Ministry of the Interior (Gobernación), and SAT, as well as state and local police) that need to be involved in identifying and targeting individuals responsible for large-scale distribution and importation of pirated goods, including the major organized crime syndicates engaged in these operations. The priority should be criminal enforcement directed at digital piracy. It has been over five years since a national IPR enforcement plan was publicly released, and although meetings were held with stakeholders, the plan has never been fully implemented. It needs to be updated and implemented, and preferably given one central authority to direct enforcement. Criminal enforcement needs to be undertaken with a coordinated plan among PGR, SAT, IMPI, Federal Bureau of Consumer Interests (PROFECO) and the Federal Police. SAT remains engaged with PGR in support of enforcement actions related to audiovisual and music piracy, especially in cases of suspected money laundering or tax evasion.

A second recommendation is to significantly improve PGR's criminal enforcement actions against digital piracy, and especially outside of the major cities. Before the adoption of the new (adversarial) criminal system, PGR had the authority to take *ex officio* actions and criminal cases against copyright infringement, but it prioritized raids at laboratories and warehouses. UEIDDAPI needs resources and training (focused on technology) to properly undertake and to focus on criminal investigations on digital piracy. Now that the sub-unit within UEIDDAPI has disbanded (it initially had five public prosecutors from within PGR), the Government of Mexico needs to properly staff UEIDDAPI to address IP cybercrimes, as well as staffing other key IPR enforcement units in PGR and the police. In the first half of 2018, UEIDDAPI filed 348 investigations for copyright-related crimes. PGR can still take *ex officio* actions (e.g., raids), but criminal cases now formally need a complaint to be filed by a rights holder to commence the case.

Organized crime syndicates continue to predominate in hard goods piracy, and increasingly, in digital piracy. PGR has a special deputy attorney general department, the Office of Attorney General for Federal Crime Investigation (SEIDF), which established the UEIDDAPI to work effectively with industries. It has achieved significant results in some key markets. However, this unit is also under-resourced, and thus unable to effectively dismantle organized crime networks. There is also a PGR Organized Crime Investigative Division (PGR-SIEDO) with excellent investigators and attorneys and resources that the other divisions do not have, including paid informants, wire-tapping authority and witness protection programs. IIPA members recommend better coordination between PGR-SIEDO and PGR-SEIDF, as well as additional resources and training.

A third recommendation is to coordinate municipal, state, and federal government criminal enforcement actions. Of Mexico's 32 states (consisting of 2,400 municipal governments), only five of the state governments regularly cooperate on IPR enforcement—the State of Mexico, the Federal District, Jalisco, Queretaro and Puebla. Otherwise, the states and municipalities have ignored copyright offenses in their jurisdictions.

Fourth, enforcement agencies should adopt clear and consistent policies for the expeditious destruction of seized infringing goods. The copyright industries have successfully applied the *Ley Federal de Extinción de Dominio* (Federal Law for Property Forfeiture) in piracy cases, but materials seized in the PGR enforcement raids continue to find their way back into the black market. Some rights holders continue to report problems, although there have been instances where rights holders were notified, and did cooperate in the destruction of confiscated goods. Article 75 of the Federal Law for the Administration and Alienation of Public Sector Goods requires a final court order to destroy goods, unless they are abandoned, and prosecutors need to wait 90 days to declare goods “abandoned” in order to destroy them. IIPA recommends both clarity in the law, and more cooperation with rights holders to ensure that illegal materials are not returned into the stream of commerce.

Fifth, PROFECO should use its *ex officio* powers for consumer protection to stop street market piracy. Unfortunately, PROFECO lacks the human and financial resources to properly conduct raids, and needs police assistance to protect its personnel during raids. There have been ongoing training programs with different agencies

undertaken by industry, but PROFECO still needs to be properly resourced to undertake action against street markets.

A continuing weak spot in Mexican IPR enforcement is the judiciary—the need for training to improve IPR expertise by judges—especially training on technology, including circumvention devices, digital distribution, and online piracy; the lack of specialized IP judges and courts; the non-deterrent sentencing in many or most cases (criminal sentences are rare); and, persistent problems with civil litigation. IIPA recommends that Mexico consider the adoption of mandatory sentencing regulations for criminal copyright cases, and/or that the Supreme Court issue its own recommended guidelines to assist judges with the imposition of deterrent sentences and the award of damages (*reparación del daño*). That court could also issue an advisory to criminal judges nationwide to act expeditiously on applications for search warrants. Finally, Mexico should provide sufficient resources for the IP magistrates within the Tax Court, and consider creating specialized IP administrative circuit courts.

Civil Enforcement

Mexico's three-tiered civil procedure system makes civil litigation very complicated, time consuming, and costly for rights holders. Since 2013, the Copyright Law has allowed rights holders to seek damages in civil courts even before an administrative infringement decision is issued or becomes final. The Copyright Law does not provide statutory damages (e.g., additional or pre-established damages), but rights holders can seek 40% of the gross sales revenues from infringing products as damage awards. Mexican law grants full validity to electronic documents and discovery, although some judges are still not familiar with these rules. The Civil Code provides *ex parte* measures to avoid the destruction of evidence, but these provisions have never been fully implemented. Plus, as noted, there is no secondary liability for copyright infringement at present in the Civil Code.

Administrative Enforcement

IMPI: Starting in 2013, IMPI used its administrative authority to take down an infringing website, and issued an order to block access to the site. A monetary fine was imposed against the website administrator, and the website removed the infringing material. A court later upheld IMPI's action and authority. In 2015, IMPI again used its authority, this time against the website *mymusic.com*, after a case was brought by the Mexican Association of Phonogram Producers (Amprofon) and the Mexican Society of Authors and Composers (SACM). But, that action by IMPI triggered a court case when two ISPs failed to comply with the IMPI order. The court lifted the web-blocking order against *mymusic.com*. The Supreme Court upheld that ruling calling it disproportionate to the infringing harm, because the site contained some non-infringing material (a blog), and the copyright ownership of all of the material on the site was not confirmed. In November 2018, phonogram producers in Mexico brought a test case (working with IMPI) to try to overturn, or at least refine the Supreme Court ruling and to re-institute the authority of IMPI to takedown material and block access against sites if a majority of the content on a site is unauthorized. That case will now not proceed because the site is offline, but the industry plans to bring other cases to overturn the ruling. A further limiting factor, even if the case is overturned, is that IMPI can only act against an operator with a physical address in Mexico. With improved inspection practices, some industries report IMPI has taken other actions against online sites, issuing injunctions and imposing fines.

One legislative reform, still pending for enactment (that resulted from the CLAC), would improve enforcement by IMPI. The reform (an amendment to Article 189 of the Industrial Property Law) would permit IMPI to notify defendants located in Mexico or abroad, via e-mail in cases where IPR violations are committed via an electronic network; it is supported by the copyright industries. Currently, the remedy is of limited use because civil and administrative procedures require site operators to be notified by writ sent to a physical address (which pirate services do not disclose). This antiquated procedure needs to be corrected. In the first half of 2018, IMPI reported 2,877 administrative actions, mostly taken against individuals (not websites), including both copyright and trademark actions.

INDAUTOR: IIPA members continue to recommend additional training for INDAUTOR staff on key copyright matters, and that public awareness initiatives should continue to issue general information about the importance of copyright to the local culture and economy. Most report that INDAUTOR has not cooperated with the copyright industries on legal reforms or enforcement matters. The recording industry reports that INDAUTOR has been helpful with its mediation procedures (known as *juntas de avenencia*) allowing music producers (via their collecting societies) to meet with users. INDAUTOR also is responsible for supervising the collecting societies in Mexico. In 2015, the Mexican Congress created a new Ministry of Culture to oversee cultural policy and funding and placed INDAUTOR within that Ministry (with the same authority it had under the Ministry of Education).

Online Enforcement

One of the biggest obstacles to effective online enforcement is the absence of law that directly establishes liability principles for ISPs (who, in the absence of clear law, seek to avoid assuming responsibility). Unfortunately, the Government of Mexico has also been very slow to create incentives to promote cooperation between rights holders and ISPs. It has been over a decade since 37 civil organizations representing copyright industries and other rights holders, and collecting societies, formally established the CLAC to promote and defend copyrights and related rights threatened by physical and online piracy. The CLAC, working with various government entities and federal authorities, focused on legislative reforms, including addressing private copy issues, provisional measures for collecting societies, and promoting cooperation between rights holders and ISPs to address piracy in the online environment. The CLAC initiatives could be the basis for needed improvements, including notice and takedown, third party liability, and a duty on ISPs to provide information to law enforcement agencies (provided, in part, in Article 189 of the 2014 Telecommunications Law). Unfortunately, some in the ISP community continue to oppose these cooperative efforts.

Instead, at present, ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. Without clear legal standards, ISPs claim uncertainty on how to react to Internet piracy and to takedown notifications from the copyright industries; some services completely deny liability. Some IIPA members report cooperation for hosted content takedowns (as well as with the local domain name registry), but more broadly, there is little or no cooperation with many local ISPs. Other participants in the ecosystem, such as payment processors and advertising networks, should also be encouraged by effective laws to cut off the economic sources of support for piratical websites and services. Some copyright industries report that Google Mexico does respond to takedown notices filed by rights holders to block access to links in *Blogspot*. In general, the takedown procedure has proven to be very time consuming for most of the copyright industries, and it is certainly not an effective or sufficient remedy (and should not be a substitute to avoid direct liability).

In addition, specific provisions in the Telecommunications Law prohibit ISPs from disclosing a customer's personal information to rights holders seeking civil recourse against alleged infringers (although Article 189 of the Telecommunications Law, as amended in 2014, does allow an ISP to cooperate with an order from any competent authority). Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit terminations of service contracts if subscribers infringe intellectual property rights. ISP contractual practices thus compound the difficulties of obtaining access to information necessary for seeking civil remedies.

Online criminal enforcement faces many obstacles. For example, file sharing committed through online networks is generally not considered a serious legal violation by Mexican courts. Article 424 *bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement, and as a result, effective prosecutions in Internet file sharing cases are unavailable. There are no new Internet piracy criminal cases to report in 2018.

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, which is why legal reforms to address these issues are strongly recommended. A few smaller ISPs do respond to IMPI orders. IMPI has also been working with ISPs and rights holders to consider "cooperative models" for fast and efficient disabling of infringing websites. Unfortunately, the Government of Mexico's proposals offered in recent years only included a very

weak “notice and notice” system which would have compounded an already weak enforcement system. As noted, IMPI claims to only have authority to address local websites (when their administrators or owners are located in Mexico), limiting its effectiveness against foreign infringing sites.

Border Enforcement

There remain formal, onerous requirements to initiate border actions in Mexico. For example, Customs authorities will not seize infringing product entering the country, or detain it for more than a few hours, without an official order from IMPI. This is true even in cases where the product is clearly infringing. Because IMPI does not issue immediate authorizations to seize products which have been identified by Customs as infringing, the suspect merchandise is usually allowed to enter the country. IIPA recommends greater cooperation between these two agencies to improve border enforcement, and to expedite the procedures by which Customs may make independent seizures of clearly infringing products.

There were amendments adopted in the Customs Code in 2018, but the changes did not provide the necessary *ex officio* authority for Customs officials to conduct independent seizures of infringing goods and components. Instead, under the current Code, it is unclear what authority Customs officials have to seize infringing materials and retain materials.

The video game industry reports that in 2018, there were 188 seizures by Customs authorities, including the confiscation of over 14,000 infringing video game products. Most of the seized material was game consoles with hundreds of pre-loaded and infringing copies of legacy video games. Cooperation with Customs is good, but there are many repeat importers of infringing materials who are not prosecuted. In 2018, there were 24 such repeat importers, with one party caught 16 times with the same infringing product. Without criminal prosecutions or other severe penalties, there are no deterrents for these parties to cease these practices. The video game industry also reports that importers are reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. Even though there has been extensive training and good cooperation in the past, there were no seizures of circumvention devices by Customs in 2018; this demonstrates that these devices are entering Mexico through small consignments. The Specialized IP Unit in Customs retains criteria that deters inspections of courier packages even though there is evidence of substantial infringement by these packages and in small consignments.

Over a decade ago, PGR established a task force with Customs, the Ministry of the Economy and private sector representatives (music and film), to monitor and develop intelligence on blank media imports. Unfortunately, in 2011, PGR halted its seizure of in-transit containers, claiming a lack of authority, and it never implemented a new “protocol” between PGR and Customs officials. Imported raw materials—blank CD-Rs, blank DVD-Rs, jewel boxes and burners—are still widely used to produce pirate material in Mexico. These importations are not considered a crime, but coordinated administrative actions by PGR, SAT, and rights holders have resulted in a few seizures of illegal imported raw material.

IIPA continues to recommend cooperative efforts between U.S. and Mexican customs authorities. IIPA also recommends coordinated meetings on this issue with the PGR Intellectual Property inter-agency committee and U.S. rights holders (and the U.S. Embassy). Mexico should also fully implement the legislation that created a centralized customs registration database to assist with identification of infringing shipments. For such shipments via courier services, complaints of suspected infringing product must be filed with the local PGR office where the shipment is located. It would be more efficient to centralize this (e.g., by allowing notification at the PGR IPR office in Mexico City). Other needed improvements include: adopting procedures to address changes in the size and frequency of shipments and to deal with falsified documents; re-launching Customs’ inspection program and its program for seizing goods arriving at local ports, destined for other countries; adopting a maximum quota on blank media importations used for the pirate market; amending the law to provide for formal notification processes to rights holders; and developing a strategy to identify infringers who import their goods using falsified information. In addition, infringers and importers hide their true identities, so more scrutiny is needed.

One challenge for rights holders to pursue recidivists is the false information provided to Customs by these importers (a red flag for enforcement officials are repeated amendments to importation documents). IIPA urges prosecutors to target recidivist importers, and to work with Customs officials on these cases. Customs chain-of-custody procedures is another hurdle, especially for criminal enforcement. Under existing procedures, Customs officials' first alert rights holders to alleged infringing shipments. Upon confirmation of infringing material, prosecutors then order the police to inspect the packages. However, police and prosecutors have been reluctant to commence criminal cases because the packages were previously opened by Customs officials and not (as the PGR office responsible for the Mexico City International Airport requires) in the presence of police witnessing the opening of (each) package. This interpretation that the chain of custody is "broken" has forced rights holders in the video game industry to appeal decisions (incurring additional legal expenses) that terminated cases and investigations. The solution is for the PGR to develop a clear unified rule on chain of custody procedures that shifts the burden to the prosecutor to prove that evidence was altered. In addition, prosecutors have argued that infringing products without tariff classifications assigned at Customs are deemed not "imported" and thus outside the scope of seizure and prosecution, creating another hurdle to enforcement.

Hard Copy Enforcement

Although digital, not hard copy piracy, is the priority in Mexico for all of the copyright industries, problems of large distribution chains of hard copies still exist. To be effective, procedures regarding expert reports need to change, customs officials need the proper authority to commence cases, and most importantly, the Mexican authorities need to coordinate their enforcement directed against high-level targets in the distribution chain. Such efforts should also make use of the forfeiture law, under which landlords aware of criminal activity on property they own, must either stop the activity, notify the authorities, or face liability.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Mexico is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO TRIPS Agreement. Mexico was a signatory and, in 2002, acceded to both the WCT and the WPPT, although it did not publish its ratification of those treaties with the Agreed Statements. It is also a signatory to the USMCA along with the United States and Canada, but that agreement has yet to be ratified in any of the three countries.

Proper implementation of the WIPO Internet Treaties would incorporate key elements into Mexican law that are currently missing. These include: (i) definitions and provisions on TPMs prohibiting acts of circumvention, the marketing, distribution and trafficking in tools, devices, components, and/or services that can be used to circumvent, along with civil and criminal remedies for violations (although some technological protections exist under current administrative sanctions (Article 231(V)); (ii) definitions of rights management information (RMIs) and protections, and civil and administrative sanctions for the removal or alteration of RMIs; and (iii) a clarification regarding the making available right for works and sound recordings (Article 27 for works; Article 131 for phonograms). Additionally, Mexico needs to address the application of presumptions of ownership for works and sound recordings.

There is also a missing WTO TRIPS enforcement obligation that Mexico should address. TRIPS (Article 61) requires that there be effective criminal remedies, including "imprisonment and/or monetary fines," available in cases of "willful ...copyright piracy on a commercial scale." The remedies in Mexico for commercial scale piracy have not been effective, and are hampered by procedural hurdles already noted (including proof of ownership and the "for profit" motive).

The obligations of the USMCA—already noted—will not come into force until the agreement is fully ratified.

COPYRIGHT AND RELATED LAWS IN MEXICO

Federal Law on Copyright (1996, as amended): The 1996 Copyright Law is in need of significant revision. It was amended in 2018 with the addition of preliminary injunctive relief, and before that, last amended in 2003 (with implementing regulations in 2005).

Draft laws to implement the WIPO Internet Treaties have circulated for years, but have never been enacted, and the circulated drafts (most recently in 2013) fell far short of proper implementation, especially on issues relating to technological protection measures. It is hoped that implementation (now a USMCA obligation, as well as an obligation of other treaties) will fulfil all of the treaty obligations and be undertaken quickly.

The full list of legal reforms (some already noted above) include: (i) adding definitions and protection for TPMs, RMI as well as appropriate civil and criminal sanctions—including closing the loophole for circumvention devices to cover the making or distribution of such devices (i.e., manufacturing, importing, selling, trafficking etc.); (ii) confirming (i.e., clarifying) the making available right for works in Article 27 of the Copyright Law (for producers of phonograms it is part of the distribution right in Article 131(III)); (iii) criminalizing camcording (eliminating the required proof of commercial intent); (iv) raising civil penalties to deterrent levels—the current system does not include statutory damages (or “additional damages”) or the recovery of costs and attorney’s fees; (v) amending the Criminal Code to delete the “for profit” (direct profit) provisions and replace them with acts carried out for commercial advantage or financial gain or that result in substantial harm to rights holders; (vi) amending the Industrial Property Law to give IMPI authority to initiate actions against foreign websites that infringe copyright within Mexico; (vii) amending the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates; (viii) amending the Administrative Code, Tax Code and Criminal Code to (a) provide tax crime prosecution of copyright infringement (when it implicates tax liability) and (b) increase administrative sanctions; (ix) establishing strong incentives for the operation of effective and efficient notices and takedowns; (x) adding sanctions for satellite and cable signal theft and against illicit streaming devices; and (xi) creating presumptions of copyright ownership in civil, administrative and criminal cases (instead of the current practice of requiring certified copies of copyright registrations). There are also provisions in the Copyright Act in Articles 150 (transmissions of works) and 151 (neighboring rights) that provide exceptions to infringement for certain public performances where: a retransmission is not “for profit-making purposes” (Article 150) and “no direct economic benefit is sought” (Article 151). These exceptions are too broad, exceeding what treaties permit, and should either be severely restricted or eliminated.

In addition, adding clear third party liability is needed to provide an effective incentive for neutral ISPs (and others hosting or providing digital services) to meaningfully cooperate with rights holders to deter the unauthorized storage, transmission or making available of copyrighted materials. This can be accomplished by limiting monetary damages relief for qualified third parties, and only if they comply with pre-conditions for cooperation (e.g., measures to address repeat infringements), and are neither controlling, initiating, inducing nor directly infringing copyrighted material.

The Government of Mexico also needs to take administrative and regulatory steps to ensure that all relevant rights holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.

MARKET ACCESS ISSUES

In 2013, a new broadcasting and theatrical exhibition regulation went into force adding burdensome regulations for motion picture and television program producers. In 2014, a new law imposed advertising limits on pay-TV channels. The advertising law was aimed to promote domestically-made programming through a combination of financial incentives and restrictions on advertisements on pay-TV channels (since the majority of these are operated by foreign companies). The law allows a free-to-air channel that dedicates 20% of its programming to

domestic content to qualify for additional advertising time. There are also (49%) limits in Mexico on foreign ownership of broadcast networks. In short, these laws discriminate against foreign content producers.

Separately, some legislators have periodically proposed the adoption of screen quotas, which if adopted, would severely limit the exhibition of U.S. films in Mexico. These would violate the 1992 NAFTA (and the USMCA, if ratified), and should be opposed.

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2019 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 2019.¹

Executive Summary: The number one priority for the copyright industries in the Russian market is to improve the effectiveness of enforcement against online piracy—especially for hosting sites and streaming services. The Government of Russia adopted new civil procedures in recent years to enhance website compliance with takedown notices from rights holders, and, to disable access to infringing sites. These procedures, however, have been directed only against the infringing activity of users within Russia, and are not being used against Russian sites and services catering to users outside the country for whom infringing material is easily accessible. This has resulted in a substantial and persistent international copyright piracy problem.

The legal reforms adopted in 2013, 2014 and 2017 improved civil procedures and streamlined processes for websites to comply with rights holders' takedown notices, and allowed Russian courts (in particular, the Moscow City Court), working in cooperation with a key government agency, to disable access to infringing sites. These court orders can now be extended—without a reapplication to a court—to clone, proxy and mirror websites containing infringing content. Additionally, online search services are required to exclude infringing websites (identified in the court orders) from search results. Overall, these reforms have blocked or slowed access to some significant infringing sites and services.

However, even the most effective takedown procedures and processes to disable access to websites—and even when directed at proper targets—can only slow piratical activities. These actions have little lasting deterrent effect without civil, and especially criminal, prosecutions directed at commercial site operators and owners. So, two steps are needed: first, the Government of Russia should target illegal sites and streaming services that operate in Russia, even if the users are abroad. Second, enforcement authorities should target the large commercial site operators and owners with prosecutions. Instead, the copyright industries continue to report that civil and criminal enforcement overall is down from what it was a decade ago, and that government enforcement is skewed to focus on physical piracy, not online piracy. Another recommended improvement would be to expand the established takedown procedures to cover mobile apps, now the most popular means of infringement. An additional key legal reform that could be effective against online infringing websites and services would be a clarification of the legal liability of Internet Service Providers (ISPs), including that the safe harbors only apply to technical, automatic and passive activities.

There are two other priorities for the copyright industries in Russia. One is to address long-standing problems concerning collective management of music rights in Russia that have resulted in revenues being a fraction of what they should be for a market the size of Russia. The state accredited Russian collecting societies are not operating with transparency or good governance rules consistent with international norms. The other priority is to address the long-standing problem of camcording motion pictures with many feature films being illegally copied in theaters and migrating online. Properly addressing the camcording problem requires changes in the Russian legal framework, and dedicating sufficient resources and government willpower to engage in effective enforcement.

Russia completed its accession to the World Trade Organization over seven years ago. As a part of its accession, Russia agreed to a detailed IPR Action Plan with the U.S. Government (U.S.-Russia IPR Action Plan).

¹For more details on Russia's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Russia's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



However, neither the WTO obligations outlined in the U.S.-Russia IPR Action Plan, nor in the 2006 U.S.-Russia IPR Agreement, have been fully and properly implemented by the Government of Russia. These obligations, meant to improve the Russian marketplace for digital copyright materials, included specific provisions directed at the problems of online enforcement and collective administration, noted above.

PRIORITY ACTIONS REQUESTED IN 2019

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2019:

- Increase the number and effectiveness of criminal IPR cases focused against digital piracy, including a focus on deterrent criminal actions against organized criminal syndicates. Also, criminal actions should target those involved in piracy retail chains that continue to sell pirated entertainment software, music and movies.
- Increase the number of administrative actions (in addition to the criminal actions, noted above) against Internet piracy—including streaming services, pay-per-download websites, video game hacking or cheating sites, cyberlockers, BitTorrent sites, private servers bypassing official video game servers, and other commercial and non-commercial enterprises that provide services with the clear intent to promote or induce infringement, regardless of whether the servers or users are located in Russia.
- Implement regulations on the operation of collecting societies that confirm that rights holders have the legal and practical ability to determine how to exercise their rights, including whether to choose to entrust licensing to any collective, and if so, to choose that entity and to delineate the rights for such collections.
- Amend the Civil Code, Part IV, to:
 - clarify the basis for liability for providers of online services that induce or encourage the infringement of copyright and related rights, or that facilitate infringement and do not take reasonable steps to prevent such activities, as well as clarify the definition of the activities that qualify intermediaries to benefit from safe harbors, to prevent knowing facilitators from enjoying these safe harbor benefits; and
 - provide additional legal norms that create incentives for ISPs to cooperate with rights holders in fighting infringement taking place over their networks. Article 1253.1 of the Civil Code provides that intermediary services facilitating the widespread dissemination of unauthorized content cannot benefit from the liability privileges, if they know or should have known of an infringement (so, Article 1253.1 provides only very general principles of ISP liability).
- Amend the Civil Code in Article 1299, and the Presidium Decision (2009), to additionally provide civil liability for commercial trafficking of circumvention devices. Current law limits liability to rare instances where the devices are advertised (solely) as circumvention devices.
- Amend the Criminal Code to establish criminal liability: (i) for the unauthorized camcording of motion pictures; (ii) against principals in legal entities, including for IPR crimes (the Civil Code limits civil liability to the legal entities, not the principals of those entities); and (iii) for the importation of and commercial trafficking in circumvention devices.
- Amend the Administrative Code by eliminating the for-profit requirement in Article 7.12 (Administrative Offences), and raise administrative penalties to deterrent levels by implementing higher fixed fines for violations by legal entities and individuals.

COPYRIGHT PIRACY AND ENFORCEMENT IN RUSSIA

Internet Piracy: Internet access in Russia has grown exponentially in the past decade, but the laws and enforcement authorities are struggling to keep pace.

Despite the laudable legal reforms of the past few years, Russia remains home to many services supporting large-scale infringing websites, including web-based (and peer-to-peer (P2P)) downloading and streaming sites, linking sites, and cyberlockers, that offer access to pirated music, film, video games, books and journal articles. Many

of these sites cater to English-speaking and other non-Russian users, harming markets outside of Russia. As a result of the new enforcement measures and court-ordered injunctions being directed at sites within the Russian market, some BitTorrent and other pirate sites have moved their sites to foreign hosting locations.

While the new laws have helped, most ISPs and website owners never comply with takedown requests, absent court orders, instead merely forwarding notices to users without taking down material, if they respond at all. Often the Russian websites insist on proof of copyright ownership before even considering compliance with takedown requests. There are a few exceptions, with some industries reporting that a few sites do comply with takedown notices. In 2018, a Memorandum of Understanding (MOU) was signed by various rights holders and Internet platforms, including *Yandex* and the *Mail.ru* Group, facilitated by the Government of Russia (RosKomNadzor). The first indications are that the platforms are complying with rights holder requests and disabling access to infringing links in accordance with the MOU. The MOU expires in September 2019 (and is intended to be a precursor to legislative reform); its compliance will continue to be monitored by the copyright industries. Even with clear evidence of infringement, all of the copyright industries report there has been little cooperation with advertising agencies and payment processors who financially support infringing sites.

In January 2018, the U.S. Government placed several Russian online sites on its Notorious Markets List (the last Notorious Markets Report issued by the U.S. Government). In that Report, USTR retained *rapidgator* and *rutracker* on its list of Notorious Markets—both have been on the Notorious Markets annual lists since 2012.² As USTR noted, the cyberlocker “Rapidgator collects revenue through its premium membership and subscription plans and employs rewards and affiliate schemes to compensate users based on downloads and sales of new accounts” and the operators of the site net “millions of dollars annually.” Many of the copyright industries have cited *rapidgator.net* in their recent (including October 2018) Notorious Market filings, and many have cited *rutracker.org* (formerly *torrents.ru*) as well. *Rutracker.org* is a BitTorrent portal that first launched in 2010 in response to the takedown of *torrent.ru* by the Russian enforcement authorities; it has over 14 million registered users, 1.5 million active torrents, and is one of the world’s most visited websites. It has also been subject to blocking orders (a permanent injunction) by the Moscow City Court. After the court order, it moved its operations to several mirror sites. This is just one of the major BitTorrent indexing sites that contain links to a wide variety of infringing copyrighted material, especially motion pictures, television programs and music. The world’s most popular infringing streaming website of film and television programs (with over 12,000 TV series available) is *seasonvar.ru*, based in St. Petersburg, and which had over 332 million visitors between October and December 2018.

The recording industry notes many stream-ripping services believed to be operating from Russia including *Flvto.biz*, *2Conv.com* and *Flv2mp3.by* (all three offer essentially the same material operating from different domains). The sites provide downloads of converted YouTube videos to users as MP3 audio files (from servers in Germany). In Italy, in November 2018, AGCOM (the telecom regulator in Italy) ordered ISPs to block access to *Flvto* and *2Conv*; in December 2018, a Danish Court also ordered ISPs there to block access to both sites.

Another problematic site is the Russian-hosted *firestorm-servers.com*. Rights holders have observed 6,400 active users on this site playing *World of Warcraft* without having to pay the monthly subscription fee established by the owners of the online video game. There are also P2P sites hosted in Russia including *videocatalog.ru* and *torrent-games.net*, which are popular not only in Russia, but in China and many other countries. Additionally, Russia is a haven for the production of cloning software and the hacking of entertainment software programs.

For the sixth consecutive year, Russia was first in the world in the number of connections by peers participating in the unauthorized file sharing of select video game titles on public P2P networks. Russia is first in the world when it comes to the unauthorized file sharing of video games on PCs with nearly six times as many illicit downloads to PCs in Russia compared to the second highest country, Brazil. In 2018, users with Russian IP addresses accounted for approximately 40% of the global volume of detected infringements occurring on public P2P networks.

²See, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

The recording industry reports that paid download sites remain a source of piracy in Russia (in addition to P2P services, linking sites and cyberlockers). Some sites offer unauthorized on-demand streaming as well as downloads (and include pre-release music). Two such examples are: *newalbumreleases.net* (a popular linking site) which has a large library of newly-released popular music available, and *mp3va.com* which has the look and feel of a legal music site like Amazon or iTunes, but sells downloads of single tracks for less than 15 cents (and albums for \$1.50 or less). Some of the other unlicensed pay-per-download sites include: *mp3panda*, *mp3fiesta* (hosted in Russia, but operated from Cyprus) and *mp3eagle.com* (many of this site's users are from the U.S.). In the past few years, access to illegal music via apps in Russia has grown exponentially, and major sources of these apps do not respond quickly (e.g., Apple), or, in some cases, at all, to takedown notices. The draft legislation that would block mobile apps (as the current law does for websites) would significantly improve this particular problem. According to a recent global music report (IFPI Global Music Report 2018), recording industry annual revenue in Russia amounted to just 59 cents per capita; in comparison, revenue in the U.S. was \$18.11 per capita.

In 2016, *vKontakte* (*vk.com*), the most popular online social network in Russia, agreed to music licenses with several major record companies. In spite of these licensing agreements, the U.S. Government retained *vKontakte* on the Notorious Markets List in 2016 and 2017 (the last issued Notorious Markets Report in January 2018). In last year's Report, the U.S. Government noted that despite "positive signals," *vKontakte* reportedly continues to be a "hub of infringing activity" noting, in particular "thousands of infringing motion picture files on the site." *vKontakte*, now owned by *Mail.ru*, has a functionality specifically designed to enable its members to upload files, which includes hundreds of thousands of unlicensed copyrighted works, including film materials. It is available in many languages, including English, and has a dedicated content search engine that enables searches and instant streaming of content (and, for years, it permitted third party "apps" to enable non-members to search, stream and download the content available on the site). Starting in 2016, *vKontakte* has limited access to such third party apps, making it more difficult for users to download content directly, and also has experimented with content recognition technologies. *vKontakte* also blocks infringing sites from accessing videos stored on *vKontakte*, but third party pirate sites can still stream illegal content from another service operated by the same parent company. According to the motion picture industry, *vKontakte* is still serving as a major infringement hub for illegal film materials. One encouraging sign has been *Mail.ru's* overtures to some rights holders to address piracy on *vKontakte* and other *Mail.ru*-owned services (and as noted, signed an MOU with various rights holders in 2018, regarding takedown and stay down obligations). The publishing industry (particularly trade book publishing), is similarly affected by ebook piracy on the site. Although the site is responsive to notifications of infringement, it remains a concern given the ease with which the site's users can upload and share pirated ebooks and audiobooks. The video game industry reported that in 2018 there was a continued decline in the number of groups distributing game items on *vKontakte*, and that they have been generally responsive to takedown notices (even as there has been an increase overall in the number of other sites offering in-game items).

Russia's second largest social network site, *odnoklassniki.ru* (with 43 million visits per day, owned by *Mail.ru*) now operates a licensed music service. It also includes thousands of unauthorized audiovisual and print materials. This site and *vKontakte* alone host more than half of the unauthorized audiovisual material in Russia, so much more needs to be done to engage in effective enforcement against these sites. For example, *vKontakte* continues to be the preferred platform for the unauthorized distribution of pirated educational course books, and CD and DVD content by certain educational establishments to its students, as well as between and among users of the site. There are many other Russian-originating websites that offer movies for downloading and/or for streaming. For example, *movie4k.tv* is a popular streaming linking site with thousands of American movies that has been identified by the motion picture industry as a notorious market.

Book and journal publishers remain very concerned by the prevalence of online piracy in Russia (consisting of pirated copies of books and scientific, technical and medical (STM) journal articles), particularly on hosted-content websites that are operated by Russian residents. The most egregious example is the search engine/locker site *Sci-Hub* (formerly *Sci-Hub.org*) and the group of sites known as the "Library Genesis Project" (*libgen.org*) which now makes available for free over 62 million copyright-protected journal articles (more than 90% of existing publisher content) and over 6 million books. To further its infringing activities, *Sci-Hub* gains unauthorized access to university

systems and publisher databases through compromised user credentials, and obtains copies of copyrighted journal articles, which it then hosts on its own server network, as well as cross-posting it to *Libgen.io*. The *Libgen* site encourages the creation of mirror sites of all of its content, and several such sites exist. *Sci-hub.org*, the Library Genesis Project (*Libgen*), and its operators were sued in the Southern District of New York in 2015 by an Association of American Publishers (AAP) member company for copyright infringement (for the unauthorized reproduction and distribution of journal articles), and violations of the Computer Fraud and Abuse Act (for *Sci-Hub*'s intrusions into publisher databases). Although the U.S. court granted the publisher a preliminary injunction in 2015, the site quickly resurfaced under the *sci-hub.io* domain.

In 2017, the U.S. court granted a permanent injunction, and awarded the publisher \$15 million in damages for the 100 sample works included in the suit. Also in November 2017, following a complaint filed in June 2017 by another American publisher, a district court in Virginia issued a second default judgment against *Sci-Hub* (then at *Sci-Hub.io*) of \$4.8 million for the 32 sample works included in that suit. The court enjoined *Sci-Hub* and "those in active concert or participation with them" from infringing the publisher's copyright, and also ruled that "any person or entity in privity with *Sci-Hub* and with notice of the injunction, including Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries, cease facilitating access to any or all domain names and websites through which *Sci-Hub* engages in unlawful access to, use, reproduction, and distribution" of the publisher's trademarks or copyrighted works. In October 2018, publishers successfully sought an injunction to block the sites' primary domain in Russia. Further proceedings are underway to seek a permanent injunction against the site's continued operation in Russia.

In general, publishers report online enforcement is hampered by low compliance rates in response to rights holder requests to takedown links to infringing content, with many sites ignoring requests altogether. P2P piracy providing free unauthorized access to e-books continues to be an issue as well.

The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium-sized businesses and cannot engage in lengthy and expensive civil enforcement. Independent producers partner exclusively with authorized local distributors to finance and distribute films and television programming. As a result of the piracy, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. Revenue from legitimate distribution services, which are licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions. The independent production sector cannot easily shift to new business practices that might otherwise limit piracy, such as worldwide same day release (referred to as "day-and-date" releases), since national distributors release films on their own schedules in synch with local release patterns that include compatibility with local holidays as well as investment in local marketing and advertising.

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

The 2013 legal reforms included two key civil law changes and procedures directed at online piracy. The first change amended the Civil Code, Part IV—in theory, to provide for third party liability, as well as safe harbors from such liability for "information brokers" (ISPs) that comply with all the requirements for those safe harbors. Unfortunately, the changes did not provide clarity regarding the liability of online infringing websites and services, so a clarification of the legal liability of ISPs is still necessary (and that safe harbors apply only to activities that are merely technical, automatic or passive). The second 2013 reform included a set of amendments to the Civil Procedure Code (and corresponding amendments to the Arbitration Procedure Code and the Federal Law on

Information and Information Technologies (2006)) authorizing judicial injunctions (but only injunctions) after notice and takedown to block access to infringing materials or websites. In 2014, amendments expanded the scope of subject matter covered by the 2013 changes (Federal Law No. 364, in force May 2015), and expanded the existing procedures for court ordered site-blocking against repeat infringers.

The 2017 reform (Federal Law No. 157, in force October 1, 2017) addressed the problems of clone, proxy and mirror sites by broadening the Russia court ordered (civil) injunctions to cover these sites as well as the original infringing site. Under the 2017 law, with an existing court order against an infringing website, a rights holder can submit a request to the Ministry of Digital Development, Communications and Mass Media (Ministry of DDCMM) identifying a mirror (or clone or proxy) site, and, after review by the ministry, RosKomNadzor issues instructions to block these sites; an administrative procedure is then used to block mirror sites. No special request to a court is needed from a rights owner; rather, a list of qualified blocked websites is provided by rights holders via an online mechanism to the Ministry of DDCMM although it is limited to 50 or 60 site blocks per day under regulations it adopted in October 2017. The ministry's decisions—which must be made within 24 hours of receipt by a rights holder—can be appealed in the courts. The 2017 legislation also required that search engines must remove links to infringing content on sites that have been subjected to an order from the courts or the Ministry of DDCMM. RosKomNadzor oversees compliance of both ISPs and search engines with this process. There are fines of up to 700,000 rubles (US\$10,350) for search engines that do not comply with de-indexing orders.

One other proposal (which has passed a first reading in the Duma), not yet adopted, would apply the same website blocking procedures to mobile apps. There are two other proposals (recommended by the Ministry of Culture): one to block anonymous pirate websites without applying to a court; the other would accelerate enforcement of site blocking orders (from three days to one day)—neither has yet been adopted. The Federal Tax Service (FTS) also has the authority to block the use of anonymizers and to create a list of banned resources to bypass blocked websites, but its jurisdiction is specifically limited to acting against online illegal gambling operations. The FTS can also request that RosKomNadzor block anonymizers, so there is in place effective authority to take action against online piracy if the Government of Russia chooses to apply it.

Separately, a law was introduced in the Duma in April 2017 to provide monetary penalties (up to 800,000 rubles; US\$11,840), for attempts to bypass website blocking orders under the law applicable to anonymizers and virtual private network (VPN) services. The VPN law went into force in November 2017; the other law providing penalties has not yet been adopted.

The result of all of these laws has been positive, with an ever-increasing number of injunctions, including permanent injunctions, against various Russian websites. The motion picture industry reports that more than 2,500 domains have been permanently blocked and de-indexed (corresponding to approximately 500 unique websites). The music industry reports that 1,165 music-related sites have been blocked to date, including 937 in 2018.

The video game industry alone identified over 95 video game-oriented piracy websites blocked in 2018. There are many examples of injunctions against major infringing sites, including those against *rutracker.org* and *rutor.org*. However, workarounds still exist, and Internet users have obtained access via mirror sites (and alternative DNS services) and VPNs, so sites such as *rutor.org*, *rutracker.org* and *nmm-club.me* retain millions of monthly users in spite of the laws. Although the 2017 legal reforms were intended to curtail this access, the court orders have struggled to keep up with the growing number of sites and services.

Even though some sites have seen dramatic decreases in traffic right after such orders (and even sites moving out of the country), many simply resurface in new guises and continue operations without the deterrence of a criminal prosecutions against the owners and operators of infringing sites and services. Still, one consequence of the recent legal reforms is that most of the copyright industries reported that civil enforcement on balance did improve in 2018, and some industries (such as the video game industry) are reporting that as a result, there has been growth in the legal marketplace.

In November 2018, rights holders (almost exclusively Russian), search engine operators and social networks signed a voluntary MOU requiring operators and networks to remove URLs to illegal content (i.e., audiovisual works), so that search results would not direct users to these sites. Currently, the MOU only applies to audiovisual works, and is effective until September 2019, but is expected to be replaced by legislation in 2019, and made applicable to all works, including books, music, and business and entertainment software (video games). If not replaced with legislation the MOU should, at the very least, be subject to independent court review to uphold the rule of law.

Criminal Enforcement Against Online Piracy: For the past several years, the Government of Russia has stopped providing annual reports or enforcement statistics, so it is difficult to accurately gauge enforcement activity as a whole. However, the industries have again reported in 2018, that enforcement overall, especially criminal enforcement, seems to have declined, and as noted, focused too much on physical, and not digital piracy. For example, the video game industry reports there were only four criminal convictions for video game piracy under Article 146 of the Criminal Code in all of 2018.

To be effective, IPR enforcement in Russia needs a clear nationwide governmental directive on enforcement with a particular focus on online piracy. Without coordination and a high-level directive, criminal and administrative enforcement practices have varied considerably from region to region within Russia, and have had little deterrent effect. Any coordinated nationwide campaign should focus on *ex officio* criminal actions targeting large-scale commercial enterprises, as well as on taking administrative actions and strengthening administrative penalties. This would allow legitimate markets to develop for film, music, entertainment software, and published books and journals, for the benefit of local and foreign creators and producers, and Russian consumers. It would also help support smaller independent rights holders who do not have the resources and therefore must rely on the government for effective enforcement.

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

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

Changes to criminal procedure which placed copyright infringement cases into the category of serious crimes have enabled—at least in theory—Russian law enforcement agencies to conduct thorough and comprehensive investigations against owners and operators of piratical operations. However, deterrent criminal penalties have rarely, if ever, been imposed against owners of commercial Internet operations. In recent years, police

and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes (and especially have had difficulty proving intent, or in identifying the individuals responsible for criminal activities). As a result, few such cases are ever brought and even fewer tried to a conclusion. The problem has been an inability to adopt a unified formulation by the police and prosecutors on how to apply the thresholds for online crimes. An intensification of criminal investigations and criminal convictions against principals of organized commercial pirate syndicates is sorely needed. The status quo only further corroborates the lack of political will or incentives by government agencies to act against large-scale copyright infringers. In addition to criminal enforcement, the relevant administrative agencies (e.g., the Federal Anti-Monopoly Service (FAS)) should target large illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia.

Camcord Piracy: Russia remains the home to some of the world's most prolific criminal release groups of motion pictures. Pirates obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet as well as selling illegal hard copies. In the past two years, over 108 MPA-company films have been camcorted in Russia (and, an additional 74 audio-only recordings were sourced from Russia). The total number of sourced audiovisual camcord copies from within Russia decreased in 2018 to 48 (down from 60 in 2017); there were 34 audio-only recordings source from Russia. Most of the Russian camcords come from Moscow, Kazan, Novosibirsk, Rostov-On-Don, Ekaterinburg, and Naberezhnye Chelny. The illicit camcords that are sourced from Russia are only of fair quality, but they remain in high demand by international criminal syndicates. Copies of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets) within a few days of theatrical release damaging revenues worldwide and across the economic lifecycle of the film. In 2018, the Russian-Anti Piracy Organization (RAPO) assisted with five interdictions by security personnel (trained by RAPO). Two criminal cases were initiated against the camcoders, and a conviction in either of these cases could serve as a precedent. Importantly, the Government of Russia needs to amend Article 146 of the Criminal Code to more effectively address illicit camcording in theaters (a 2013 amendment was never adopted). The government should also properly resource and undertake more effective enforcement against illegal camcording of motion pictures.

Criminal Enforcement in General: Criminal enforcement in Russia remains a priority for the copyright industries to deter digital as well as hard copy piracy. Russia's laws are generally adequate for addressing hard copy piracy, although some gaps remain. As in years past, much of the criminal enforcement by the government in 2018 was aimed at physical piracy, but that form of piracy has declined significantly as the marketplace moved online. A few industries, such as IFTA, reports that physical piracy is still a problem, in their case, for independent producers and distributors. High quality pirated DVDs and artwork are routinely sold in street markets or uploaded and offered for free online, destroying the legitimate market for these works.

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

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

government expert reports. Delays also result from a lack of subject matter expertise in some cases as well as a reluctance to use or rely on rights holder expertise on forensic matters. Worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, making effective cooperation extremely difficult. The problems are further exacerbated by ongoing reforms of the investigative bodies. These arcane and outdated rules and practices create unnecessary delays and costs in litigation. The rules should be modernized so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. It is reported that some courts will accept private expert testimony, but a uniform rule would be more effective.

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

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

Russia's current Criminal Code does not allow for corporate entities to be held criminally liable for infringement. Only a natural person (usually a corporation director) can be found criminally liable, and only upon a showing that he/she had a direct intent to commit the infringement. It is extremely difficult to meet this burden of proof, so many cases are suspended without any penalty.

Several copyright industries continue to report that raids against retail outlets, while undertaken, are not ultimately successful in stopping criminal activity because: (a) there is no criminal liability for corporate entities or principals of these entities; (b) the police fail to comply with the Criminal Procedure Code; (c) prosecutors are generally reluctant to recommend the initiation of criminal cases; and (d) targets of raids are often tipped-off, preventing successful surprise raids. Amendments to the Criminal Code to allow principals of corporate entities to be held criminally liable would help to correct this problem.

Civil Enforcement in General: The commercial-scale piracy, which harms all of the copyright industries, can and should be addressed through enhanced administrative actions (and penalties) and criminal remedies. Civil measures are not capable of providing the requisite level of deterrence against this type of piracy; but, if, properly applied, civil enforcement can be a useful tool for some industries (as it has in the courts actions against some websites). However, independent film producers and their authorized distributors are unable to avail themselves of lengthy and costly civil enforcement. For those who are able to pursue these remedies, there remain many civil enforcement inadequacies, including: (i) remedies limited to the seizure of specific copies of works that are the object of a lawsuit; (ii) the failure to award preliminary injunctions (although 2013 amendments made some improvements), or to freeze assets and evidence; (iii) low damages awards, which, like all awards, are also very difficult to enforce; (iv) burdensome evidentiary requirements, including rights ownership information; (v) the absence of personal liability for the directors of infringing companies or enterprises (the only way to bring proceedings in cases where bogus

companies operate); and (vi) the absence of the notion of clear contributory liability under the Russian civil law system dealing with copyright infringements. One additional recommendation is the adoption of judicial guidelines on civil search practices, including provisional measures consistent with the WTO TRIPS requirements.

One very troubling development is a proposal to lower fines (statutory damages) from their current levels, below the minimum levels set in the Civil Code (currently US\$170) per infringement. Awards are already too low as imposed by the courts; further lowering the permissible levels will not provide deterrent penalties. This proposal, adopted at a first reading in the Duma in October 2017, remains under consideration for final passage (Amendments to Article 1252 of the Civil Code). It should not be adopted.

Administrative Enforcement: The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles, US\$22 to US\$30), the owners or managers of legal entities (10,000 to 20,000 rubles, US\$148 to US\$296), and on legal entities themselves (30,000 to 40,000 rubles, US\$444 to US\$592), as well as permits the confiscation and destruction of pirated product. Administrative cases are filed by the police or by agencies, but the levying of fines is done by courts of general jurisdiction (for natural persons and juridical entities) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities would have a deterrent effect, especially in instances when criminal cases are terminated for failing to meet the high evidentiary burdens. Unfortunately, current administrative procedures are inadequate because of the very low level of fines imposed and the inability to reach commercial enterprises that distribute infringing content. The video game industry reported only a single administrative law case involving fines and damages in all of 2018 against an entertainment software infringer.

Collective Administration: In 2017, legislation was enacted (entering into force in May 2018), to purportedly address the problems of the state accreditation system and the governance of collecting societies. Unfortunately, the new law falls far short of either providing transparency to rights holders or good governance consistent with international norms and best practices for collecting societies. The new 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 new law regarding transparency is that it neither allows rights holders to see how much money their RMOs collect, nor how much they distribute to their members.

The new law creates “supervisory boards” for each of the various authors’ collection societies (the Russian Authors Society, the Russian Union of Right Holders and the All-Russian Intellectual Property Organization) consisting of members of each RMO, but also including government representatives and “user” group representatives. This does not allow rights holders to be involved in the selection and management of the organizations that purport to manage their rights. Proper management would allow for a supervisory board of rights holders to oversee the internal management of the RMO, and would include international rights holders with local representatives on the board. Instead, partial control 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). Lastly, the so-called fiscal control improvements, including regular audit reports, will not improve accountability, because the audit obligations are only to the government (for taxation purposes), not to those rights holders. There are many models for proper governance of RMOs, including WIPO best practices, international rights holder group best practices, as well as U.S. and European Union existing practices.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

In three separate bilateral and multilateral agreements over the past several years, the Government of Russia made commitments to take effective action against Internet piracy. First, in the 2006 U.S.-Russia IPR Agreement, Russia agreed to combat the growing threat of Internet piracy “with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights” (and especially for websites registered in Russia’s .ru domain name, or whose servers are situated in Russia), and “to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.”

Second, when Russia joined the WTO in 2012, as part of its WTO accession, in the Working Party Report (paragraph 1339), the Government of 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.”³ Last, in 2012, in the U.S.-Russia IPR Action Plan, the Government of Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, *inter alia*: “Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content....Take actions against the creators and administrators of websites through which intellectual property crimes are committed....Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites.” The Government of Russia has not fully implemented these obligations.

With regard to collective administration, existing regulations and state accreditations have institutionalized a system that is not transparent and lacks good governance or accountability for authors, record labels and performers—who have no other option except the state collective management organizations. Correcting this problem is also a treaty obligation. During WTO accession (in the Working Party Report, paragraph 1218), Russia assured its trading partners it would “review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect,” to bring the management societies in line with international standards on governance, transparency and accountability. That commitment was due in 2013. Instead, the 2017 legislative reforms (in place as of May 2018) set any progress backwards to phase out non-contractual license management schemes—now five years after Russia was obligated to fix this problem.

To develop properly functioning music broadcasting and public performance payment systems, the Government of Russia must fulfill its WTO Working Party Report and U.S.-Russia IPR Agreement obligations. This would entail the proper state accreditation of collecting societies in a manner that ensures that rights holders are able to control and manage their own societies, so they are fairly represented and there are no conflicts of interest in the governance structures. Fair representation in these societies includes direct representation of rights holders on the board in a manner that is proportionate to relevant market share and that reflects commercial realities.

In 2014, by presidential proclamation, Russia was removed from eligibility for trade benefits under the Generalized System of Preferences (GSP) program because its economic developments exceeded the statutory qualifications for GSP benefits. As a result, in 2014, USTR closed the GSP country practices review of Russia’s protection of intellectual property rights which was originally launched in response to a petition filed by the IIPA. Thus, the removal or suspension of GSP benefits for IPR deficiencies is no longer a trade enforcement tool.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Russia has made progress on legal reforms during the lead up to WTO accession, and in the more recent Civil Code, Part IV revisions, but gaps remain in the legal regime, with either incomplete or inadequate reforms, especially with regard to effective Internet enforcement and implementation of the digital treaties.

IIPA and its members have in the past commented on three major overarching concerns in the Civil Code, as amended: (a) a lack of clarity on numerous provisions, especially exceptions; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of clear liability rules for online websites and services that induce or encourage infringement (and the applicability of safe harbors for such services). Even after the recent amendments, the law does not clearly define ISPs and the various services they provide, nor does it link liability and safe harbors in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy—in civil and criminal law; lastly, it does not clearly define

³The U.S. Government detailed all the intellectual property WTO commitments of Russia in its “2018 Report on the Implementation and Enforcement of Russia’s WTO Commitments” (December 2018), available at <https://ustr.gov/sites/default/files/Russia-2018-WTO-Report.pdf>.

secondary liability. In fact, the only pending proposals regarding ISP liability and safe harbors would extend the safe harbors to search engines (within Article 1253 of the Civil Code). If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia needs to develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy, and one that does not provide cover for services that induce or promote infringement (or that directly infringe). Further, it is critical that Russia amend its regime to allow for injunctive relief that is quick and effective and applicable to all works, especially for Internet matters.

Other existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; (b) overly burdensome evidentiary requirements to prove title; and (c) the lack of criminal liability for corporate enterprises or the principals in such enterprises. To require a “full” chain of title for each recording in every investigation is especially problematic for foreign rights holders with translation, notarization and other costs and delays. Similarly, the procedures for obtaining injunctions tied to notice and takedown (and proposals for further changes), have been criticized as being overly burdensome in requiring “proof” of ownership.⁴

Article 1299 of the Civil Code (in conjunction with the Presidium’s decision No. 5/29 (October, 26, 2009)) prohibits the commercial distribution (i.e., trafficking) in circumvention devices and services that circumvent technological protection measures (TPMs). It applies to devices and services that are advertised or offered for sale, but only if advertised or sold exclusively as circumvention devices. The law needs to be expanded so that liability applies to the commercial trafficking in all variety of circumvention devices and services, not just those advertised and marketed as “circumvention devices.” In addition, commercial trafficking in circumvention devices—including by importation—should also be criminalized.

In addition to those already mentioned, IIPA recommends steps to ensure that remedies for IPR infringements required by treaties, found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code, continue to apply in light of the adoption of the 2008 Civil Code and the repeal of the copyright law. Lastly, IIPA recommends that Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, be improved by deleting the exception for the sale of materials by the state for “income,” and by parallel changes in the respective procedural codes.

One proposal currently being considered by the Government of Russia (FAS) would bring copyright within the scope of anti-monopoly laws (which have to date been exempted), and could result in a prohibition of exclusive licensing and distribution agreements. If adopted, this would cause chaos for many of the copyright industries in the Russian market who are dependent on such exclusive agreements.

MARKET ACCESS ISSUES

There are four existing laws harming the marketplace for audiovisual content in Russia, and one proposed restriction that, if enacted, would do even further damage.

In 2015, a law went into force banning advertisements on pay cable and satellite (i.e., scrambled signal) channels. The law does not affect state-owned (Russian) television channels because they do not rely on advertising revenue, and exempts terrestrial broadcasters (who are heavily dependent on ad revenue). As a result of this disparity in its application, the law is significantly impacting the market for cable and on-demand services, including those services operated by foreign companies.

In 2017, a Mass Media Law amendment was adopted (Federal Law No. 87, in force July 1, 2017) which regulates and licenses online film websites, including streaming platforms, and which limits foreign (non-Russian) ownership to 20% of such sites. The law applies to operators of all online audiovisual services, if their Russian audiences are below 50% of their total users (and, if Russian users are below 100,000/day). The calculation of this

⁴For a detailed list of IIPA’s prior comments specifically on the Civil Code (and some of the related laws), see <https://iipa.org/files/uploads/2017/12/2010SPEC301RUSSIA.pdf> at page 138.

usage is very unclear, with severe consequences for violations, including barring a foreign entity or individual from owning or participating in these businesses entirely. Moreover, the law imposes burdensome regulations on the operators of legal sites. When it was proposed, the law drew opposition from both Russian and foreign film distributors (as a violation of international treaties) and website owners of legitimate content, fearing that, if adopted, it would become a tool to limit legal websites while alternatively resulting in more, not fewer, piratical film sites. Although when drafted it was rumored to be aimed at preventing the expansion of foreign businesses into the local market, it is now clear the law was part of an overall scheme to control all media sectors.

Two other discriminatory laws are problematic. First, there are customs duties on the royalty value of some imported audiovisual materials (which includes video games), rather than solely on the value of the physical carrier medium. In practice, however, digital distribution has mitigated its impact, and there are few reported disputes with the customs authorities on this matter in the past two years. The second law is the Value Added Tax (VAT), which remains very problematic and has been imposed in a discriminatory manner: only Russian-made films are given national certifications that exempt them from the VAT. This is a WTO violation because it denies national treatment for taxes on Russian versus identical foreign products.

In October 2018, the Ministry of Culture proposed a measure to limit the percentage of screens that can be taken by any single foreign film (earlier proposals limited the number of foreign film screenings in multiplexes or monoplexes to 35% of the total number of screenings in those theaters). If enacted, these proposals would harm the distribution and exhibition of foreign films in Russia. Another proposal would place a 3% tax on theatrical box office revenue. None of these proposals have been implemented, nor should they be implemented, as they violate Russia's international treaty obligations (WTO Agreement).

SOUTH AFRICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place South Africa on the Priority Watch List in 2019.¹

Executive Summary: 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. It is now more important than ever to maintain and expand proper incentives for investment in the creation of original material—motion pictures, music, video games, books and journals in all formats. New technologies for distribution of cultural materials provide exciting opportunities for growth of the copyright industries and all creators. To capture this opportunity, it is essential that rights holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their goods and develop new legitimate services. South Africa’s government has stated its commitment to protecting intellectual property and its desire to bring its laws into compliance with international treaties and commitments. South Africa’s Cabinet also recently approved the country’s accension to the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Beijing Treaty (the “WIPO Internet Treaties”). IIPA applauds this development, but is seriously concerned about two draft laws recently accepted at the National Assembly, and pending approval by the National Council of Provinces, which are in violation of these treaties and, potentially, South Africa’s Constitution.

Since 2015, South Africa has embarked on a project to update and amend its Copyright Act and Performers’ Protection Act, which resulted in two fundamentally problematic bills—a Copyright Amendment Bill and a Performers’ Protection Amendment Bill, both of which have been subject to numerous revisions to bring them into their present forms, but which have failed to address their fundamental deficiencies. These bills raise many concerns for the content industries and move South Africa further away from international norms, rather than into compliance with the WIPO Internet Treaties. Moreover, the bills undermine the potential of the modern marketplace because they fail to establish a clear legal framework—particularly in the digital arena where the potential for growth is most evident. Many of these defects stem from an approach that focuses on government interference in negotiations and the distribution of revenue from licensing, rather than on ensuring the vibrancy of a free market in creative materials. Also very troubling are a number of issues that have clear potential to drive a formal challenge in the Constitutional Court.

Considerable work remains to make the bills acceptable and frankly, implementable in practice, and the full extent of the clarifications needed to establish a robust system of copyright incentives through amendments to the Copyright Act go beyond those raised in this report. The bills would benefit from revision, not only to address their deficiencies as outlined by multiple stakeholders, but also to reduce ambiguity and thereby establish greater certainty in the law for rights holders and users alike. Considering the importance of the task of modernizing South Africa’s Copyright Act, and the degree of concern raised by the creative industries with the current bills, IIPA recommends that the U.S. Government send a clear message that the proposed bills are flawed and additional review is necessary to address the concerns of *all* stakeholders and ensure the provisions comply with international treaties.

¹For more details on South Africa’s Special 301 history, see previous years’ reports at <https://iipa.org/reports/reports-by-country/>. For the history of South Africa’s Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2019

- Revise the Copyright Amendment Bill and the Performers' Protection Amendment Bill to make them implementable and ensure compatibility with international treaties and commitments, and further to avoid undermining the existing commercial practices of the creative industries.
- Engage in effective enforcement against online piracy, including by appointing cybercrime investigators and developing a cybercrime security hub recognizing copyright as a priority.
- Ratify and fully implement the WCT and WPPT.

COPYRIGHT LAW IN SOUTH AFRICA

Amendment of South Africa's Copyright Law and Performers' Protection Act are needed to bring the country's laws into compliance with international treaties. In 2015, a Copyright Amendment Bill was introduced (2015 Bill), followed by a Performers' Protection Amendment Bill (PPAB), intended to effect this purpose. However, these bills were highly unsatisfactory. Following criticism from many rights holders groups, including IIPA, the progress of the bills was postponed pending further review and discussion with stakeholders. In December 2016 and May 2017, two further Copyright Amendment bills, amounting to a revised version of the troubling 2015 Bill, were introduced, and further amended in 2018 (2018 Bill). A revised PPAB was also produced in 2018. These revised bills address only a few of the problems in the 2015 Bill. Moreover, many of the most problematic provisions carried over to the new bills, and new problematic provisions have been introduced without any public consultation in some cases. These bills were passed by the National Assembly in December 2018 and are now pending before the National Council of the Provinces. At the time of writing, it is understood that they may be presented for Presidential assent prior to the 2019 South African elections, which may take place in May.

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

- The inclusion of severe restrictions on the freedom of rights holders to contract in the open market, which is a key factor for the healthy growth of the entire creative sector. For example, both the 2018 Bill and the PPAB limit 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.
- An ill-considered importation of the U.S. "fair use" rubric is appended to a proliferation of extremely broad new exceptions and limitations to copyright protection, whose effects would imperil the legitimate markets for educational materials, locally-distributed works, and online works in general. Neither the "fair use" nor the "fair dealing" aspects of the proposed bill are ideal, but, more importantly, the proposed "hybrid" model is of utmost concern in terms of its drafting and the challenges posed to any entity that may try to actually use it.
- The licensing and regulatory mechanisms are likely to undermine the digital marketplace by regulating the relationship between creative parties, rather than providing a robust legal framework for the protection of creative works within which private parties can freely negotiate the terms of their relationships.
- Inadequate criminal and civil remedies for infringement, including online piracy.
- Inadequate provisions on technical protection measures, and overbroad exceptions to prohibitions on the circumvention of such measures.

Taken as a whole, these provisions are inconsistent with South Africa's international obligations, far exceeding the scope of exceptions and limitations permitted under the World Trade Organization Trade-Related Aspects of Intellectual Property Rights Agreement (the "WTO TRIPS Agreement") (Article 13). Moreover, aspects of both bills are incompatible with the WIPO Performances and Phonograms Treaty and WIPO Copyright Treaty.

2018 COPYRIGHT AMENDMENT BILL (2018 BILL) AND PERFORMERS' PROTECTION AMENDMENT BILL (PPAB)

Many of the proposals in the 2018 Bill and the PPAB suggest a mistaken assumption that there is a fixed market for works and that the government's role is to regulate the internal relationships of the creative community, and their authorized distributors, rather than to incentivize new creative output. This misguided approach will instead result in a stagnation of South Africa's cultural community. Without important revisions to these provisions, South Africa will be taking a step backward in its effort to strengthen copyright incentives. South Africa would be better served by providing clear and unencumbered rights that would allow the creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats. This is important particularly in the context of the President's clear objective to improve levels of foreign direct investment, as well as the imperative to improve the lives and legacies of South Africa's own artists and creators.

It is important to note that the 2018 Bill and PPAB are extremely broad-reaching documents. IIPA's comments in this filing are not comprehensive, but instead highlight some of the major concerns for the U.S. copyright industries. It should also be noted that the bills, when read together, are incoherent. For example, Section 3B of the PPAB purports to set out the nature of copyright in sound recordings, which are already enumerated in the Copyright Act, as amended by the 2018 Bill. Notwithstanding the very significant flaws in the bills, described below, from a technical perspective, the drafts are inadequate and require urgent attention to avoid introducing widespread uncertainty into South African law.

1. *Severe Intrusions into Contractual Freedom*

Several provisions in the 2018 Bill and the PPAB constitute severe intrusions into private contractual relations. As such, these provisions restrict how private parties can collaborate to facilitate the public's access to copyrighted works, threatening the market value of books, films, sound recordings, musical works, music videos, video games, and other works created by South African creators.

A. Limitation on term of assignments: Sections 22(b)(3) of the 2018 Bill and 3A(3)(c) of the PPAB limit the term of assignments for literary and musical works and performers' rights in sound recordings, respectively, to a maximum term of 25 years from the date of agreement, and in the case of performers' rights in sound recordings, provide for automatic reversion of rights to the performer after that period. These provisions raise serious concerns, including that Section 3A of the PPAB, in proposing to limit the term of contracts between performers and copyright owners to a maximum term of 25 years, would detrimentally disrupt the well-established practices of the recording industry in South Africa when it comes to the creation and use of sound recordings. It would risk serious harm to the South African recording industry, performers, and other creators because a major incentive for investment in South Africa would be removed through the effective halving of the term of assignment of recordings from 50 years to 25 years.

The effect of these provisions would be that it would be impossible to clear rights in many works after 25 years, meaning they would simply be unusable as a result of this provision, and no one would receive any revenues from them. Sound recordings will typically include performances from a large number of performers. While the copyright owner of the sound recording (the record company) will often have a long-term relationship with the featured artist, it is far less likely to have such a relationship with, for example, a performer who has entered into a one-off agreement to provide backing vocals or other musical performances in a sound recording. Each such performer would have rights according to the PPAB, which under draft 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. Draft Section 3A provides that the record company would cease to have those rights after 25 years. That would mean that the record company would have to seek out thousands of performers (with whom the company has no long-term relationship) to obtain their mutual consent to an extension of the 25-year term. The inability to locate just one session musician involved in a sound recording would mean the sound recording could

longer be used, ending the revenues that come to record companies, performers, authors, or publishers from the exploitation of that recording. That cannot be the intention of this legislation.

The provision would have a broader negative effect on performers. Introducing new artists to the market and promoting their careers requires large upfront investment from record companies, with no certainty to 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 number of investments in new talent that can be undertaken by record companies. These provisions require urgent reconsideration to avoid the serious harm that they risk causing to all participants in the South African music industry. Moreover, although audiovisual works are now excluded from this provision, the proposed clause would increase legal uncertainty and introduce a disincentive to the acquisition of literary properties by film companies for adaptation into film and TV. This would ultimately inhibit financing of film projects and would jeopardize the market for making films in South Africa.

B. Sweeping ministerial powers to set contractual terms: Section 39 of the 2018 Bill and Section 3A(3)(a) of the PPAB create ministerial powers to prescribe “compulsory and standard contractual terms”, including setting royalty rates across any form of agreement covering copyright or performers’ rights. These provisions are not only unjustified, but are seemingly premised on a lack of understanding of the myriad of contractual relationships that underpin the creation of copyright content, which often comprises many different rights from various parties, and which are licensed for use by third parties in a variety of ways. Empowering ministers to impose contractual terms risks imposing a degree of rigidity into the South African creative economy that will stifle investment and innovation.

Insofar as agreements between sound recording performers and producers are concerned, these provisions would restrict the flexibility in transfer agreements, which is needed to address the varying relationships between performers and copyright owners. For example, the relationship and contractual agreement between the featured artist and the 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 fail to meet the differing needs of performers depending on their role in a sound recording. There is simply no evidence of a market failure that would justify this extensive interference into contractual relations. Furthermore, the proposals would impose unwarranted contractual formalities on all contractual partners.

C. Mandating the mode of remuneration for audiovisual performers: Section 8A of the 2018 Bill includes a new proposal to regulate the remuneration terms of private contractual agreements between performers and copyright owners. Despite proposing a significant interference into private contractual arrangements, to the particular detriment of certain performers, Section 8A was not published for consultation (except for Section 8A(6)). The result is a proposal that would substantially undermine the economics and commercial practices concerning the production of audiovisual works (including music videos). While it may be assumed that the intention of Section 8A is to ensure that performers are remunerated appropriately, in practice the proposal would cause substantial harm to a large category of the performers who perform background roles in music videos.

Music videos are comprised of performances from featured performers (the artist or artists with whom the record company has partnered) and non-featured or backing performers (the performers who typically are contributing to a music video on a one-off basis, such as dancers performing in the background of the video). Featured artists are remunerated in accordance with the terms they have negotiated with the record company, and these terms almost invariably are on a royalty basis (in addition to lump-sum advances). Non-featured performers, on the other hand, are remunerated by way of lump-sum payments, typically by way of one-off contracts, rather than by way of a longer-term partnership with a record company. Section 8A would appear to propose removing the possibility of lump-sum payments and replacing them with royalty payments.

The effect of Section 8A, rather than benefitting performers, would in fact result in many performers having no guarantee of receiving any remuneration from exploitations of the music video in which they have performed. This is because many creative projects are loss-making for the producer. As a consequence of proposed Section 8A, non-

featured performers performing in music videos would no longer enjoy being paid a lump sum immediately in return for their one-off performances and would instead have to wait to be remunerated on a royalty basis, which would only happen if the video in question actually succeeded in generating revenues. The current commercial practices avoid that outcome by paying non-featured performers on a lump sum basis, irrespective of whether the music videos in which they perform succeed or do not. This provision also risks a direct negative impact on investments in South African productions and a reduction in the number of South African “background” performers engaged to perform in audiovisual works.

D. Prohibition on contractual override: The risks posed by the 2018 Bill are further compounded by the prohibition on contractual override in Section 39B(1), which prohibits any contractual terms that deviate from the provisions of the bill, thereby removing the possibility for parties to determine their own contractual arrangements in a manner that avoids the harm caused by certain provisions of the bill.

2. *Inadequate Protection of Performers’ Rights*

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

Section 5 of the PPAB sets out the rights granted to performers. In the PPAB, performers’ rights are also enumerated under Section 3. The amendments to Section 5 are therefore, in part, duplicative of Section 3. More 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 protracted at 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 as a result of one set of rights being subject to private negotiation (the producers’ rights), and the performers’ rights being subject ultimately 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 2018 Bill drastically expands the exceptions and limitations to copyright in South Africa’s law for, amongst others, educational and academic uses and uses by libraries, galleries and museums. It also allows for perpetual and unassignable claims to royalties by authors, composers, artists and filmmakers (with retrospective effect); unlimited parallel importation; and the override of contracts. The broad exceptions, which are duplicated in the PPAB, will create a disproportionate imbalance against creators and producers of copyright-protected works and undermine the predictability needed to support a robust marketplace for copyrighted works. Additionally, they appear to far exceed the scope of exceptions and limitations permitted under South Africa’s international obligations, namely under Article 13 of the WTO TRIPS Agreement (and Article 9 of the Berne Convention and the corresponding provisions in the WIPO digital treaties). The government should be guided by a 2016 High Court decision that firmly rejected an expansive reading of South Africa’s provisions on exceptions and limitations, rejecting arguments that copyright stifled freedom of expression, and holding that copyright is a constitutionally protected property interest. The case rejected any interpretation of the “public interest” that would serve to constrain copyright protection.²

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

The fair use provisions proposed in the 2018 Bill derive from the fair use statute in U.S. law. However, the doctrine will likely be difficult to apply in South Africa, as the country lacks the decades of legal precedent that have served to define, refine, and qualify the fair use doctrine in the United States. The relative confidence with which copyright owners and users can function within the fair use environment in the U.S. is a result of nearly two centuries of case law that has developed and (after codification) elaborated on the four factors to be considered; how they are to be balanced and weighed in particular cases; what presumptions ought to apply; and so forth. Without the foundation of a well-developed body of case law, South Africa's importation of the U.S. fair use doctrine can only result in uncertainty for rights holders and users on the parameters of permissible uses. Furthermore, South Africa's legal system lacks statutory and punitive damages that infringers face in the United States. The reality is local and other rights holders will not have the protections afforded by the U.S. precedent, which means that they will face far more uncertainty in the South Africa market, as well as legal fees and protracted timeframes for cases that will likely deter most and leave even the most courageous determined never to try again.

At the same time, the draft retains South Africa's existing "fair dealing" system, but also introduces a number of extremely broad, new exceptions and limitations to copyright protection, all of which have the potential to adversely impact the legitimate market for educational texts, locally distributed works, and online works in general. These exceptions virtually guarantee an intolerable level of confusion and uncertainty about which uses of copyright works require licenses and which may not. A robust legitimate marketplace for works cannot develop in such an unpredictable environment and may well jeopardize the existing licensing system in the country. A 2017 study by PricewaterhouseCoopers predicted "significant negative consequences" for the South African publishing industry should the proposed fair use provision and the broad exceptions be adopted.³ The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP, VAT, and corporate tax revenue collections. Some 89% of publishers surveyed noted that the 2018 Bill, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

4. Exceptions and Limitations

In addition to the introduction of "fair use" into South African law, the following new or expanded statutory exceptions contained in the 2018 Bill are likewise of concern:

A. Section 12B(1)(i) and 12B(2) allow individuals to make copies for "personal uses." These broad exceptions in effect allow for private copying without any remuneration for rights holders, which is out of step with international norms (and has in fact been challenged successfully, for example, in EU courts in relation to a proposed UK exception). Furthermore, such private copying exceptions are typically accompanied by a remuneration system by which rights holders are compensated for the private copying of their works. The proposed exception also permits copying in an "electronic storage medium," which risks undermining existing licensing practices with regard to digital content services.

B. Section 12B(1)(f) grants an exception for making translations for the purpose of "giving or receiving instruction." The scope of this proposed exception could be interpreted too broadly, particularly as it allows for communication to the public, albeit for non-commercial purposes. Though the bill attempts to limit the scope by defining its purpose, it could undermine the author's translation rights, which is a significant market for authors and their publishers, and one for which just compensation is warranted.

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

³See "The expected impact of the 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry," available at <http://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>.

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

D. Section 12B(1)(a) provides a broad and circular exception for quotation, permitting any quotation provided that “the extent thereof shall not exceed the extent reasonably justified by the purpose,” but without enumerating the permitted purposes, for example, criticism and review. The result is an exception that appears to permit quotations for any purpose whatsoever, which risks causing substantial harm to rights holders and renders the proposed exception incompatible with the internationally-recognized three-step test for copyright exceptions and limitations.

E. Section 12D permits the copying of works, recordings, and broadcasts for educational purposes with very few limitations. Subsection 12D7(a) on open access for “scientific or other contributions” is overreaching and will likely undermine the rights of authors and publishers and deny authors academic freedom. Subsection 12D(4)(c) specifically authorizes the copying of entire textbooks under certain conditions, even those 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 impact of these provisions on normal exploitation of works for educational markets is likely to far exceed what is permitted under international standards.

F. Section 19D provides an exception provision for persons with disabilities, as defined to mean essentially disabilities that relate to the ability to read books. This 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 the ‘Making Available’*

The proposed Section 9(f) confirms that sound recording producers have the exclusive making available right set out in WPPT Article 14. This is a positive clarification, as this right underpins the digital music industry. However, the wording of draft Section 9(e), which enumerates 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”: communication to the public “includes making the sounds or representations of sounds fixed in a phonogram audible to the public.” To avoid ambiguity in the legal framework, we submit 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 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. *Technical Protection Measures*

Technological protection measures are vital tools for the copyright-based sectors in the digital era, enabling creators and rights holders to offer consumers their desired content, at the time and in the manner of their choosing, while also empowering rights holders to explore new markets opened up by current and emerging technologies. The

provisions regarding technological protection measures (TPMs) introduced in the 2018 Bill (and incorporated by reference into the PPAB), while welcome, are inadequate. Article 18 of WPPT requires that contracting parties provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.” At present, the proposed provisions in the bills are not compatible with that requirement.

This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the creative industries, including the music industry. 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.

First, the definition of “technological protection measure” in Section 1(h) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies designed to have that effect or control access to copies of works. The plain reading of this definition would be that a TPM that is circumvented is therefore not one that prevents or restricts infringement (because it has not achieved that aim), and therefore the circumvention of it is not an infringement. This would defeat the purpose of the provisions prohibiting the circumvention of TPMs. It needs to clarify that a protected TPM is one that in the normal course of its operation is designed to prevent or restrict infringement of copyright in 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. Rather, the provision of Section 28P(2)(a) would apply to enable the user to seek assistance from the rights holder in gaining access to the work in question. As it stands, paragraph (b) of the definition is open to abuse and would provide a charter for hacking TPMs. In this respect, see also our comments below with respect to Section 28P(1)(a).

Second, we also recommend that the definition of “technological protection measure circumvention device” be amended also to include devices that (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs. This would ensure that the definition is adequately scoped to encompass all TPM circumvention devices, which would also be consistent with Article 6(2) of the EU Copyright Directive.

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

7. Penalties for Infringement

The 2018 Bill lacks appropriate remedies for infringement. The criminal fines provided will not assist copyright owners in recovering their losses from infringement, as the money does not go to them. Additionally, the bill does not provide copyright owners any additional civil remedies in cases of online infringement. Online piracy remains a persistent and growing threat to the creative industries. In 2016, nearly one billion films and TV shows were pirated. With regard to worldwide streaming piracy, in 2016 there were an estimated 21.4 billion total visits to streaming piracy sites across both desktops and mobile devices.⁴ Given the scope and scale of online piracy, there is a serious need for more mechanisms to combat infringement and further remedies for rights holders.

⁴Alliance for Creativity. <https://alliance4creativity.com/mission/the-threat-of-online-piracy/>.

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

8. *Intellectual Property Tribunal*

Proposed amended Sections 29 through 29H would establish an Intellectual Property Tribunal to replace the existing Copyright Tribunal. The Tribunal's purpose would purportedly be to assist the public in the transition to the new copyright regime by resolving disputes and settling the law, particularly in relation to the proposed "fair use" and other exceptions. This assumes that the Tribunal will be staffed with qualified professionals, adequately resourced, and accessible to the parties it is intended to serve, though none of these things are required by the bill, nor do the proposed provisions sufficiently delineate the Tribunal's scope. Indeed, the 2018 Bill 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 broadcasts or to reproduce and publish out of print additions for "instructional activities," with few limitations. To the extent that a revitalized Tribunal is to be considered, it would best serve the South African market with a much more limited mission, confined to copyright matters related to collective licensing.

Another significant concern with these provisions is the lack of benchmarks for how the Intellectual Property Tribunal should determine royalties in the event of a dispute between a collective licensing body and a user. It is imperative that the legislation set out that rates should be determined with reference to the 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 market forces based on a willing buyer and a willing seller, and not by reference to a perceived and vague "public good." If creators are not rewarded at market-related rates, even the best copyright regime in the world will not achieve its objectives.

9. *Collective Management of Rights*

IIPA is concerned by proposed Section 22B, which may be understood to preclude a Collective Management Organization (CMO) representing, for example, both copyright owners and performers. Such an interpretation could prohibit the existing collaboration between performers and producers in the SAMPRO CMO, which administers needletime rights on behalf of both recording artists and record labels. This would go against the interests of those rights holders, the users (licensees), the public at large, and industry standards. 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, 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, 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 2018 Bill contains concerning provisions that revert rights to the government in situations that could discourage investment, while unnecessarily diminishing the public domain. The proposed Section 5(2) transfers to the state all rights in works "funded by" or made under the direction or control of the state. This provision could be broadly interpreted to include works developed with a modicum of government involvement and may well diminish incentives for public-private cooperation in creative development.

11. **Term of Protection**

At present, sound recordings only receive a term of protection of 50 years from the year in which the recording was first published. The 2018 Bill should be revised to include a proposal to extend the term of protection for sound recordings to 70 years. This will provide greater incentives for the production of 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 recordings to local consumers in updated and restored formats as those formats are developed.

MARKET ACCESS ISSUES IN SOUTH AFRICA

Broadcast Quota: In 2014, the Independent Communications Authority of South Africa (ICASA) began the Review of Regulation on South African Local Content: Television and Radio. While the regulations have yet to be finalized, IIPA recommends that market forces, rather than discriminatory quota regimes, should be used to determine programming allocation.

Online Value-Added Tax: In May 2014, South Africa published regulations relating to registration and payment of value-added tax on all online transactions conducted in, from, or through South Africa. Currently levied at 15%, the tax includes online selling of content such as films, TV series, games, and e-books.

COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN SOUTH AFRICA

Creative sectors in South Africa are growing, but face the challenge of illegal competition. One group of South African artists lamented that they came together as youths to try and make a living out of music, but that street vendors are killing their business by illegally selling pirated CDs and DVDs that they would have released.

Internet Piracy: 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. Easy access to pre-released film and television content through international torrent, linking, and cyberlocker sites also fuels online piracy in the country. As South Africa lacks injunctive relief for rights holders, consumer access to these infringing sites continues unabated. It is important to have a legal framework that facilitates rights holders in addressing unauthorized use in all ways and supports consumer education and awareness programs.

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

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

Enforcement: The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the legislation that rights holders rely upon for title, site, and link take downs. The lack of cybercrime inspectors continues to limit the full potential of this legislation. 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.

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Taiwan be placed on the Special 301 Priority Watch List.¹

Executive Summary: Taiwan was once a regional leader in establishing policies that fostered and rewarded creativity. But at least since 2013, Taiwan has failed to recognize and address a growing online piracy problem that has hampered the creative industries, casting off the issue as industry's problem, too controversial or difficult to explain, or the problem of other jurisdictions. Yet data suggests that the public in Taiwan would support more effective protection of creative content online. The creative industries make considerable contributions to Taiwan's economy. A 2017 Oxford Economics study shows local film and television sectors directly contribute US\$5.9 billion to Taiwan's GDP, support 104,200 jobs, and generate approximately US\$490 million in tax revenues. Moreover, Taiwan is a hub of music production for the Chinese speaking world and a major exporter of "C-pop."

Piracy websites and software applications (apps) are increasing and facilitating various forms of piracy, including stream-ripping and the proliferation of Piracy Devices. One bright spot in 2018 is that TIPO issued guidance that Piracy Devices are prohibited under the Copyright Act, and, in August, an IP Court decision confirmed this interpretation, which should help to combat this problem if enforcement authorities take action. Online piracy of reading materials has overtaken the longstanding problem of unauthorized photocopying of textbooks. In addition to e-book piracy, copyrighted teaching materials are increasingly made widely available without authorization on university digital platforms, and are often downloaded, printed, and/or disseminated by students without authorization.

Taiwan's government needs to do more to combat these mounting problems. Unfortunately, the government has indicated opposition to proposals for a narrowly tailored remedy to disable access to flagrantly infringing websites through no-fault orders directed at ISPs. The steps Taiwan's government has taken can only be described as missed opportunities. For example, draft amendments to the Copyright Act under consideration by the Legislative Yuan fail to provide the statutory tools necessary to effectively address Internet piracy; would not bring Taiwan's term of protection in line with evolving global norms to protect creators; would not correct unfair practices regarding collective management; and would raise questions regarding Taiwan's commitment to its existing international obligations by, among other things, broadening already overbroad exceptions and limitations, limiting protections for sound recordings incorporated into audiovisual works, and diluting sanctions for criminal infringement. Additional amendments under consideration intended to meet the standards of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) also do not effectively address Taiwan's piracy problems, and would weaken its enforcement framework regarding pirated optical discs. IIPA urges the Government of Taiwan to change course and take the steps necessary to address the growing threats to the creative industries (including authorized distributors in Taiwan), which contribute so significantly to Taiwan's economy and culture.

¹For more details on Taiwan's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Taiwan's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2019

Enforcement:

- Criminal Investigation Bureau (CIB), Telecommunication Police Brigade (TPB), and Criminal Investigation Brigade (CIBr) should accept and prosecute more online piracy cases and cases against Piracy Devices now that these devices have clearly been found to be illegal under the Copyright Act.
- Ensure that the Criminal Investigation Bureau (CIB) focuses on online piracy cases and that the Criminal Investigation Brigade (CIBr) is provided with sufficient training, funding, manpower, and equipment to investigate online piracy cases.
- Increase trainings for judges and prosecutors on specific issues related to online copyright infringement, and the application of procedural requirements to the online environment.
- Take action against infringement of reading materials at educational institutions, including the making available of on-demand printouts of pirated e-books or teacher resource materials, and against digital infringement occurring on online education platforms.
- Issue a regulation (or equivalent administrative measure) pursuant to Article 87(7) of the Copyright Act confirming that the provision applies to websites and apps that facilitate infringement of copyright, including stream-ripping, and bring cases under that provision.

Legislative:

- Enact legislation to:
 - provide for no-fault injunctions to order Internet Service Providers (ISPs) to disable access to flagrantly infringing websites (including, as necessary, amending the Civil Procedure Code and the Intellectual Property Adjudication Act to overcome potential civil procedure restrictions).
 - make all criminal copyright infringement, including Internet piracy, “public crimes” to permit *ex officio* action against infringement;
 - clarify ISP liability provisions to ensure: (1) only neutral and passive ISPs that do not encourage infringement are eligible for safe harbors from liability; (2) ISPs adopt and implement meaningful repeat infringer policies; and (3) upon notice of infringement, ISPs are required to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.
 - amend Article 87 of the Copyright Act to ensure this provision may be more effectively used in copyright infringement cases by, for example, removing the condition “and to receive benefit therefrom” under Article 87(7);
 - extend term of protection in line with the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 75 years);
 - make unauthorized camcording of motion pictures in theaters a criminal offense;
 - make unauthorized camcording of live musical performances a criminal offense;
 - correct Taiwan Intellectual Property Office (TIPO) collective management practices to allow a fair-market based royalty rate and eliminate delays in fixing the rate;
 - provide exclusive rights for public performance and retransmissions of sound recordings.
- Ensure amendments to the Copyright Act do not reduce criminal liability standards, and do not extend exceptions beyond what is permissible under Taiwan’s TRIPS and Berne obligations (i.e., ensure exceptions are narrowly tailored to avoid overbroad interpretations), including by explicitly referencing the three-step test in all applicable exceptions.
- Revise the Communication Security and Surveillance Act to eliminate overly restrictive requirements for investigators to obtain a court order to solicit essential information, such as IP addresses, from ISPs.

PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

Prior IIPA reports on Taiwan contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of all issues.²

Mounting Piracy, Especially Online: Rampant online and mobile device piracy in Taiwan continued to worsen in 2018 in the absence of any effective government action to address the problem. Foreign websites, such as U.S.-hosted *eyny.com*, (the 19th most accessed site in Taiwan according to Alexa), *youtaker.com* (ranked 228th in Taiwan), *plus28.com* (ranked 286th in Taiwan), and *123kubo.com* (ranked 38th in Taiwan), that provide illegal content remain a significant problem, putting enormous pressure on the ability of legitimate rights holders to survive commercially in Taiwan. Particularly popular are streaming, forum,³ blog, deeplinking, peer-to-peer (P2P), BitTorrent, and cyberlocker sites, which are used to infringe copyright in movies and television content, music, video games, and books and journals. There is still no effective means to combat P2P sites, and sites such as *jvod* and *xfplay*, hosted in China and elsewhere, are popular with local users. “Stream-ripping,” where users of legitimate online music platforms use tools, such as an app or a website, to illegally “rip” the streamed content, is a growing problem impacting primarily the music industry.⁴ Social media platforms have become a popular way to share pirated content. Apps for Piracy Devices and mobile devices, such as *Mixerbox 3*,⁵ have become a significant platform for disseminating illegal content. Infringement of “over the top” (OTT) content is a growing problem. OTT platforms stream copyrighted content online to subscribers. There is currently no direct legal basis to combat infringement of this content, and rights holders are urging TIPO to revise current law or issue a new administrative explanation to make Article 87 of the Copyright Act and anti-circumvention provisions applicable to OTT infringement.

The publishing industry has long reported continued problems with unauthorized photocopying and use of infringing materials at universities. While a “Campus Intellectual Property Protection Action” plan has been incorporated into the Ministry of Education’s (MOE) Campus Inspection program since 2006, the prior inspections merely consisted of self-assessment by universities. In late 2015, MOE finally included publishing industry representatives in the limited number of campus inspections, which found that while some of the universities inspected had policies in place regarding copyright protection, student and faculty compliance was low. MOE should conduct campus inspections on a consistent basis and continue to allow industry participation to foster greater cooperation among MOE, university administrators, and rights holders. In 2018, MOE began a process to revise its Campus Intellectual Property Protection Action plan to account for piracy in the digital environment. The publishing industry has submitted recommendations for MOE to take the following actions: 1) set up an Internet portal for rights holders to communicate with MOE regarding piracy concerns; 2) implement certain measures to ensure university online learning platforms are not used to facilitate piracy; and 3) address online piracy in MOE’s awareness raising efforts. MOE appears to have adopted some of these recommendations, issuing guidelines that: 1) require the creation of an online reporting portal (the Portal) for rights holders, and providing the contact information for the university employee charged with administering the Portal; 2) warn universities to adopt cautionary language (or “warnings”) on university platforms advising students and professors to comply with the law in their use of copyrighted materials; and 3) require warnings against “illegal photocopying, downloading, and dissemination” in student manuals and on student bulletins.

While the problem of unauthorized photocopying of textbooks at universities is slowly diminishing, this is not due to improved efforts by university administrators, but rather to unabated digital piracy, which has worsened the overall piracy situation in Taiwan. An on-campus copy shop equipped with computers and multi-function printers

²See, e.g., *IIPA, Taiwan, 2018 Special 301 Report*, (February 8, 2018), available at <https://iipa.org/files/uploads/2018/02/2018SPEC301TAIWAN.pdf>.

³Forums are a serious problem, including *eyny.com* and *plus28.com*, as just two examples. The flow of infringing music and audiovisual content through these forums is enormous.

⁴The legal framework in Taiwan presents challenges for taking action against persons who facilitate this activity (i.e., the app developer or website operator), but it appears possible that Article 87(7) of the Copyright Act, which provides for aiding and abetting liability, could be used. IIPA urges Taiwan Intellectual Property Office (TIPO) to issue an administrative statement (regulation) clearly specifying that Article 87(7) provides a legal basis for liability against apps or websites that facilitate copyright piracy, including stream-ripping.

⁵*Mixerbox 3* is a popular app that provides unauthorized music video content by directly streaming content from YouTube stripped of advertisements.

appears to allow students to download and print copyrighted materials, while computer labs at universities also appear to be venues for downloading and printing infringing materials. Unfortunately, the universities do not appear to be acting against infringing conduct. Copy shops near universities use digital files to provide on-demand printouts of pirated digital textbooks and teacher-resource materials.⁶ The MOE and university administrators may have inadvertently contributed to infringement online through a “Teaching Excellence Program,” which encourages teachers to make teaching materials they have created available on a university digital platform freely accessible to students. Unfortunately, it appears that in addition to original content generated by the instructors themselves, a significant amount of materials—such as textbook content, PowerPoint slides, exercises, or test banks and the like—on these platforms consist of unauthorized copies of copyrighted content created and owned by publishers. Without access to these university platforms, publishers are unable to determine the full extent of the infringement. Another problem is that universities also make “Open Courseware” available in Taiwan and around the world for free without any authentication to ensure it is available only to authorized users. In 2018, the publishing industry found several so-called “open course” platforms providing unauthorized access to proprietary content and resources. Unauthorized copies of textbooks in digital form proliferate online, through hosted and non-hosted (P2P) platforms,⁷ and through a number of services that sell unauthorized copies of digital textbooks on optical media.

Piracy in “cram schools” is also a serious problem.⁸ These schools use pirated copies of textbooks, even placing the name of the school and the teacher on the pirated copy, misleading students to believe that the materials are authorized. This piracy is difficult to detect because the pirated materials are distributed after students have registered. Although a few enforcement actions were taken in 2016 against cram schools, much more is needed to meet the growing challenge of book piracy in educational settings.

Piracy Devices: The sale of Piracy Devices (i.e., media boxes, set-top boxes, or other devices and their corresponding apps and services), which facilitate piracy, has increased considerably in Taiwan. Piracy Devices originating mostly from China are available openly throughout Taiwan, including at so-called “3C” shops that sell computers, software, and peripherals, 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.

TIPO has previously indicated that Piracy Devices can be addressed through current provisions of the law, but legislation is needed to address this growing problem.⁹ TIPO issued an administrative explanation in February 2018, indicating that a Piracy Device may violate Article 92 of the Copyright Act. In August 2018, the IP Court issued a ruling reversing a lower court decision and holding that Piracy Devices violate Articles 87(7) and Article 92.¹⁰ In June 2018, the TPB initiated a successful action against a Piracy Device called QBox, but other devices continue to be sold. In 2017, the motion picture industry initiated a case against a Piracy Device known as “terminator.” That case involved a raid by CIBr and is currently being investigated by the Taiwan Prosecutors Office. The local motion picture industry has worked well with enforcement authorities on Piracy Device cases, and IIPA is hopeful enforcement authorities continue to pursue such cases.

⁶Copy shops have unauthorized PDF files of textbooks on their in-house computers, where students can easily search and select titles and request shop clerks print them out and bind with color title pages.

⁷For example, *PDFDrive* provides downloads of millions of PDFs, including more than 18 million ebooks; *iss.net* is a web server that hosts pirated content; *taodocs.com* is a file sharing site providing pirated content to read for free and selling downloads; and *Taobao* sells pirated textbooks.

⁸Cram schools are specialized schools that help students meet a specific goal such as passing an English language proficiency test.

⁹Actions could be brought under Articles 87(7) or 92 of the Copyright Act, as aiding or abetting cases under the criminal law, or through other measures. It would also appear that allowing devices to use apps that provide access to infringing content is a violation of the anti-circumvention provisions in Taiwan's Copyright Act.

¹⁰See *Taiwan Taichung Local Inspectorate Prosecutor v. Zhang Zhiyuan (first accused) and NESO Technology Pte Ltd (2nd accused)*, Taiwan IP Court, 2018, Case Number 7 (29 August 2018). The case significantly held that Article 87(7) is not restricted to peer-to-peer (P2P) technology, and can be applied to other technologies that enabled access to unlicensed programs and copying of copyrighted works through apps installed on the Piracy Device.

Online Piracy Enforcement Hampered by Inadequate Legal Framework and Lack of Will: While the takedown rate remains extremely high for domestically hosted content, Taiwan's Internet users obtain unauthorized content primarily from websites located overseas. Cooperation with ISPs is ad hoc, and it is generally good for domestically-hosted infringement. One problem, however, is that the law penalizing repeat infringers has never been properly implemented so ISPs do not enforce against repeat infringers as required by the Copyright Law.

Regarding infringing websites, however, Taiwan's legal framework is wholly inadequate. No-fault injunctive relief against ISPs to stop infringement by piracy websites may in fact be available, but it remains untested. Taiwan government officials and stakeholders have had discussions with major ISPs about the severe problem of online piracy, and ISPs are generally sympathetic. Taiwan has a mechanism to report and take down content that facilitates illegal activities such as child pornography, human trafficking, and defamation/cyber-bullying. Unfortunately, ISPs take the position that they will not take action without an order by a court or government agency. Government involvement and support is, therefore, essential. Unfortunately, in 2018 the government indicated an unwillingness to implement any mechanism to disable access to infringing websites. This in the face of proposals by members of the Legislative Yuan and industry to provide narrowly tailored injunctive relief in the form of no-fault orders to disable access to flagrantly infringing websites. Such relief has been shown in many jurisdictions to reduce online piracy, but mere introduction at the Legislative Yuan of the proposal led to protest by a vocal minority, and the bill was eventually withdrawn. As a result, Taiwan has become an outlier in Asia, as many other countries in the region (and elsewhere in the world) are taking active steps to address the growing online and mobile piracy problem. Taiwan's government should reverse itself and support efforts by rights holders and ISPs to take action against growing online piracy.

In a positive development, rights holders have been working with advertisers on an Infringing Website List (IWL) initiative to eliminate advertising on piracy websites. The Taiwan Intellectual Property Alliance (TIPA) has so far signed a Memoranda of Understanding (MOU) with the Taipei Association of Advertising Agencies (TAAA), representing 135 ad agencies, and the Taiwan Advertisers Association (TAA), representing 27 Taiwanese companies. Under the MOU, TAAA and TAA will forward TIPA's notices to their members advising them to stop placing ads on the listed websites. TIPO has assisted in this effort by sending letters to government agencies, the Chinese National Federation of Industries, and the General Chamber of Commerce. TIPA continues efforts to seek cooperation from other essential stakeholders, including Google, Yahoo, and Skupio, a local ad network.

Without overall effective remedies, online piracy investigations suffer, and piracy proliferates. The implementation of the amendments to the Communication Security and Surveillance Act in 2014 has negatively impacted investigations into online infringement because these amendments restrict the information investigators can obtain from an ISP without a court order.¹¹ Investigations are few and far between, underscoring the need for a remedy to disable access to infringing sites through no-fault injunctions. The music industry reports that CIBr actions against music piracy have been significantly reduced in part because domestic takedown notice recipients have become more responsive.¹²

Priority of Copyright Cases Should be Elevated: The reorganization of the IPR Police (IPRP) into CIBr resulted in decreased human resources, funding, and de-prioritization of copyright infringement cases. At its peak, CIBr was supposed to have 218 officers. In October 2018, 30 new police college graduates joined CIBr, but the average age of the current force is 40 and, as a result, CIBr has been slow to adopt new technologies and knowledge. Another factor inhibiting digital piracy investigations is that current equipment is antiquated, making it difficult to investigate advanced digital piracy in real time. IIPA believes the CIBr needs to re-staff to at least 185 officers; elevate IPR protection as the chief priority within the division; and assign a commander and supervisors who understand IP and have the know-how to take effective action against physical and Internet/mobile piracy. The

¹¹The amended law requires officers to obtain court orders before soliciting further information from Internet Service Providers (ISPs) such as IP address account information. It is estimated that only about 30% of applications for such orders are approved by the courts. In one case, the IP Court found a defendant not guilty because the IP address of the defendant was not solicited with a court order in violation of the Act.

¹²The Criminal Investigation Brigade (CIBr) brought 18 piracy cases in 2016 (2 physical and 16 online), 10 piracy cases in 2017 (3 physical and 7 online), and 3 online piracy cases in 2018.

budget should be increased to make it sufficient to effectively enforce against copyright infringement, including allocating funds to purchase modern equipment and to provide training for investigators. Benchmarks must be maintained for copyright cases, both in terms of the numbers of cases initiated, as well as reasonable targets for successful convictions. It is important that such goals be subdivided by subject matter, such as: Internet piracy, book piracy,¹³ unauthorized camcording, ISD piracy, signal theft, and limited piratical imports. Finally, TIPO should continue in its advisory role.

Award Budgets Must Be Reinstated: It is critical to reinstate an award budget so that the CIBr officers feel that fighting copyright piracy is an important endeavor and that successful efforts will be rewarded. Unfortunately, the previous budget of NT\$4.5 million (US\$145,005) for awards for physical and Internet cases was entirely removed in 2014 by the Ministry of Economic Affairs (MOEA), responding to pressure from the Legislative Yuan. The National Police Administration (overseeing CIB and CIBr) subsequently decided to cease the incentive for copyright anti-piracy cases. IIPA recommends the reinstatement of reasonable awards. As we have raised before, it is unfortunate that TIPO's role will be relegated to a training budget for IPR enforcement officers, and TIPO will no longer play an important role in the IPR police force as in the past.

Improvements Needed in Court Adjudication of IP Matters: Many reports from copyright and other IP rights holders indicate that civil court procedures in Taiwan remain expensive, inefficient, and time-consuming, and that criminal prosecutions do not result in deterrence. Although it is technically possible under current law to obtain a no-fault injunction against an ISP to disable access to a flagrantly infringing website, the law has not been tested. A major obstacle is that courts have interpreted the law too narrowly regarding several questions, including: 1) whether a website can be a defendant under the law; 2) whether it is necessary to issue an exceedingly high "performance bond," which deters rights holders from taking steps to protect their rights; and 3) whether the ISPs can be brought into court as a no-fault defendant. Instructions should be issued to courts in Taiwan that, under the Copyright Law, a no-fault application can be brought against ISPs to disable access to flagrantly infringing websites, and, pursuant to such an application, judges may dispense with the issuance of a performance bond.

In the criminal context, prosecutors overwhelmingly settle for "suspension of indictment" in digital piracy cases and judges tend to commute prison sentences to a fine or suspend punishment altogether. The Judicial Yuan may be receptive to trainings for judges and prosecutors on specific issues related to IP infringements, focusing on the technical particularities of Internet and new technology-based copyright infringement cases; aspects of the civil and criminal system that are not operating smoothly for rights holders; and primers on ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the digital environment.

COPYRIGHT LAW AND RELATED ISSUES

The dominant concern in Taiwan remains the continued lack of an administrative or judicial remedy against online piracy services targeting Taiwan users. IIPA strongly urges Taiwan to incorporate such a remedy into its copyright reform process, and to improve the draft amendments to the Copyright Act in order to address other pressing needs and bring Taiwan's legal framework in line with international norms and best practices.

Concerns Over Continued Lack of Administrative or Judicial Remedies Against Infringements Emanating from Outside Taiwan: It remains the case that many of the online services built on infringing activities of others, and/or facilitating infringement, are located outside of Taiwan. Nonetheless, a significant amount of infringing activity occurs within Taiwan and should create a nexus for action. Although ISPs in Taiwan have indicated a willingness to address the problem of flagrantly infringing websites, the current inadequate legal framework inhibits them from doing so. Around 45 jurisdictions around the world have developed approaches to halt illegal services from being accessed from across their borders. We believe that all organs of the Taiwanese Government (TIPO, the

¹³As noted above, on-demand printouts of pirated digital books (particularly higher education and English language teaching materials (ELT)) and journals has become the primary problem faced by the U.S. publishing industry in Taiwan. Publishers have also seen an increase in online piracy, particularly of textbooks and password-protected material, though the unauthorized copies of reading materials are being made available mainly from servers/sites in China.

Ministry of Justice/Judicial Yuan, and the Legislative Yuan) should remain steadfast in seeking an appropriate remedy that is narrowly tailored with appropriate processes to halt services that are built on, facilitate, and/or encourage infringement. It is unfortunate that no remedy has been included as part of the copyright review process. Governments in the region, including Australia, Korea, Singapore, India, Indonesia, Malaysia, and Thailand, have adopted and/or refined approaches that provide a remedy for ISPs to disable access to sites that are primarily infringing, and draft legislation has been introduced in the Philippines.¹⁴

Draft Digital Communications Act: In October 2017, the Executive Yuan approved the draft Digital Communications Act and forwarded it to the Legislative Yuan where it is pending. This Act is part of a legislative effort to consolidate regulation of telecommunication, Internet, television, and radio platforms; but, unfortunately, the draft does not appear to address the urgent need to authorize disabling access to foreign-hosted infringing sites. Moreover, the draft includes broad ISP safe harbor provisions, which, notwithstanding language indicating that the ISP liability provisions in the Copyright Act supersede those provisions, could have negative implications for copyright enforcement.

Proposed Copyright Amendments Inconsistent with International Norms: In October 2017, the Executive Yuan passed draft amendments to the Copyright Act and forwarded them to the Legislative Yuan for consideration. These draft amendments, unfortunately, do not address many of the criticisms IIPA provided in comments on the previous drafts that TIPO had released for public comment. There is presently no schedule for the Legislative Yuan to consider the draft amendments.

Although the draft retains many of the positive features of Taiwan's modern copyright regime, it remains flawed in fundamental aspects. For example, the draft amendments, if enacted, would not strengthen Taiwan's enforcement framework to address non-hosted infringements, nor would they address the urgent problem of foreign rogue websites directed at Taiwanese users. A new mechanism, such as judicial authority to issue injunctions disabling access to foreign hosted-infringing sites, is needed to deal with rogue websites that are specifically built to induce and encourage infringement and foreign hosted piracy sites that target users in Taiwan.¹⁵ In addition, the draft should clarify Taiwan's ISP liability framework to ensure: (1) only neutral and passive ISPs that do not encourage infringement are eligible for safe harbors from liability; (2) ISPs adopt and implement meaningful repeat infringer policies; and (3) upon notification of infringement, ISPs are required to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.

The draft also fails to address many of Taiwan's other pressing needs, including: 1) deeming all criminal copyright infringement, including Internet piracy, "public crimes" (as was so successfully done regarding optical disc piracy); 2) extending the term of protection for copyrighted works, including sound recordings, in line with the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 75 years); 3) making it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters;¹⁶ 4) making it a criminal offense to engage in unauthorized camcording of live musical performances;¹⁷ and 5) correcting problematic TIPO practices regarding collective management.¹⁸

¹⁴IIPA also encourages Taiwan to look at how Europe has addressed this problem, in particular, through Article 8.3 of the European Information Society Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content.

¹⁵To the extent necessary, additional legislative changes should be made to overcome potential civil procedure restrictions, such as amending the Civil Procedure Code and Article 22 of the Intellectual Property Case Adjudication Act.

¹⁶It has been reported that actions against camcording as "unauthorized duplication" have been brought and sustained under Article 91 of the current Copyright Law; nevertheless, it is important that Taiwan adopt *sui generis* provisions specifically covering the act of camcording. Camcording is a growing problem in Taiwan; the motion picture industry detected nearly a dozen camcording incidents occurring in just the second half of 2018.

¹⁷The music industry reports that infringement through camcording live concerts is increasing.

¹⁸Corrections 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 Collective Management Organizations (CMOs) tariffs reviewed, revised, and approved by TIPO; and eliminating TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection. The 2010 amendments to the Copyright

In addition to retaining an inadequate term of protection, the draft includes many other provisions that are inconsistent with evolving international norms and may even raise questions regarding Taiwan's compliance with its existing international obligations. For example, the draft provides an exception to the rights of sound recording producers (including the exclusive rights regarding reproduction, distribution by sale or rental, and the remuneration right for public performance or "re-public communication") for sound recordings "which have been fixed on audiovisual works." There is no justification for this exclusion, which is inconsistent with Taiwan's obligations under the TRIPS Agreement and with the obligations of the WIPO Performances and Phonograms Treaty (WPPT), which Taiwan claims to meet notwithstanding that it cannot independently join the treaty.¹⁹

In addition, the proposed draft includes numerous other overbroad exceptions and limitations to protection, which would call into question Taiwan's compliance with its TRIPS obligations.²⁰ These include:

- a broad exception for distance learning;
- compulsory licenses for the benefit of educational institutions and compilers of "pedagogical texts";
- an exception for using "common domestic reception appliances" to retransmit publicly works that have been publicly broadcast;
- a broad exception for public performance of works for "non profit" activities; and
- a further broadening of Taiwan's "fair use" exception.²¹

The draft also reduces criminal liability standards (e.g., requiring participation in collective management organizations as a prerequisite for criminal enforcement, exempting a broad range of uses of copyright works from criminal liability, and removing the minimum prison sentence of six months for making and distributing infringing copies);²² and requires rights holders to file a formal complaint rather than providing *ex officio* authority for law enforcement to take action against criminal acts of infringement. Further, Taiwan should bring its law up to the emerging international standard by providing producers and performers exclusive (rather than remuneration) rights for public performance and retransmissions of sound recordings, as many other countries around the world have done. Exclusive rights are important to enable producers and performers to effectively enforce their rights against infringement, and to negotiate fair market terms for the exploitation of their works.

To further its stated ambition to join the CPTPP, which requires compliance with the standard of protection of the WPPT and the WIPO Copyright Treaty (WCT), Taiwan has been considering a second set of amendments to the Copyright Law that purport to implement the CPTPP standards. Although the draft has not been released for public comment, we understand it would make Internet piracy a public crime where the "whole" work is exploited "for consideration" and the infringement value exceeds NT\$1M (about US\$32,169); and would weaken enforcement against pirated optical discs.²³ This draft is a priority bill in the Legislative Yuan, and is expected to be passed before

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.

¹⁹See TRIPS Article 14 and WIPO Performances and Phonograms Treaty (WPPT) Article 2(b). The definition of "phonogram" under WPPT Article 2(b), the corresponding Agreed Statement Concerning Article 2(b) in WPPT Footnote 2, as well as numerous judicial decisions worldwide make clear that a blanket exception for sound recordings fixed in an audiovisual work is inconsistent with the WPPT.

²⁰To ensure compliance, the three-step test (i.e., TRIPS Article 13) 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.

²¹Article 77(1) of the draft states that all of the enumerated exceptions (Articles 53-75) are subject to fair use without any requirement that they be confined to the fair use factors outlined in Article 77(2). Article 77(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 77(2), which was originally intended to confine the enumerated exceptions to the three-step test. As noted, *supra* footnote 20, all of these exceptions should be expressly confined to the three-step test to ensure compliance with Taiwan's international obligations.

²²The draft mandates that rights holders participate in a CMO to benefit from criminal enforcement against some infringing re-broadcasts or public communications, which impinges on the contractual freedom of creators and raises serious questions of TRIPS compliance. Parallel imports should not be decriminalized because the government needs appropriate means to address the fact that many piratical imports are labeled as legitimate goods, which undermines Taiwan's legitimate marketplace. And the exemptions from criminal liability set forth in Article 46 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.

²³The provision would eliminate minimum penalties regarding pirated optical discs (Article 91*bis*) and eliminate the legal basis for confiscating pirated optical discs seized (Article 98 and 98*bis*).

the end of June 2019, although it is not clear when or how Taiwan could join the CPTPP. While the draft includes some positive aspects, it does not address most of the deficiencies in Taiwan's legal framework outlined above, including inadequate term of protection²⁴ and the lack of an effective remedy against flagrantly infringing websites. IIPA strongly encourages removal of the NT\$1M threshold requirement for considering digital piracy a public crime because calculating the value of infringement is fraught with uncertainty, and the high bar does little to deter online infringement and may actually encourage it. Similarly, the requirement that the whole work must be exploited for consideration also is an unnecessary obstacle that will undermine deterrence. Moreover, Taiwan should strengthen, rather than weaken, enforcement against pirated optical discs.²⁵

Taiwan is on the verge of squandering this opportunity to update its copyright laws and demonstrate its commitment to the protection of intellectual property rights. Rather than conducting a complicated copyright overhaul that fails to address many of Taiwan's most pressing needs and moves Taiwan further away from international norms and its current international obligations, Taiwan instead should use this opportunity to improve its copyright regime to meet the challenges of the digital age.

MARKET ACCESS UPDATES AND RELATED ISSUES

In 2017, Taiwan instituted a number of regulations that discriminate against U.S. audiovisual content. On January 8, 2017, the National Communications Commission (NCC) issued regulations that included significant local content requirements that limit the broadcasting of U.S. audiovisual content on terrestrial and satellite television.²⁶ These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, and restrict U.S. exports. In December 2016, the NCC issued the Television Program Classification Regulations, which require all terrestrial, cable, and satellite channels to display Taiwanese ratings and warning messages regardless of the content being broadcast. This onerous requirement, which entered into force in 2017, is a significant barrier for non-Taiwanese content. In response to objections from international channels, Taiwan has indicated it will consider requests for waivers but such requests are discretionary on a case-by-case basis and are not always granted. The Cable Radio and Television law limits foreign direct investment in a domestic cable television service to 20% of the operator's total issued shares. Foreign investment in satellite television broadcasting services is also restricted to no more than 50%. In 1990 Taiwan set a rate cap for cable TV service of NT 600 (\$20) per month per household, which has never been adjusted to keep up with inflation. Other restrictions on television services include a mandatory carriage requirement of 90-100 channels in the basic cable package, and, for all IPTV offerings above the basic level cable TV services, only *a la carte* pricing is allowed. Such investment restrictions and rigid regulations of retail cable rates by the central and local government have hindered the development of the cable TV industry, satellite operators, and content providers.

TRAINING AND OUTREACH

Rights holders continue to work with the Taiwan government, organizing dozens of campus outreach campaigns for students, as well as participating in training seminars organized by TIPO for judges, police, prosecutors, customs officers, and other law enforcement units, and organizing similar seminars themselves. In 2018, the local motion picture industry initiated a series of training courses for cinema staff regarding copyright protection and anti-camcording. Industry also provides assistance by sharing the results of investigations with law enforcement authorities (this would include rights identification, and investigations into piracy activities sourced from

²⁴The obligation for term of protection in the Trans-Pacific Partnership (TPP) has been suspended in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

²⁵For example, the law should instead make clear that reproduction of optical discs is a "public crime" under Article 100. While digital piracy is the overwhelming concern in Taiwan, hard goods piracy remains a problem. Physical formats represent 27% of the revenues of the Taiwan recorded music market.

²⁶The Administrative Regulation for the Terrestrial TV Stations Broadcasting Local Productive Programs and the Administrative Regulation for the Satellite TV Channels Broadcasting Local Production Programs require terrestrial TV stations to broadcast at least 50% of locally produced dramas between 8 pm and 10 pm; local satellite TV channels to broadcast at least 25% of locally produced children's programs between 5 pm and 7 pm; and at least 25% of locally produced drama, documentaries, and variety programs between 8 pm and 10 pm. Forty percent of these locally produced programs must be new productions. Furthermore, cable TV services must broadcast at least 20% of local programming.

outside Taiwan, e.g., mainland China). Industry also supports raids and anti-piracy operations by providing on-scene examinations of seizures and logistical support to police and prosecutors. The industries provide publicly available data (including the recording industry's website in Taiwan) with important information about anti-piracy actions and copyright protection campaigns. Industry remains available and interested in providing more of the same in 2019, including through the American Institute in Taiwan (AIT), the European Economic and Trade Office (ECTO), the European Chamber of Commerce Taiwan (ECCT), and the AmCham.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The deficiencies in the Taiwan's enforcement framework outlined above—including de-prioritization of copyright piracy cases at CIBr; inadequate civil procedures that do not result in deterrence; and a judicial system that does not take piracy cases seriously resulting in non-deterrent criminal sentences—are inconsistent with Taiwan's obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61. Furthermore, as noted above, should Taiwan adopt the proposed draft amendments to the Copyright Act without significant revisions, Taiwan's copyright laws will run afoul of a number of its TRIPS obligations including, in particular, those under TRIPS Article 13 on exceptions and limitations.

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained on the Priority Watch List in 2019.¹

Executive Summary: There are two long-standing priorities for the copyright industries in Ukraine: first, is improving the legal and enforcement regime to address widespread online infringement of copyrighted works and sound recordings. Second, is fixing the chaotic collective administration system (and applying the rule of law) to allow licensed music markets, dependent on public performance rights, to develop. In 2018, there was no progress on the online infringement problem—neither substantial legislative changes, nor any significant improvement with deterrent enforcement against large commercial websites or services. In 2018, a collective administration bill was enacted, intending to correct some of the problems of the current system. Unfortunately, the Government of Ukraine and the Rada ignored the objections of experts in the field, as well as Ukrainian, U.S. and other foreign rights holders, and passed a bill that is likely to allow the existing chaotic system to persist and which will not improve the market for music services in Ukraine, without further revision.

Ukraine has been on the Priority Watch List for many years, following its designation in 2013, as a Priority Foreign Country (PFC), which triggered a year-long investigation of Ukraine's IPR regime as required by Section 301 of the Trade Act of 1974. The PFC designation was the result of three critical shortcomings in Ukraine, as described by the U.S. Government: (1) the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights;” (2) “the unfair, nontransparent administration of the system for collecting societies;” and (3) concerns with prevalent government ministry use of unlicensed computer software. In 2014, after the U.S. Government's investigation acknowledged these shortcomings, in lieu of sanctions, it decided instead to take “no action under Section 301...[i]n light of the current political situation in Ukraine,” and placed Ukraine on the Priority Watch List, even though none of the three identified problems had been properly addressed by the Government of Ukraine.

Now six years later, the problems that triggered the PFC designation persist and are causing severe economic harm to U.S. copyright rights holders in Ukraine, as well as to Ukrainian rights holders. In December 2017, by proclamation (citing 502(c)(5) of the Trade Act of 1974 regarding “adequate and effective protection of intellectual property rights”), the President partially suspended the duty-free treatment accorded certain products from Ukraine under the Generalized System of Preferences (GSP) program; that suspension remains in place, while the problems continue unabated.

In the past few years, there have been some positive enforcement actions, most notably the closure of major infringing websites and services. For example, in 2016, a transnational enforcement operation, including Ukrainian authorities, arrested the Ukrainian operator of *kickasstorrents* (*kat.cr*) in Poland. That website, which was one of the largest torrent sites in the world and considered by U.S. criminal enforcement agents as a “lucrative flea market” for “infringing movies, television shows, video games, music and computer software,” remains shut down. Several other major sites and services with contacts to Ukraine have also been taken down in recent years, including: *ex.ua*, *torrent.net.ua*, *extratorrent.cc*, *fs.ua* (*fs.to*), and *hdclub.org*. There were a few video-on-demand sites, at least one video pirate streaming site (*kinoprostir.com*), and one large music streaming service (*onlainfilm.club*) targeted by the Cyber Police Department in 2018. There were four criminal convictions against pirate site operators in 2017, but only two such criminal convictions in 2018. In the two 2018 convictions, the site operators

¹For more details on Ukraine's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Ukraine's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



were fined 17,000 UAH (US\$612) in each instance, but received no prison time. There are at least four other criminal cases against site operators still pending in the courts.

One positive step (in 2017) was the creation of a specialized IP High Court (although its jurisdiction is only for civil, not criminal, matters), and, a year earlier, of the Cyber Police Department within the National Police of Ukraine. In recent years, there has been cooperation by the National Police with the FBI and INTERPOL on IP matters, as well as with rights holders. Another positive step was the passage of a package of anti-piracy legislation in 2017. The first of two bills that year was the bill "On State Support of Cinematography" (Law of Ukraine #1977-VIII), which entered into force on April 26, 2017. It amended the Copyright Act, the Criminal Code, the Telecommunications Law, and the 2015 e-Commerce Law. Those resulting changes included criminalizing camcording (Article 176 of the Criminal Code), as well as criminalizing those who finance piratical operations. The new law clarifies that camcording in theaters is illegal for any purpose if done without authorization from the rights holder. Although there are no exceptions in the camcording law, the Copyright Law does include a general undefined "private use" exception which some experts fear may be problematic against camcording activities. In August 2018, the Cyber Police Department began its first investigation into camcording activity at a theater in Kryvyi Rih; a criminal investigation is ongoing.

The anti-piracy laws also provide a clear requirement for ISPs to respond to notice and takedowns, which, to date, have often been ignored because ISPs have a broad liability exemption in the Telecommunications Law. The new laws create detailed procedures and timetables for takedown notices and responses. However, the notice and takedown provisions apply only to audiovisual works, musical works, sound recordings and computer programs (so e.g., not including literary works, or photographs), and the law has other deficiencies (most immediately, no administrative agency to enforce it). Separately, a judicial reform bill (Law of Ukraine #2147-VIII, in force on December 15, 2017) included amendments to the Commercial Procedure Code, the Civil Procedure Code and the Administrative Code. That bill established a High Court on Intellectual Property Matters for civil cases. Plans to start its operations in September 2018 were delayed into 2019 (judges, with proper qualifications, are still being appointed to the court).

There was one minor legislative change (Law of Ukraine #2514-VIII, in force in September 2018), which changed existing law, and was intended to improve the licensing of audiovisual works, sound recordings and software, and included sanctions for the removal of rights holder authenticity marks from copies of such works and recordings. The change in 2018 was an amendment to the ongoing use and administration of the hologram sticker system (adopted in 2000). It requires authorities to publish lists of those businesses that have to apply these stickers. However, the hologram sticker law has been an ineffective means of guaranteeing the authenticity of products, and in combatting piracy for years, and this minor change will not improve the situation; instead, the mandatory sticker system should be repealed.

There are a number of additional legal reforms still needed to allow the marketplace to develop for the digital distribution of music, films, television programs, video games, and books online in Ukraine for the benefit of foreign and domestic rights holders, Ukrainian consumers, and the local economy. Additionally, the Government of Ukraine needs to prioritize the establishment and funding of an agency to administer the new anti-piracy law, including the authority to impose sanctions (fines) for non-compliance with notice and takedown and other provisions in the law. Last, criminal enforcement, which several industries report has worsened in the past two years, needs to improve significantly.

PRIORITY ACTIONS REQUESTED IN 2019

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2019, in addition to those already noted:

Criminal enforcement:

- Focus criminal enforcement, using the newly adopted and existing laws, on: (i) owners and operators of ISPs that host illegal streaming, pay-per-download, peer-to-peer (P2P) and BitTorrent sites, including sites dedicated to pirated music, film, entertainment software and printed materials; and (ii) the principals of collective management organizations (CMOs) operating without legal authorization from rights holders, including foreign rights holders; and (iii) the principals and participants of camcording operations.
- Coordinate key agencies, including the National Police and the General Prosecutors Office and their respective enforcement practices and investigations; significantly increase the number of investigations (i.e., criminal searches) and prosecutions; properly resource enforcement authorities, including the specialized Cyber Police Department within the National Police (which needs a sub-unit dedicated to IP-related crimes); and, establish specialized IPR prosecutors within the General Prosecutors Office.

Legal reforms:

- Fully implement the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)).
- Amend the Telecommunications Law and e-Commerce Law to reconcile existing conflicts to provide clear rules of liability for ISPs and other third party providers of online services pertaining to copyright matters.
- Revise the 2018 Law On Collective Management (CMO Law)—currently just starting to be implemented—to correct the 2018 deficiencies, including: (i) fixing the rules used to calculate revenue-based tariffs for collective licensing organizations; (ii) adopting rules to identify current and future rates; (iii) limiting the scope of extended collective licensing and the role of collective licensing organizations. In addition, the “cable retransmission” definition in the bill is a violation of international treaty obligations because it excludes local broadcasts. The new law also repealed an effective enforcement tool providing an award of pre-established (statutory) damages—statutory damages should be restored into the law (allowing rights holders to choose between seeking actual or statutory damages).
- Amend the Copyright Law to: (i) broaden the scope of works covered under the new notice and takedown procedures; (ii) eliminate the need for attorneys to file such notices, to simplify and improve the process (and enforce the law applying penalties for non-compliance with such notices—currently, there is no agency to enforce the law); and (iii) add clear third-party liability for website owners and Internet Service Providers (ISPs) to encourage cooperation with rights holders (and to ensure that compliance with notice and takedown alone is not sufficient to avoid liability for those engaged in inducing or encouraging infringement). There has been little cooperation by ISPs with rights holders to date.
- Repeal the requirement to manufacture film prints in Ukraine, as well as the other market access barriers that value films for the VAT based on projected royalties and that exempt Ukrainian (or Ukrainian dubbed) films.

COPYRIGHT ENFORCEMENT IN UKRAINE

The IPR legal regime in Ukraine has lagged far behind the rapid growth of technological advances as access to mobile devices, and the demand for online services for copyrighted materials have grown considerably in recent years. Only ten years ago (2009), fewer than one-fifth of the population in Ukraine had access to the Internet according to the International Telecommunications Union (ITU). Today, not only is access widespread, but Ukraine is home to many advanced coders, hackers and others engaged in highly technical activities that facilitate cybercrimes. The failures in Ukraine to modernize its laws, and to engage in effective and deterrent enforcement means that it is a major exporter of piracy, especially digital piracy, into both the European Union markets and other countries regionally.

Internet Enforcement: Weak digital enforcement has resulted in an exponential increase in the number of illegal P2P hosting and website-based Internet piracy sites. Legal markets in Ukraine are harmed by BitTorrent sites (some located in Ukraine) as well as by online streaming sites of music and movies. Some Internet pirates have

purposefully moved their servers and operations to Ukraine in the past few years to take advantage of the weaknesses in the law. In 2018, Ukraine ranked third in the world in the number of connections by peers participating in the unauthorized file-sharing of select video game titles on public P2P networks, retaining its position from 2017. Ukraine is also ranked third in the world for infringement of video games for the PC platform.

One bright spot (in 2016) in Ukraine was the takedowns of several major pirate websites including *ex.ua* and *fs.us (fs.to)*—two of the largest and most popular pirate sites in Ukraine. For years before that, *ex.ua* had been one of the most popular sites in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content, and it was repeatedly on the U.S. Government's list of Notorious Markets. However, *ex.ua* has resurfaced as a cyberlocker at *fex.net*, and there are some reports that infringing material is now on that site. Another site, initially linked to Ukraine, that had been on the Notorious Markets list since 2013, and which was disrupting markets in India, Pakistan, and China among many other territories, was *extratorrent.cc (extratorrent.com)*. It was removed from the U.S. Government's Notorious Markets list in January 2018 after its operators announced in May 2017 that they were "shutting down *Extratorrent* and its mirror sites." While the main domain is no longer available, unfortunately, the site is still available via proxy sites.

In 2018, there was no significant site blocking or takedown activity against large commercial sites, and there remain many such websites in Ukraine. Many of these are in English directed to Western markets, including streaming sites, torrent sites, cyberlockers, and linking sites such as: *rnbxclusive*, *leakedearly*, *hiphopisdream*, *purplinks*, and *musicfire*. Additionally, there are a number of sites offering unlicensed pay for download musical recordings, including *mp3caprice.com*, which claims to have copyright licenses from the rogue collecting society AVTOR. The motion picture industry notes that some infringing sites have used hosting services in Ukraine, such as *yify-torrent.org* and *mejortorrent.org*. The entertainment software industry is particularly concerned about popular sites, hosted in Ukraine including *btidig.com* and *piratebit.ru*. *Vk.com (vKontake)* is blocked in Ukraine at the ISP level, as part of the ban on Russian-based web services that was initiated in May 2017.

One major initiative, which was undertaken in cooperation with Ukraine's four major media groups, the largest television channels, and rights holders, has been to monitor advertising of well-known brands on pirate sites. The Ukrainian Anti-Piracy Association (UAPA) has started to monitor these sites and to notify major brands that are advertised on these sites to get the brands to pull their advertisements; UAPA is also sending similar notices to the advertising agencies. In 2017, after a conference that included many of these parties working cooperatively, a list of pirate websites was created for the brands and advertising agencies to readily identify sites to avoid (*blacklists.org.ua*); rights holders report that the initiative has, so far, yielded positive results.

A roadmap for improved enforcement against digital (and hard copy) piracy was agreed to in the U.S.-Ukraine Action Plan of 2010, with very specific steps set out to effectively combat Internet piracy. The "plan" was actually a formal summary of commitments made by the Government of Ukraine to the U.S. Government. It has never been fully implemented.

The U.S. Government noted in its 2013 designation of Ukraine as a PFC that the Ukraine IPR regime failed "to institute transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy; to introduce limitations on such liability for ISPs; and to enforce takedown notices for infringing online content." In fact, not only is there no clear third party liability that could incentivize cooperation between rights holders and ISPs, but the current Law on Telecommunications (Article 40, paragraph 4 on the "responsibility of operators") bluntly states that ISPs "do not bear responsibility for the content of the information transmitted through their networks." Instead of creating incentives for ISPs to take action and cooperate with rights holders, the current law in Ukraine is premised on prescribing actions for rights holders to request, but ISPs have no obligation or legal incentives to comply. Article 38 states that ISPs can only disable end-users from the Internet, or block access to (i.e., takedown) infringing websites, with a court order. In the past, the Internet Association of Ukraine (IAU), representing the ISPs, has taken the position that rights holders need to go after illegal website operators directly, without ISP assistance or cooperation, citing this statutory language. The 2017 amendments to the Telecommunications Law will

only require defined “websites” and “hosting providers” to respond to proper takedown notices, but to otherwise retain their immunity from liability (so, the 2017 amendments did not revise Articles 38 or 40).

Many of the websites offering pirated copyright materials are thriving in part because of the support of local ISPs (there are hundreds of ISPs in Ukraine and hundreds of sites offering pirated content). This is particularly true in eastern Ukraine that has recently been outside of any enforcement jurisdiction. For the other parts of Ukraine, until the passage of the 2017 package of anti-piracy laws, the copyright industries had, for years, sought private agreements (with governmental assistance) with ISPs to establish effective mechanisms to takedown illegal websites and slow illegal P2P traffic. In the absence of legislation on liability, these voluntary efforts generally did not succeed, although, some ISPs did delete links to infringing content upon request. For the past several years, conferences and meetings were organized to try to get ISPs, broadcasters, advertisers and rights holders (via UAPA) together to cooperatively agree on procedures to respond to takedown notices and to take effective action against unauthorized sites. Before the new laws were adopted in 2017, UAPA and the Motion Picture Association of America (MPAA) reported that about one in five takedown requests in Ukraine resulted in action (since there were no laws mandating compliance). Other industries report that, without a Memorandum of Understanding, and with laws essentially granting immunity from liability, the Ukrainian ISPs have not, to date, cooperated with rights holders. Even the new law will not be effective unless a government agency is delegated responsibility for compliance, including the ability to sanction those who do not properly comply with notices.

The 2017 amended law mandates responses by access providers and hosting sites to properly submitted takedown notices from rights holders. The law requires that such notices must come from attorneys for rights holders to hosting providers, and mandates that the hosting provider notify the alleged unauthorized user (website) within 48 hours, and then act within 24 hours to take down the content; it also provides for put-back provisions. The law also addresses repeat infringement problems, holding services liable if the same content re-appears twice within a three-month period. In addition, the law requires website owners and hosting providers to have contact information on their sites, and to participate with the Whois database, and, it provides certain safe harbors if hosting providers properly comply with the law. Still, even with the 2017 amendments, the Telecommunications Law explicitly stipulates that these site and service operators have no responsibility for the content on their websites (even with knowledge it is infringing), except to respond to proper takedown notices. In 2018, UAPA issued 3,093 takedown notices, and cease and desist letters, to site operators and hosting providers, including 17 notices sent based on the 2017 law (Article 52-1 of the Copyright Law).

The new notice and takedown procedures still need to be properly enforced. In 2016, the Government of Ukraine abolished the State Intellectual Property Service of Ukraine (SIPSU) for poor governance and transparency problems. In addition, all of the state IP inspectors who had worked for SIPSU were fired. As the result of recent governmental reforms and funding issues, no new agency has yet been assigned to replace SIPSU's copyright enforcement authority. Thus, while SIPSU was a problem for rights holders for its governance issues, there is no agency in place to fill the gap, making it all but impossible to effectively use the new anti-piracy law.

In addition, and more importantly, even as websites and hosting services have been taken down, and some advertisements have been taken off of unauthorized sites and services, criminal enforcement against the owners and operators of these websites or hosting services, has rarely been successful (or even seriously pursued). Rights holders are not able to commence civil actions against infringing websites or to block sites, they can only send takedown notices under the new procedures. Further complicating enforcement is a lack of resources by enforcement authorities. Additionally, some large piratical operations have been set up in the eastern part of the country engaged in conflict, and are thus out of reach of the Ukrainian police.

The motion picture industry reported there were 42 criminal digital piracy investigations opened in 2018, compared to 18 in 2017 (55 in 2016 and 31 in 2015). In addition, 45 pirate sites were closed by the police or site owners (the same number in 2017, but down from the 78 in 2016 and 61 in 2015). The recording industry reported on one major ongoing investigation against a large site operator.

As noted, the motion picture industry reported only two criminal verdicts in 2018 for online piracy directed at site operators (there were four cases in 2017). In one case, against a streaming site (*tsv.net.ua*) the operators received no prison sentence, but were fined 17,000 UAH (US\$612) in Kharkiv City. In the other case, the same fine was imposed against the operator of *world-na.com* in Lviv. There are four other criminal cases pending against pirate site operators in the courts in Ukraine.

Thus, more criminal enforcement will have to be undertaken if the problems in Ukraine are going to improve. Currently, the Criminal Procedure Code does not grant police *ex officio* authority, so the police are unable to initiate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs, which often refuse to provide available information on their infringing users. Amendments to the Law on Telecommunications, which would have assisted the police in conducting Internet criminal investigations by providing subscriber information, have been proposed in recent years, but not enacted. The copyright industries report that the lack of clear prosecutorial and judicial procedures for Internet-related cases is a bar to effective enforcement, with existing procedures too complicated to be used effectively. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors, and judges for these crimes.

To combat Internet crimes, a Cyber Police Department was established within the National Police Department. In 2016, 30 investigators were recruited to join this unit; that number was raised 410 staff in 2018 (but the number, if any, dedicated to IP-related crimes is unclear). The formation of this unit was good news, but it has focused on non-IP related online crimes to date, and its actions are limited by a lack of resources. With many infringement cases having a Ukrainian nexus, the unit would certainly benefit from an increase in resources and training to address IP issues. In addition, a dedicated sub-unit was formed to focus on IPR offenses (not general cybercrimes); that too was good news. However, the copyright industries report that these units have not been properly staffed or resourced (e.g., with proper computer equipment). All of these problems combined with a 2015 re-organization of the police nationwide, have left the police short of the resources they need to be effective.

For civil enforcement, it is hoped that the new High Court for IPR offenses, which was supposed to begin operations in September 2018, will have the expertise to try IPR cases, and will also develop guidelines for judges in other courts. One reason for the new court is to avoid the current problem of defendants who forum shop for courts with little experience, and which, as a result, treat IPR offenses leniently. The new High Court needs to be properly staffed with qualified IP-trained jurists and resourced.

Collecting Societies: Collecting societies in the music sector, specifically in connection with broadcasting, public performances, as well as certain other communications to the public (e.g., certain cable retransmissions), can provide cost effective services to both rights holders and users for licensing, collecting, and paying remuneration. A proper collective administration regime allows CMOs to operate with full transparency and accountability, and fair and balanced governance. It also provides for proper accreditation procedures based on the criterion of the largest representation of domestic and foreign repertoire in active use.

The 2018 CMO Law is intended to resolve longstanding issues, but it has not yet been implemented, and leaves many questions regarding the accreditation of qualifying CMOs. There are currently operating licenses for 18 competing collecting societies, but these licenses are due to expire under the new law. Unfortunately, the CMO Law has many flaws, including: (i) problems regarding royalty rate calculations; (ii) no transitional provisions for the application of tariff rates until new rates are set; (iii) a definition of “cable retransmission” that excludes all local broadcasts; (iv) unclear provisions on how to accredit CMOs especially so-called “second tier” (additional accredited organizations) where a primary CMO exists; (v) troublesome extended collective licensing provisions (allowing CMO collections without rights holder authorization); and (vi) problems with the calculation of damages in copyright cases. Under the current system, CMOs grant inexpensive licenses to users of copyrighted material to “clear” their obligation to pay private copy levies, public performance licenses, or licenses for online music services. These longstanding problems were one reason for the designation of Ukraine as a Priority Foreign Country, and the Presidential

proclamation in December 2017 to remove Ukraine's GSP benefits. Instead of a growing marketplace as in other countries in Europe, the current chaos has prevented the development of the marketplace for legal music services, and it allows pirate websites to flourish claiming they are "licensed" from the rogue collecting societies.

If the accreditation is carried out properly, no more than one society representing the majority of commercially used rights and repertoire (in each sector or category of rights and rights holders) would be appointed as the CMO managing the rights under the extended collective licensing and mandatory collective management regime. Under the CMO Law the qualifying criteria for accreditation are: (1) representation of a significant number of Ukrainian resident rights holders whose rights are actually being exploited in Ukraine; and (2) agreements with corresponding foreign CMOs and rights holders of the repertoire actually used in Ukraine. One factor is the quantitative indicator of use of repertoire in Ukraine (so, properly based on actual use, including frequency of broadcasts on national TV and radio, plus a consideration of the territorial reach of the broadcast). The frequency of broadcast would be based on annual actual data provided to the accrediting agency.

Fair application of these criteria and the production of usage reports accurately reflecting the actual usage of musical works and recordings is critical to the success of the accreditation process. If incorrect data is provided in cue sheets or usage reports and/or other criteria are incorrectly interpreted or applied, the process will lead to accrediting non-representative and potentially rogue CMOs. For this reason, rights holders are very concerned that user groups will be on the accreditation committee, representing a clear conflict of interest, since users want the lowest possible license fees (and some have infiltrated their "own" CMOs).

The CMO Law transitional provisions have set the registration date for existing CMOs at April 23, 2019 (but extended collective licenses will be at a future date to be announced by the Ministry of Economic Development and Trade (MEDT)). The concerns regarding extended collective licenses and mandatory collective management are many, and the accreditation process is unclear (an expected announcement in December 2018 by MEDT was extended into January 2019). Also unclear is the accreditation of a CMO for the administration of private copying levies and cable retransmissions (neither of which are set to start until September 2019). Overall, the current regulations and implementation are unclear, and are moving very slowly, further delaying the possibility for proper payments of rights holders for the use of their works and recordings in Ukraine. In addition, the problem of allowing rogue CMOs to continue to operate is not merely an IP problem, but indicative of larger rule of law issues where cybercriminals and large illegal syndicates can disrupt other businesses and governmental operations.

Criminal Enforcement: As highlighted already, one key to improve enforcement, especially against online piracy is to properly form a sub-unit dedicated to IPR crimes within the Cyber Police Department within the National Police Department of Ukraine, and to properly train, staff, and resource it. Additionally, the unit must be allowed to engage in enforcement actions against owners and operators of infringing websites and services without political interference. In November 2017, a State Bureau of Investigation was formed in the General Prosecutors Office. This bureau is an independent body with very limited authority against whom it can carry on investigations (e.g., state officials and judges), and most online piracy operations are outside of the scope of its authority. It is recommended, instead, that the Government of Ukraine create a separate IPR unit within the General Prosecutors Office to focus on criminal prosecutions against online piracy operations, and that the unit be properly staffed and trained; no progress was made on this recommendation in 2018.

The lack of effective criminal prosecutions and deterrent sentencing is a lingering problem in Ukraine for both digital and hard copy piracy. In 2005, the Criminal Code (Article 176) was amended to lower the threshold for criminal prosecution. The current threshold (as of January 1, 2019) is 19,210 UAH (or US\$689). The main concern with the threshold is that there is no unified approach on how to calculate a valuation of the copyright material in question, so the threshold acts as a bar to criminal enforcement, resulting in rights holders having to use less effective administrative actions instead. This is particularly true for online piracy matters, where the valuation of damages (by law enforcement agents, prosecutors and the courts) is too difficult to calculate absent an official methodology, and prevents the initiation of criminal investigations and prosecutions. Additionally, enforcement

officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized and the material for every rights holder does not exceed the threshold, a criminal case does not proceed (the losses cannot be combined).

There are other criminal procedural problems as well, including: (1) rules regarding the use of expert evidence (denying the use of rights holder experts); (2) non-deterrent sentences for repeat offenders; (3) delays and case dismissals in pre-trial investigations that can be fixed with changes to the Criminal Code or Criminal Procedure Code (Article 242-6 requires an expert to calculate damages caused by a crime – and there is a scarcity of these experts); (4) the lack of presumptions that rights holders are the infringed (harmed) party to commence a criminal proceeding; (5) the lack of guidelines for judges on sentencing and developing expertise in IPR cases; and (6) a 2017 amendment (Article 242 of the Criminal Procedure Code) creating a procedural hurdle by requiring a court's permission before an investigator or prosecutor can offer forensic evidence. A recent troubling problem for online enforcement has been a "requirement" that rights holders provide proof of actual damages before cases can proceed. Until recently, indirect evidence was accepted by prosecutors. In addition, prosecutors demand disclosure of business confidential licenses (as examples of damages) in enforcement actions.

Provisions exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. Other (related) lingering enforcement problems: (1) the required proof of ownership in criminal and civil cases, including a complete chain of title; (2) the confiscation and destruction of infringing goods, as well as materials and equipment used for their manufacturing is not clearly a part of the Criminal Code sanctions; (3) the requirement that parties in all cases—beginning in 2017—be represented by local counsel (no more *pro se* or power of attorney representations).

Other Key Enforcement Issues: The camcording of motion pictures in theaters and the quick transfer of these illegal copies on the Internet remains a major problem for the motion picture industry; it is mostly undertaken by criminal syndicates operating in Ukraine and Russia. As a consequence, illicit camcording shifts quickly between the two countries, resulting in hard copy and Internet piracy. The 2017 Cinematography Law (in force in April 2017) amended Article 176 of the Criminal Code to criminalize camcording. But, as noted, there are definitional and other ambiguities in this law, and it has not, to date, been properly utilized by enforcement authorities.

Between 2011 and 2018, over 160 camcords (including audio only and video only recordings) have been sourced from Ukraine. In 2018, there were at least four MPA-member company videos sourced from Ukraine (there were six in 2017 and 13 in 2016), and another four audio-only camcords sourced from Ukraine.

Theatrical piracy is also a problem in Ukraine, especially a small theaters which screen pirate prints without a license which is a violation of the Administrative Code (Article 164-6). In 2018, there were no cases commenced using Article 164-6 (in 2017, there were 13 arrests). During 2018, there were 171 camcording events identified by the motion picture industry, with 18 theaters ordered to close operations. Unfortunately, there were no criminal cases commenced against theater owners (there were four such cases in 2017). However, the Government of Ukraine has said that implementation of the new camcording law will be a priority in 2019.

The current Customs Code gives Customs officials *ex officio* authority to properly conduct enforcement investigations. Using this *ex officio* authority, Customs officials can seize illegal material at the border without a court order. Unfortunately, Customs authorities within the State Fiscal Service are not sufficiently engaged in enforcement measures, and thus under utilize their authority, with the exception of some minor seizures by Customs authorities of illegally produced CDs and other pirated materials; cooperation with right holders could be improved as well.

Broadcast and Cable Television Piracy: Piracy of content by broadcast and cable television systems, including by the state-owned radio and television networks, continues to be a major problem for the motion picture and recording industries—both with regard to regional and nationwide broadcasts. There are a large number of

Ukrainian cable operators that continue to transmit audiovisual programming without licenses. The Government of Ukraine should take actions ensure that its state-owned enterprises pay for the copyrighted content that they broadcast. Enforcement authorities should shut down these operations and use enforcement measures against the operators of these systems.

Administrative and Customs Enforcements: The Administrative Code (Article 164-17) includes fines for infringing websites that do not respond to takedown notices regarding infringing materials (as well as fines for unfounded claims for blocking content). But, the administrative agency in charge of enforcement was dissolved, and no new authority has yet been established.

The Government of Ukraine should also increase the number of administrative enforcement actions by moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (as well as, where applicable, criminal) actions. Administrative fines for physical piracy (street piracy, retail stores, etc.) are low: most fines are from US\$40 to a maximum of US\$400. In addition, *ex officio* authority should be used to improve border controls, especially along the Russian border.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Ukraine is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement, and in 2001, it acceded to the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), which entered into force in 2002. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation of the treaty obligations, especially with regard to technological protection measures, by requiring proof of “intentional” circumvention, which is a major impediment to protection.

In 2010, the Government of Ukraine developed an IPR “Action Plan” in cooperation with the U.S. Government to combat and target the digital piracy problem, but the plan was never completely implemented. For example, addressing the problems of ISP liability, notice and takedown, administrative remedies, and fixing or eliminating the hologram sticker program, are all covered in the 2010 Action Plan, and have not been fully and properly addressed by the Government of Ukraine. The 2017 Act did address some of these issues, with formal notice and takedown provisions and timetables, and penalties for noncompliance.

LEGAL REFORMS

As noted, two major pieces of legislation—Law of Ukraine #1977-VIII (cinematograph law) and Law of Ukraine #2147-VIII (procedural amendments)—were enacted in 2017. These resulted in amendments to the Copyright Law, the Telecommunications Law (and the 2015 e-Commerce Law), the Criminal Code, the Commercial Procedure Code, the Civil Procedure Code and the Administrative Code. IIPA recommends additional legal reforms in Ukraine, in addition to full WIPO Internet Treaty implementation.

Copyright Law: The Copyright Law and related laws were amended in 2017, as discussed above, but the laws still need to be properly implemented. The 2017 amendments established a notice and takedown regime, without the need for a state authority or court. Under the 2017 changes to the Copyright Law, a takedown notice must contain specific information and be sent by a licensed lawyer to the hosting provider (ISP); it is deemed to be received when it is sent. The notice triggers specific timetables: 48 hours for the hosting provider to notify the website, and 24 hours to takedown the material; there is also a put-back provision (unless the rights holder commences infringement litigation within ten days). A rights holder can alternatively go directly to the ISP if an owner of an infringing website is not identifiable (i.e., not in the Whois database). If the website does not take down the material, the ISP has to do so. The ISP retains its immunity (safe harbor) from any (i.e., not just monetary) liability if it complies. The 2017 law included a “repeat infringer” provision, so that if the same material reappears twice within a

three-month period on the same website or webpage, the owners of the site or page can be held liable. There are no provisions in the new laws for “blocking” infringing websites, only for taking down infringing materials from sites.

There are numerous concerns with the new procedures: (1) they are burdensome—requiring ownership information, instead of a statement or affirmation of ownership; (2) notices must come from an attorney, and with an electronic signature; (3) a website owner can refuse action merely by claiming a “right” to use the work and the only remedy is for a rights holder to commence infringement litigation; (4) it only requires the hosting provider notify a webpage owner (which could be an uploader) to take material down, rather than acting to do so; (5) many of the definitions (“websites” and “webpages”) are unclear and appear to be inconsistent with international norms. In addition to these burdensome procedures (and once an enforcement agency is established to administer the law), the Copyright Law needs to be amended to broaden the scope of works covered under the new notice and takedown procedures (and to improve those procedures) so that all copyrighted and related rights works are covered.

The bill also included amendments to the e-Commerce Law (enacted in September 2015) somewhat limiting the overbroad exemption from liability for ISPs and hosting service providers, which exceeded international norms. Under the 2017 changes, a provider of online services now can be held liable for copyright infringement if they do not comply with the notice and takedown rules. But, the definition of which services are covered is not clear. It is presumed to cover ISPs, but it is unclear whether a website that is hosting third party content (i.e., “webpages”) are covered; and, the new law has not yet been tested in the courts. Since civil litigation is the only avenue for rights holders for noncompliance with the notice and takedown requests, there needs to be a clear basis for liability for sites and services online, and it should be clear third-party liability (that extends beyond merely responding to takedown notices) is applicable to website owners and Internet Service Providers (ISPs). Providing clear third party (ISP) liability is critical to effective enforcement and cooperation with rights holders, and can be done in a manner under generally accepted standards applicable to parties who “induce” infringement, and including obligations on service providers to reasonably gather and retain evidence. Additionally, the new law did not establish a duty to provide information to law enforcement agencies and rights holders, which should be added.

Other deficiencies in the Copyright Law require: (1) clearly defining temporary copies; (2) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (3) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; (4) adding statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement (Article 52—to double actual damages)—the CMO legislation in 2018 removed the pre-established damages provisions from the law; and (5) ensuring that an unauthorized online distribution, communication, or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.

Law on Collective Management: After the passage of the 2018 law, further amendments and subsequent regulations, as already note, are needed to properly govern the activities of Ukrainian collective management organizations to improve the current situation, and to restore public trust and basic business practices for the administration of public performance rights and the broadcast markets.

e-Commerce Law: An e-Commerce Law was adopted in September 2015, and then amended in 2017. As noted, the 2015 law included broad ISP liability “safe harbors” which are not consistent with international norms and far exceed U.S. law (as well as the Association Agreement with the European Union). After the 2017 amendment, the only “liability” of ISPs is to comply with takedown notices. The law should be further amended to provide for clear third party liability (in this law and in the Copyright Act), consistent with international norms as well as U.S. and E.U. laws.

Criminal Code and Criminal Procedure Code: In 2017, as part of the package of amendments, Article 176 was changed so that there are criminal remedies against online piracy of all works and sound recordings (the old law only applied to hard copy piracy), and it added sanctions for camcording. The codes should be amended to

provide: (1) remedies against repeat infringers (within 12 months) that would automatically lead to criminal, not solely, administrative prosecution (and, even if each separate infringement is below the criminal infringement threshold); (2) clear rules in the Criminal Procedure Code for prosecuting infringers, and remedies for intentional infringements related to the obligation to pay music rights royalties.

Ukrainian criminal procedures require rights holders to file complaints to initiate actions, which acts as a bottleneck to successful enforcement (including against optical disc producers or distributors). Police should be granted (and should use) the authority to initiate intellectual property criminal cases and investigations for submission to courts. It should also be clear that the police have the authority to seize all copyright products and equipment for use at trial (they currently only do so in software cases).

Administrative Remedies: Administrative courts should be empowered to hear infringement cases even in the absence of the infringer, and procedures that introduce unnecessary delays and impose unreasonable deadlines, leading to unnecessary case dismissals, should be corrected. One major enforcement hurdle in the Administrative Code of Ukraine (Article 51.2) is the requirement to prove intent of the infringer; intent, while relevant in criminal proceedings, has no relevance in administrative sanctions, and should be deleted from the Code.

Administrative Code amendments were also adopted in 2017 adding the following remedies: (1) Article 164-17 provides administrative remedies for failure to properly respond to takedown procedures for infringements by ISPs and websites; (2) Article 164-18 provides sanctions for “knowingly providing false information” for takedown notices; and (3) there are provisions pertaining to administrative violations of the new procedures (but, as noted, the authority to do this was vested in SIPSU which was closed down).

For physical piracy, administrative remedies exist but they are not being used effectively to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA continues to recommend.

Customs Code: The Customs Code of Ukraine has included some administrative improvements in recent years. IIPA continues to recommend the abolition of the customs registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement, especially for some industries. Another matter that has been a concern is the treatment of seized infringing materials. The Customs Code (Article 401) provides that goods failing to clear customs because of alleged IPR infringements, may be seized and destroyed by Customs authorities without a court order (i.e., an expedited destruction). However in practice, this procedure is applied only in cases where rights holders notify Customs officials about alleged infringing material; the destruction is then undertaken at the rights holder’s expense and in doing so, releases the infringer of any administrative liability, and thus any deterrence from repeating their infringing actions.

MARKET ACCESS ISSUES

The Government of Ukraine continues to maintain onerous market access barriers. Two of these barriers are: (1) an obligation to manufacture film prints and digital encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium.

The compulsory manufacturing requirement is included in the Law on Cinematography (amended in 2010) requiring the production of film prints locally for the issuance of a state distribution certificate. The required local production rule was reiterated by the State Film Agency, and entered into force in 2012. The Law on Cinematography should be amended to repeal this requirement of local production of film prints.

In December 2015, the Government of Ukraine adopted a law on VAT that discriminates against foreign films. It applies to the distribution, theatrical exhibition, and other public performances of films. In July 2017, the law

went into force: it suspends the VAT “temporarily”—until January 1, 2023—on the exhibition and distribution of domestic films or foreign films dubbed into the state language, if the dubbing is done in Ukraine.

In addition, several years ago, Ukrainian Customs authorities declared new customs valuation rules. Rather than assessing duties on the underlying carrier medium, the new rules assess valuations based on projected royalties. To further complicate matters, Ukrainian Customs officials stated that the new ruling would be retroactive (three years), and would be enforced with serious penalties for valuations based on the carrier medium rather than royalties. In 2012, the government revised the Customs Code and affirmed the duties on royalties for both theatrical and home entertainment imports. These valuation procedures are governed by CMU Resolution No. 446 (which is still in force), and even after Supreme Court rulings calling these customs valuations into question.

Unfortunately, no changes to the customs valuation, or to the manufacturing of prints requirement, were made in the Cinematography Law amendments enacted in 2017.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

IIPA filed a petition in 2011 to have Ukraine’s Generalized System of Preferences (GSP) benefits suspended or withdrawn. On December 27, 2017 (82 FR 61413) the President used his authority—citing 502(c)(5) of the Trade Act of 1974 regarding Ukraine’s denial of “adequate and effective protection of intellectual property rights”—to announce a suspension of the duty-free treatment accorded certain articles (products) from Ukraine under the GSP program. That partial suspension of GSP benefits entered into force on April 26, 2018 and remains in place.

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2019.¹

Executive Summary: Vietnam is an important emerging market in Southeast Asia for the creative industries, which has investments planned to tap into Vietnam's booming economy. But the market for creative works in Vietnam remains severely stunted due to worsening piracy and persistent and debilitating market access barriers. Vietnam is now host to many of the world's most popular piracy websites, and other problems are growing, including Piracy Devices and apps used to access illegal content. While rights holders have implored Vietnam's government to take action, the government has done very little to address the growing problem. For example, while the highly popular online piracy site *123movies* was shut down due to considerable pressure from the U.S. Government and from industry, the Government of Vietnam did not take any effective actions against those responsible for the site. Thus, the site appears to have simply sold its main architecture, which has led to a proliferation of copycat sites around the world. One exception is the government's support for national broadcasters to protect their investment in the World Cup broadcast by disabling access to hundreds of infringing websites. Unfortunately, the government has not been as amenable to working with foreign rights holders to take action against similarly harmful websites hosting or distributing other types of infringing content.

Rights holders face unreasonable hurdles in enforcing their rights, including requirements for evidence collection that are impossible to meet. Exacerbating the situation is that foreigners remain restricted from investigating, placing the onus on the Government of Vietnam to fill in any evidentiary gaps, which it has been reluctant to do without significant political pressure. Vietnam must take more affirmative enforcement actions against piracy, such as issuing deterrent administrative penalties against infringers, taking additional measures in cases of repeat infringement (e.g., the *chiasenhac.com* service), and undertaking criminal prosecutions, beginning with major online piracy operations that are based in Vietnam. To this end, Vietnam must properly implement its revised Criminal Code consistent with its international obligations to ensure that criminal procedures are applicable to flagrant piracy sites. Vietnam has committed to ratifying the WIPO Internet Treaties, and, without delay, the government should take the necessary steps to ratify and implement them and to bring its standards for copyright protection and enforcement into alignment with its international obligations, including the Bilateral Trade Agreement with the United States (BTA) and the WTO TRIPS Agreement, and evolving global norms. The government should also address deficiencies with the Copyright Office of Vietnam (COV), which is grossly understaffed, and has not taken any action to reform the dysfunctional collective management organization for music producers. Vietnam's piracy problems can be mitigated if the country removed its highly restrictive market access barriers, which, by limiting Vietnamese consumers' access to legitimate content, pushes them towards illegal alternatives. It is long past time for Vietnam to make good on its political commitments and international obligations to improve copyright protection in the digital environment, confront its enormous piracy challenges, and remove the remaining barriers to its creative marketplace.

¹For more details on Vietnam's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Vietnam's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2019

Enforcement:

- Ensure enforcement officials, including the Ministry of Information and Communication (MIC), Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate, and Ministry of Public Security (MPS) IPR/High-Tech Police and related police units, increase the number and the effectiveness of operations focused on online infringement, including against websites identified in this report and operators of such sites; issue administrative penalties for infringement sufficient to deter; ensure administrative orders are properly enforced; and bring criminal prosecutions against commercial scale piracy, including flagrant piracy websites (i.e., globally popular websites that brazenly infringe).
- Encourage educational institutions to implement appropriate use and copyright policies to ensure that students and faculty use legitimate textbooks, other course materials, and copyrighted software.
- Provide the COV with adequate resources, including additional staff, to develop and implement effective enforcement policies.

Legislation:

- Make necessary changes to laws and implementing Resolutions, Decrees and Circulars, including the IP Code and the new Criminal Code, to ensure Vietnam is in full compliance with its BTA, TRIPS, and other international obligations, including, in particular, adopting a Resolution that (1) interprets "commercial scale" consistent with Vietnam's international obligations (including under the recently concluded Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)) to cover infringement that has a significant impact even absent a profit motive and (2) takes into account peer-reviewed studies to ensure that the monetary thresholds can be met by applying an appropriate substitution rate to effectively criminalize the main piracy sites operating in Vietnam.
- Strengthen the legal framework to take effective action against digital infringement, including by:
 - ensuring phonogram producers are provided a full, unrestricted public performance right and exclusive rights for the digital uses of their sound recordings, consistent with Vietnam's international obligations;
 - eliminating the legal and procedural impediments, and easing the evidentiary requirements that interfere with the ability to take effective action against piracy websites, illegal camcording, live streaming piracy, and Piracy Devices and apps that facilitate access to infringing works;
 - closing gaps in substantive copyright protection, especially overbroad exceptions and limitations, and affording adequate levels of protection to enable Vietnam to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT);
 - encouraging meaningful cooperation between rights holders and ISPs by providing for clear primary and secondary liability provisions; making clear that ISPs must take action against infringing content even without governmental intervention; and ensuring ISPs comply with requests to remove infringing materials and take other measures that have been demonstrated effective in preventing or restraining infringement;
 - increasing administrative penalties for copyright infringement to achieve deterrence and ensuring enforcement authorities are able to take action to enforce administrative orders, including shutting down or disabling access to infringing sites that do not comply; and
 - developing an effective procedure to promptly respond to rights holders' requests for administrative enforcement.
- Extend the term of copyright protection for all copyrighted works, including sound recordings, in line with the international trend of 70 years after the death of the author or, when term is calculated based on publication, at least 75 years (or 100 years from fixation) as provided in the BTA.

Market Access:

- Eliminate foreign investment restrictions, quotas, and other entry barriers with respect to the production, importation and distribution of copyrighted materials, whether in the physical, online, or mobile marketplaces.
- To encourage the development of “over-the-top” (OTT) services, adopt a light-touch self-regulatory approach in Decree 06, and do not impose unreasonable compliance obligations in implementing the new cybersecurity law.
- Deregister the Recording Industry Association of Vietnam (RIAV) and engage with local and foreign music producers to set up a new collecting society to enable all music producers to effectively manage the rights that are subject to collective management in Vietnam.

PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

Prior IIPA reports on Vietnam contain detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.²

The Vietnamese Government has long recognized that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights.”³ Yet Vietnam’s actions to combat piracy (including actions taken pursuant to the 2012 MIC and MCST Joint Circular 07⁴) have not adequately addressed its piracy challenges, including those identified below. Vietnam must take more affirmative enforcement actions against piracy, such as issuing deterrent administrative penalties against infringing operations, and spearheading criminal prosecutions, beginning with major online piracy operations based in Vietnam.

Growing Online Marketplace Presents Challenges: A significant and growing percentage of the Vietnamese population is online, with most of that increased access stemming from mobile broadband subscriptions.⁵ Vietnam’s large population of young people and rapidly growing online and mobile user-base offer enormous new opportunities for legitimate services for creative content.⁶ Indeed, a growing number of licensed Internet music content providers are trying to take advantage of these opportunities, including *Zing.vn*, NCT (*nhaccuatui.com*), Viettel Media (*keeng.vn*), Vega Corporation (*nhac.vn*), Spotify, iTunes, and Deezer. Mobile applications like *Pops TV* are also pioneering the availability of music and audiovisual content, using iTunes, Amazon MP3, Android, Windows Phone, and Samsung Smart TV as vehicles for the distribution of content, including local Vietnamese content. Two video-on-demand (VOD) services were launched in Vietnam in 2016: Film+ (“film plus”) and Danner. Netflix and Iflix are also available. These channels for digital distribution offer huge potential for the creative industries; however, as discussed below, Vietnam must significantly improve its legal framework and enforcement efforts, and dramatically reduce market access barriers for this potential to be realized.

Vietnam faces the rising challenge of combating increasing online and mobile network piracy from download sites, peer-to-peer (P2P) networks, linking sites, streaming sites, search engines, cyberlockers, and on social media networks. A wide variety of movies are available online for free, making it impossible for legitimate businesses to compete. Vietnam is also now home to some of the worst piracy sites in the world, sites with global reach and extremely high popularity (such as *phimmoi.net*, *bilutv.com*, *phimbathu.com*, *xemphimso.com*, *bomtan.net*, *vtv16.com*, and *hdonline.vn*). Streaming of unlicensed music through websites and mobile apps is rising, and stream-ripping is also a problem. There are a vast array of these piracy services operating in the market, offering massive

²See, e.g., IIPA, *Vietnam, 2018 Special 301 Report*, (February 8, 2018), available at <https://iipa.org/files/uploads/2018/02/2018SPEC301VIETNAM.pdf>.

³Copyright Office of Vietnam, *Overview of Copyright in 2008*, January 19, 2009 (on file with IIPA).

⁴*Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL on Stipulations on the Responsibilities for Intermediary Service Providers in the Protection of Copyright and Related Rights on the Internet and Telecommunications Networks* (in force August 2012) (“Joint Circular 07”).

⁵According to the International Telecommunications Union, the percentage of individuals using the Internet in Vietnam increased from 43.5% in 2015 to 46.5% in 2016, and active mobile broadband subscriptions were almost 47 per 100 inhabitants in 2016. See *Measuring the Information Society Report 2017*, International Telecommunications Union, at 145, available at https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017_Volume1.pdf.

⁶One recent report found that “Vietnam has seen a very rapid increase in mobile broadband penetration over the past five years” and “strong growth is expected to continue in the fixed broadband market.” See *Vietnam - Telecoms, Mobile and Broadband - Statistics and Analyses*, BuddeComm, Executive Summary available at <https://www.budde.com.au/Research/Vietnam-Telecoms-Mobile-and-Broadband-Statistics-and-Analyses>.

amounts copyrighted content. Most of these websites generate revenue through advertisements or through paid subscriptions for premium service. The harm caused from online piracy is significant, making it nearly impossible for legitimate online platforms to develop sustainable and properly-monetized content distribution services because they must compete with pirated websites. For the motion picture industry, piracy also implicates the life cycle of filmed entertainment, as new movies are frequently available online while they are still in their theatrical run. Some major piracy sites are listed below:

- *Chiasenhac.com* (Alexa ranking 161) is the most popular pirate music site. It allows users to stream unlicensed Vietnamese and international music,⁷ attracting 84% of its traffic locally and the remainder from territories including the U.S., Mexico, and India.
- Sites such as *phimmoi.net*, *bilutv.com*, *phimbathu.com*, *xemphimso.com*, *bomtan.net*, *viv16.com*, and *hdonline.vn* and related sites are of deep concern to the motion picture and television industry.
- *Y2mate.com* is one of the most popular stream-ripping sites in the world, and the site owner is located in Vietnam.
- Other sites that provide unlicensed music and music video content for download and streaming include *nhac.pro.vn* (also *nhacpro.net*), *trangtainhac.net*, *trangtainhac.com*, and *tainhacvemay.mobi*.

As noted, one major global piracy site, *123movies*, was shut down in 2018, but appears to have sold its main architecture, leading to a proliferation of popular lookalike and copycat sites with locations all over the world, many with names like *123movies* or *gomovies*. This is in part due to the government's unwillingness or inability to take effective action against those responsible for the site, which is a longstanding barrier to effective enforcement, as discussed below. Even licensed music websites may inadvertently contribute to global piracy because most music sites do not have efficient geo-blocking systems and, therefore, the content becomes available elsewhere.⁸ Some third party sites (especially open source sites) circumvent licensed sites' technological protection measures (TPMs), including geo-blocking systems, to obtain music recordings for users to download or stream online without authorization both in and outside of Vietnam. This "deeplinking" problem appears to be under control through coordinated efforts of rights holders and the licensed sites. In 2018, licensed music services in Vietnam took measures to prevent at least 97 local and foreign third party websites, including now-defunct sites *nghenhacvui.com* and *fullsongs.net*, from deeplinking to their contents. But some new websites have appeared, such as *trangtainhac.com*, that deeplink to other services, such as *chiasenhac.vn*. It is important that Vietnamese sites build their capacity to employ TPMs to prevent such unlicensed deeplinking, and there should be an effective legal remedy against these deeplinking sites. Unfortunately, Vietnam's copyright law does not provide adequate protections against circumventing TPMs.

Vietnam has been willing to take some important steps in its enforcement against online piracy of audiovisual broadcasts over the past few years, demonstrating at least some willingness to cooperate with rights holders in enforcement actions and training and capacity building. In 2018, Vietnam broadcasters, including Vietnam TV (VTV), with support from MIC and MPS and cooperation from ISPs, successfully took action to stop unauthorized online transmissions of the World Cup soccer tournament. As reported last year, other recent positive developments include Decree No. 17/2017/ND-CP (Decree 17), issued in 2017, authorizing MIC to implement regulations in coordination with other authorities that would enable MIC to take actions against online infringement. MIC also issued Decision No. 1278/QĐ-BTTTT, which authorized a project to "strengthen MIC's capacity to fight online infringement and online crimes." Under this project, MIC and other relevant authorities will amend regulations to improve enforcement and conduct technical trainings and institutional reforms to ensure MIC's inspector and other relevant departments are fully able to address online infringement. IIPA remains hopeful that these developments will result in improved enforcement against online piracy.

⁷*Chiasenhac.com* (also *chiasenhac.vn*), which has an Alexa ranking of 161 and receives 4 million monthly visits, is owned by Yeu Ca Hat Company and hosted from Vietnam by Viettel IDC. As a result of an administrative complaint filed in 2016 with the Ministry of Information and Communications against *chiasenhac.com*, the site was fined and ordered to remove all infringing contents. Its infringing activities, however, continue.

⁸SimilarWeb estimates that visitors from the United States and Mexico are the second and third top foreign visitors to Vietnam's music sites.

Unfortunately, however, rights holders note that the process of addressing infringements is cumbersome and is done on a case-by-case basis. Enforcement actions are slow, with rights holders subject to a complicated procedure in which myriad of impossible evidence requirements are imposed, which is exacerbated by the ban against investigations by foreigners. The police and prosecutors insist that this extensive evidence must be produced before any action is taken, creating a “catch 22” because the investigation is necessary to uncover the required evidence. Even where the infringement is clear, identification of the infringing website is not enough. Vietnam’s ban on investigations by foreign entities should be eased, because it creates an impossible situation in which enforcement authorities require substantial evidence, but rights holders are unable to provide the necessary level of detail due to the ban on investigations. As a result, the onus is on Vietnam’s government to collect the evidence necessary to take effective administrative or criminal action. It is not helpful that Vietnam’s domain registrar, Vietnam Internet Network Information Center (VNNIC), is not required under national law to provide contact and registration information of website owners in any WHOIS-style lookup database, making tracing the owners of infringing websites extremely difficult and hampering enforcement. The difficulty in identifying infringers also makes civil actions nearly impossible, because such actions cannot be initiated against an unknown infringer (i.e., “John Doe” actions are impossible in Vietnam), even where the domain name, IP address, and related email addresses are known.

Many offending rogue sites remain in operation and are growing in popularity. Vietnamese authorities, including the MIC Inspectorate, MCST, and MPS, are currently being asked to take more effective measures against notorious infringing sites with business models based on providing access to infringing content, employing the remedies set out in the MIC/MCST Joint Circular 07 (JC), including bringing criminal prosecutions.⁹ The Inspector of MIC should use the authority granted under the JC and Decree No. 17 to sanction violations more effectively, particularly against those websites that are under MIC licenses. IIPA also hopes for increased criminal investigations into online piracy cases by the many police units with responsibility for investigating copyright and online crimes, including the MCST Inspectorate, MPS IPR/High-Tech Police and related police units (such as the Hanoi local High Tech Crime Police (PC50), the High Tech Crime Police (National) (C50), and the Security Police (P83)); and increased prosecutions by the Supreme People’s Procuracy. Furthermore, IIPA recommends that Vietnam’s government provide the understaffed COV with adequate resources, including additional staff, to develop effective enforcement strategies and policies to tackle online piracy. In June 2016, MIC and MCST promulgated a Joint Circular to provide guidance for changing and revoking domain names that infringe intellectual property laws; but unfortunately, IIPA understands that this Joint Circular does not apply to infringement of copyright.¹⁰ This is a major loophole in the Joint Circular and IIPA urges MIC and MCST to review it and extend its application to copyright infringement.

The level of cooperation with ISPs has improved as some of these companies have started their own licensed services. The responsiveness of some licensed services, such as *zing.vn*, to takedown notices has greatly improved, but other local hosting providers, including FPT, claim that under the JC they are unable to take action against piracy websites without government intervention. Thus, while high piracy levels continue to distort the marketplace, ISPs will only take down infringing content when instructed by government authorities. This appears to have happened when Vietnam broadcasters’ asserted their rights regarding the unauthorized World Cup transmissions, as discussed above. Because, under Vietnam’s legal framework, the government is the indispensable authority for taking action against illegal online content, it is incumbent on the government to take action. One way to

⁹Joint Circular 07 (JC) imposes high standards of performance requiring “providers of intermediary services” to: 1) take affirmative steps to “[e]stablish a system to examine, supervise and process the information that is uploaded, stored and transmitted on internet and telecommunications networks in order to prevent violations of copyrights and related rights”; 2) “[u]nilaterally refuse to provide a service that runs counter to the laws on copyright and related rights”; and 3) “[r]emove and erase the digital content that violates the copyright and related rights; terminate, stop and temporarily suspend the internet and telecommunications services upon receiving a written request of the MIC Inspectorate, MCST Inspectorate, or of other Government authorities in accordance with the law.” Additional requirements are imposed upon social network operators to “send a warning of a responsibility to compensate for civil damages and a possibility of being subject to administrative sanctions and criminal prosecution to a social media user who commits an act that violates copyright and related rights.” The JC requires providers of intermediary services to be “[s]ubject to the inspection and examination conducted by state management authorities in compliance with the regulations on copyright and related rights.” Finally, liability is possible when copyright is violated or technological protection measures (TPMs) are removed, including liability for “[h]aving operations like a secondary distributor of the digital content generated from violations of the copyright and related rights.”

¹⁰See Joint Circular 14/2016/TTLT-BTTTT-BKHCN.

better share this responsibility would be for Vietnam to amend the JC to enable greater cooperation between rights holders and ISPs.

In 2018, MIC's Authority of Broadcasting and Electronic Information (ABEI) worked with a number of rights holders to help combat online piracy, resulting in sanctions against infringing websites. ABEI has also indicated a willingness to further engage with rights holders to develop procedures to combat online piracy. Such procedures may involve asking ISPs to disable access to infringing sites. More work needs to be done, however, to prove the effectiveness of these efforts.¹¹ In addition, the local audiovisual industry, with U.S. rights holders, has established a pilot program to work with online advertisers and brand owners to ensure they do not inadvertently place ads or sell products on piracy websites in Vietnam. IIPA would welcome support of this initiative from the Government of Vietnam as well as from Vietnamese industry to begin to choke the advertising revenue streams of piracy sites.

The absence of a more effective means of encouraging responsible practices—including taking enforcement actions against sites that knowingly distribute infringing music, or those with business practices based on the distribution of infringing music and, therefore, promote infringement (e.g. *Chiasenhac*)—has continued to negatively impact the local music market and has contributed to Vietnam remaining a major source of trans-border online piracy. The situation for the motion picture industry is also difficult. While most ISPs do not openly place pirated films on their VOD services, much more needs to be done to address infringement on all the services they provide. For example, ISPs do not provide for the termination of services due to copyright infringement under the terms and conditions of the user agreements with websites they host; such a provision should be included in these agreements.

With the rapid increase in the number of mobile phone subscribers in Vietnam, mobile network piracy has significantly increased in over the past several years. Rights holders now face two major challenges in the mobile space: 1) mobile device vendors loading illegal copyright content onto devices at the point of sale; and 2) the proliferation of "apps" designed to access infringing sites from mobile networks. For example, Socbay developed a mobile app called *Socbay iMedia*, which provides users with a variety of unauthorized entertainment content, including music files. Another problem is that some licensed music services have created mobile apps that do not sufficiently support geo-blocking, allowing their contents to be played in other territories that are not licensed. For example, *Thegioinhac* (owned by Mobifone) and *Xmusic Station* (owned by NCT) both lack effective geo-blocking mechanisms.

Piracy Devices and Apps: Piracy Devices are media boxes, set-top boxes, or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes around the world. China is a hub for the manufacture of these devices. The devices, gaining popularity in Vietnam, may be promoted and/or advertised to enable infringement of copyright or other illegal activities. Chief among these activities is enabling users through apps, to access remote online sources of unauthorized motion pictures or television programming. Often camcording in cinemas is the source of the pirated material. The apps may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale, as an "after sale" service, or by the users themselves, often utilizing easy to follow instructions provided by the vendor. Piracy Devices are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. Research indicates that e-commerce websites, such as *Lazada.vn*, are the most common pathway to market for the promotion and sale of Piracy Devices in Vietnam. The Vietnamese Government, including MCST and MIC, must increase enforcement efforts, including cracking down on piracy apps and on vendors who preload the

¹¹In 2017, with the support of MIC's Authority of Broadcasting and Electronic Information (ABEI), movie rights holders in Vietnam met with key ISPs, including VNPT, Viettel, FPT, and VCCorp, to discuss enhanced cooperation against online piracy. Although the meeting did not result in a Memorandum of Understanding, some ISPs agreed to improve coordination with movie rights holders to address online piracy of audiovisual content, including considering a procedure that ensures pirated content that has been taken down does not reappear. IIPA hopes that ABEI will officially endorse the procedure, encourage rights holders and ISPs to test the procedure, and take necessary steps to ensure the procedure is implemented effectively. ISPs should move forward on initial procedural steps to achieve concrete outcomes to combat online infringements. IIPA further hopes that this procedure will become available to other rights holders as well.

devices with apps that facilitate infringement. Moreover, Vietnam should take action against key distribution points for devices that are being used illegally.

Book and Journal Piracy Severely Harms Publishers: Book and journal publishers report continuing problems in Vietnam with unauthorized photocopying and illegal print piracy, mostly of English language teaching (ELT) materials. The proliferation of small, private ELT schools makes enforcement against widespread use of unauthorized reproductions of ELT materials at such institutions extremely difficult. Unfortunately, the enforcement environment in Vietnam remains challenging for publishers and little progress has been achieved to combat infringing uses of ELT materials. It remains the case that the agency tasked with administrative IPR enforcement has little experience or expertise, and there is presently no accredited authority to issue expert opinions on copyright infringement. Publishers have identified a number of online sites that provide access to infringing copies of medical, dental, and pharmaceutical text books, and referred them to the MCST for administrative action; but, unfortunately, MCST has not taken action.

Court Reform Needed: Certain industry sectors and the U.S. Government were working with the Supreme People's Court in drafting an "IP Manual for Vietnamese Judges," but that effort stalled. All copyright sectors should be involved in this effort and the manual should be completed as soon as possible, and should include procedural and evidentiary guidance as well as sentencing guidelines to create a level of deterrence in copyright cases. In addition, building IP expertise should be part of the overall judicial reform effort, and training should also be provided to police and prosecutors, as they play a very important role in bringing a criminal case to the courts.

Increase Efforts Against Camcording: A vast number of movies are stolen right off the screen by professional camcorders, who use video cameras to illicitly copy a movie during its exhibition in a movie theatre—usually very early in its theatrical release or even before the film's release (e.g., at a promotional screening). These illicit copies are then distributed to pirate "dealers" throughout the world and over the Internet. Illegal camcording destroys entire windows for distribution of audiovisual works, and damages not only the U.S. film industry, but also local cinema businesses. A camcording of a major motion picture was found on YouTube with Vietnamese subtitles. In addition, the rise of live streaming content over the Internet has contributed to the growing camcording problem. While Vietnam's Ho Chi Minh City Police initiated its first enforcement action against camcording in 2015, more needs to be done to address this insidious problem, including adopting a measure providing for criminal procedures to deter unauthorized camcording in movie theaters.

Collective Management: Due to market access barriers, as 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. Locally, its membership has fallen from 69 to 10. COV should engage with foreign music producers to enable reform of collective management to put in place a more inclusive 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. This would best be achieved by deregistering RIAV and facilitating renewal by setting up a new collecting society for producers in cooperation with both local and foreign rights holders.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (as last amended in 2009), the Criminal Code (as amended in 2017), the Joint Circular (2012), and the Administrative Violations Decree (No. 131) (as amended in 2017).¹² The Civil Code of 2015 remains as a vestigial parallel law. Vietnam is obligated to accede to the WCT and WPPT (collectively, the WIPO Digital Treaties) through the CPTPP

¹²Decree No. 131/2013/ND-CP on Sanctioning Administrative Violations of Copyright and Related Rights, entry into force December 15, 2013 (replacing Ordinances Nos. 47 and 109).

and the EU-Vietnam Free Trade Agreement, and IIPA encourages Vietnam to take the necessary actions to join and implement these treaties.

Vietnam has taken some recent strides, but it still must close the gaps between its current legal framework and its unmet international obligations, including those it committed to in the TRIPS Agreement and the BTA with the United States.¹³ Unfortunately, some recent changes noted below may have moved Vietnam further from those standards. We are hopeful that Vietnam will raise its standards for copyright protection and enforcement to, at least, meet its BTA obligations as quickly as possible.

Implementation of New Criminal Code is Critical and Should Be Consistent with International Commitments: Vietnam's newly enacted Criminal Code became effective in January 2018. The new Criminal Code criminalizes piracy "on a commercial scale," although the meaning of "on a commercial scale" is not defined. Pursuant to its obligations under the TRIPS Agreement, the BTA, and the CPTPP, Vietnam is required to criminalize copyright piracy "on a commercial scale."¹⁴ CPTPP Article 18.77 expressly defines "commercial scale" to include 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." Footnote 127 of the CPTPP states 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." Vietnam should implement its new Criminal Code consistent with these provisions.¹⁵ In 2009, Vietnam established criminal procedures for copyright infringement, but left application of those procedures to the discretion of the People's Procuratorate. Soon thereafter, Vietnam adopted monetary thresholds, but the thresholds have proven difficult, if not impossible, to apply in practice, without further guidance. The Supreme People's Court is currently working on a draft Resolution to provide guidelines for interpreting "commercial scale" and how to calculate the monetary thresholds. The Resolution, which is expected to issue in 2019, should ensure that all infringement on a commercial scale is subject to criminal liability, consistent with Vietnam's international obligations, including TRIPS, the BTA, and the CPTPP. Specifically, "commercial scale" infringement should be defined consistent with the CPTPP definitions cited above. Furthermore, consistent with Vietnam's international obligations, it is critical that the thresholds are not set too high and that they effectively criminalize the main piracy sites operating in Vietnam. The government should take into account peer-reviewed studies to ensure that the monetary thresholds can be met by applying an appropriate substitution rate (i.e., the percentage of piracy that is substituting for legal consumption).¹⁶ By employing an appropriate substitution rate analysis, any of the top 10 movie piracy sites, including those noted above (*phimmoi.net*, *bilutv.com*, *vtv16.com*, and *hdonline.vn*) are engaged in "commercial scale" piracy.

IP Code as Amended Remains Incompatible with Global Norms and with Vietnam's International Obligations: The IP Code and amendments have made a number of improvements in the overall protection of copyright in Vietnam. Yet, they leave questions regarding Vietnam's compliance with the BTA and other international obligations. Among the issues that should be resolved in the current Code are the following:

- The IP Code does not provide for a term of protection for all copyrighted works, including sound recordings, in line with the international trend to 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 4.4.¹⁷

¹³Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations, July 13, 2000 (BTA), Chapter II on Intellectual Property Rights.

¹⁴See TRIPS Article 61; BTA Article 14; and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Article 18.77.

¹⁵The new Criminal Code is intended to implement Vietnam's obligations under the CPTPP.

¹⁶Some research has estimated that the substitution rate is equal to the portion of piracy that would have been consumed legally. Research shows that substitution rates vary, but that a 30-40% substitution rate is generally reasonable. See, e.g., Herz and Kiljanski, "Movie Piracy and Displaced Sales in Europe: Evidence from Six Countries", https://mpr.ub.uni-muenchen.de/80817/1/MPRA_paper_80817.pdf (estimating an overall 37% rate of cannibalization of paid consumption from first unpaid viewings).

¹⁷Article 4.4: "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."

- The right of producers of sound recordings “to distribute to the public the original or copies of the phonograms by sale, rental or distribution or any other technical means accessible by the public” under Article 30(1)(b) of the IP Code is vague and is not in line with the right of “making available” under the WPPT.¹⁸
- Enactment of the IP Code created an apparent inadvertent gap; namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14) as to “works”) was not made applicable to related rights.
- Articles 7(2), 7(3), and 8 of the IP Code appear to give the State power to restrict the ability of rights holders to exercise lawful rights in broad circumstances, and remove copyright protection in ways similar to provisions in China’s Copyright Law that were found by a WTO panel to violate China’s WTO obligations.¹⁹
- Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights owners, undermining the rights of the latter, which is inconsistent with Vietnam’s obligations to provide certain exclusive rights to related rights holders, including producers, performers, and broadcasters, under international agreements, including the TRIPS Agreement and the Rome Convention. Article 17(4) should be repealed.
- Certain exceptions and limitations in the IP Code may be overly broad and call into question Vietnam’s compliance with its international obligations, including TRIPS Article 13 and Article 4.8 of the BTA.²⁰
- Articles 202(5) and 214(3) of the IP Code permit seized infringing goods and the means of producing them to be distributed or used for “non-commercial purposes,” rather than destroyed. These provisions fall short of Vietnam’s BTA (Article 12.4) and TRIPS Agreement obligations.
- Article 203 fails to provide an adequate presumption of copyright ownership, potentially running afoul of Vietnam’s commitments in the BTA (Article 3.2), as well as under TRIPS (Article 9(1) incorporating Articles 1-21 of the Berne Convention) and the Berne Convention (Article 5, establishing that copyright exists in the absence of formalities, and Article 15, providing for a presumption of ownership for an author whose name appears on the work in the usual manner).

Decree No. 22/2018 Could Undermine Rights of Sound Recording Producers: Decree No. 22/2018, issued in April 2018, provides guidelines for implementing certain provisions of the IP Code. Article 32(3) of this Decree is problematic because it appears to provide an exhaustive list of the types of venues where sound recordings can be used for public performance pursuant to Article 33 of the IP Code. Thus, this provision could be interpreted to mean that the public performance right applies only to this list of venues, and no others, which would unacceptably limit the scope of the public performance right. Furthermore, the list of venues includes “establishments providing . . . digital environment services.” While this appears to refer to venues providing Internet services, such as an Internet cafe, it could be misinterpreted to refer to the use of phonograms online. As such, the provision is not sufficiently clear and, if misinterpreted, would raise uncertainty regarding the exclusive rights of phonogram producers for the digital uses of their sound recordings. Such a misinterpretation would also cause further problems, given that Article 33 of the IP Code appears to be limited to a remuneration right in contrast to Article 30(1)(b) of the IP Code, which provides producers with the exclusive right to “distribution to public by technical means accessible to the public.” The Government of Vietnam should amend Article 32(3) of the Decree to clarify it and ensure that it is interpreted consistent with Vietnam’s international obligations.²¹

¹⁸Article 30(1)(b) should be clarified to ensure it provides a making available right, as well as a distribution right, and that it covers any form of transmissions of sound recordings, including interactive and non-interactive digital transmissions.

¹⁹Article 7(2) potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances. Article 7(3) permits the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights. Article 8 establishes impermissible content-based restrictions of protection under copyright.

²⁰The following provisions remain problematic: Article 25(1)(g) on “[d]irectly recording and reporting performances for public information and educational purposes”; Article 25(1)(f) on “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns”; and Article 25(1)(j) allowing importation of copies of others’ works for personal use. Article 25 further codifies a broad broadcasters’ compulsory license as to all works except cinematographic works, the breadth of which cannot be remedied by the simple addition of three-step test language. As drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license for use of audiovisual recordings for commercial “broadcasting” violates international standards at least as to the works involved and cannot be remedied by the addition of three-step test language. Articles 7(2), 7(3), and 8, referenced above, are overbroad exceptions that run afoul of the three-step test.

²¹Vietnam’s obligations under the CPTPP include providing producers of sound recordings with exclusive rights for communication to the public and making available of their sound recordings. See CPTPP Article 18.62(3).

ISP Liability Should be Amended to Meet Modern Challenges: Joint Circular 07 (JC) merely requires intermediaries to take down infringing content and terminate services under certain circumstances, but this authority has been used in practice only in very narrow circumstances where online services and websites are directly infringing, and no secondary liability provision exists in the JC or elsewhere in Vietnam's legal framework. The concept of "intermediaries" in the JC is broad and should be applied broadly to improve enforcement. But the Circular itself does not establish liability rules. The law should make it clear that any ISP that engages in any act restricted by copyright cannot avoid liability for copyright infringement. The JC also does not include any requirement for neutral intermediaries to take down infringing content in response to a notice received directly from a rights holder.²² What is needed are clear legal incentives, including clear liability provisions, to ensure online platforms do not engage in infringing activities, especially regarding the making available right, and to ensure neutral intermediary service providers will cooperate with rights holders to deter unauthorized storage and transmission of copyrighted materials. For example, the "right" for ISPs to take measures "for prevention [of] infringing acts of copyright [and] related rights" under Article 4 should be included as part of the "obligations" under Article 5. And the requirements in Article 5 for ISPs to remove and erase digital content that violates copyright and suspend services should be clarified to ensure ISPs are held liable at least for infringements that ISPs control, initiate, or direct, and for infringements that ISPs fail to expeditiously remove or disable access to upon obtaining knowledge or awareness, such as (but not limited to) receiving notification from a rights holder. Furthermore, the obligation of intermediaries in Article 5 of "cutting, stopping, and suspension of the Internet line" should be clarified to expressly include the disabling of access to locations inside or outside of Vietnam that host copyright infringing content.

Administrative Enforcement Decree Must Be Implemented in Practice: As reported previously, the Administrative Violations Decree (No. 131) reduced the maximum administrative fine for an individual to VND250 million (~US\$11,000), and set the maximum fine in the amount of VND500 million (~US\$21,600) for an organization. The following fines are also set forth: 1) VND3 to 5 million (~US\$130 to \$220) for transporting goods produced without permission of rights holders and VND5 to 10 million (~US\$220 to \$430) for stockpiling goods produced without permission of the rights holder; 2) VND200 to 250 million (~US\$8,600 to \$10,800) for importing an original or unauthorized copy of a work; 3) VND70 to 100 million (~US\$3,100 to \$4,320) for the act of unauthorized broadcasting or re-broadcasting; 4) VND15 to 35 million (~US\$650 to \$1,510) for reproduction of unauthorized copies of phonograms or video recordings; and 5) VND10 to 30 million (~US\$430 to \$1,300) for distribution of originals or copies of phonograms or video recordings without permission of the rights holder. In addition to these fines, infringers may face remedial measures, such as confiscation of infringing goods and any false registration certificates, as well as the forced suspension of business, consultancy, or service activities. Notwithstanding the reduction in the general maximum, the government should raise and employ these maximum fines to full and deterrent effect forthwith. Moreover, Vietnam's enforcement authorities, such as MIC, should take action to ensure administrative orders are enforced, including shutting down or disabling access to the infringing sites that do not comply.

Decree No. 85 Questions Remain: Decree No. 85 (2011) amended certain provisions of the Civil Code.²³ While Decree No. 85 contains some helpful clarifications, it also contains provisions that are problematic in terms of Vietnam's compliance with international norms and best practices. Most notably, Decree No. 85 makes certain changes to Article 41 of Implementing Decree No. 100 governing collective management that, if applied to foreign rights holders, would be onerous.²⁴ It should also be clarified that the "Principles and methods of payment of royalty,

²²The requirements of Article 5 of JC appear to apply only where the government has intervened.

²³Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

²⁴For example, Article 41(4) of Decree No. 100 as amended now requires the following particulars to be reported by the collective management organization to MCST, as well as the Ministry of Home Affairs and the Ministry of Finance:

"amendments or supplementations to the operation charters or regulations; changes in the leadership; participation in international organizations; other external activities; rates and modes of payment of royalty, remuneration and material benefits; long-term and annual programs and plans; operations, conclusion of authorization contracts and use licensing contracts; collection, levels, modes and methods of dividing royalty, remuneration and material benefits; and other related activities."

Such onerous provisions should be stricken from the law in order to allow right holders to freely exercise their rights in Vietnam. In the absence of immediate changes, it should be clarified that these provisions do not apply to administration of foreign rights.

remuneration, and material benefits," added to a new Article 45a of Implementing Decree No. 100, are merely guidance and not compulsory.

Decree No. 72 Ignores Piracy: Decree No. 72/2013/NĐ-CP on the Management, Provision, and Use of Internet Services and Online Information as amended and supplemented by Decree No. 27/2018/ND-CP unfortunately fails to clearly include copyright infringement on the list of prohibited acts that trigger sanctions and remedies. Vietnam should amend this Decree to ensure piracy is expressly included among the Decree No. 72's prohibited acts and, thus, eligible for a remedial action, including the remedy of disabling access to infringing websites.

Certain Enforcement Provisions Inconsistent with the BTA: A number of Vietnam's civil, administrative, and border enforcement provisions remain inconsistent with obligations in the BTA. For example, the availability of pre-established damages is limited and the amount is inadequate. BTA Articles 12.2.D and 12.3, require the availability of pre-established damages "adequate to compensate for the injury the right holder has suffered..." As noted above, Vietnam's remedies for civil and administrative enforcement allow for distribution or use for non-commercial purposes of infringing goods and the materials and means for producing them, falling short of Vietnam's obligations in BTA Article 12.4 and TRIPS Article 46. Similarly, Vietnam's remedies for infringement at the border also allows for distribution or use for non-commercial purpose of infringing goods, which does not meet its obligations in the BTA (Article 15.12) or TRIPS (Article 59).

Decree Regulating OTT Services: In 2018, ABEI drafted a Decree to amend Decree 06 (18 January 2016) regulating radio and television services in order to improve the regulation of "over-the-top" (OTT) services. The draft was posted online for comments and is expected to be passed in early 2019. Unfortunately, the draft provides stricter regulation over OTT services, without providing measures to improve copyright protection. Instead, the Decree should include measures to improve copyright protection, but should otherwise adopt a light-touch self-regulatory approach to encourage development of the sector, particularly regarding licensing, mandatory use of editing and translation services, classification, advertising, and local content quotas.

MARKET ACCESS BARRIERS IN VIETNAM

Vietnam continues to generally restrict foreign companies from setting up subsidiaries to produce or distribute "cultural products." Restrictions on foreign investment quotas, and other entry barriers regarding production, importation, and distribution of copyrighted materials (whether in the physical, online, or mobile marketplaces) persist. The Vietnamese have indicated that they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products.²⁵ Unfortunately, their restrictions on foreign investment in cultural production undermine this objective, impoverishing the content marketplace and discouraging investment in the creation of new Vietnamese cultural materials.

The restrictions also fuel demand for pirated product. Vietnam's virulent piracy problems would be reduced if the country removed its highly restrictive market access barriers. By limiting access to legitimate content, these barriers push Vietnamese consumers towards illegal alternatives. The restrictions instigate a vicious circle in which less legitimate product is produced or available. To facilitate commercial development of Vietnam's cultural sector and the development of a potentially very significant digital content market, Vietnam should look to internationally accepted standards and practices, which recognize that constraining market access for legitimate creative content complicates efforts to effectively combat piracy. IIPA urges Vietnam to quickly discard the longstanding market access barriers identified below and open its market in the creative and cultural sectors.

²⁵See Asia-Europe Meeting (ASEM) Seminar on Cultural Diversity in Hanoi on Dec. 15, 2008, discussed in *Vietnam Prioritises Preservation of Cultural Diversity*, Nhan Dan, March 26, 2009, available at http://www.nhandan.com.vn/english/culture/171208/culture_v.htm.

Barriers Specific to the Audiovisual Sector

Laws Leave Potential Quotas In Place: The amended Cinematography Law created the potential for a film quota, with numerical benchmarks set at 20% for Vietnamese feature films shown in theaters. On November 11, 2013, the Prime Ministerial Decision of Approval of “Development Strategy for Movie Industry to 2020 and Vision to 2030” set an even more restrictive aspiration of 45% Vietnamese films (including 40% Vietnamese major films) by 2030. Although the Cinematography Law’s stated quota and the Decision appear to be hortatory in nature because Vietnam is producing more local films, which now command over 20% market share, the Vietnamese Government should nevertheless remove the quota. IIPA also notes a hortatory preference to show “valuable” foreign films, which may disproportionately impact the independent film sector in its ability to access the Vietnamese market. Rather than instituting unworkable quotas or developing preferences for films based on arbitrary or subjective criteria, the Vietnamese Government should take steps to provide more openness and flexibility in the marketplace, thereby fostering greater development and more avenues for distribution of motion picture content, whether foreign or domestic, in Vietnam. Certain articles of the Cinematography Law also endanger the television broadcast market. For example, Article 35(2) provides that broadcast of films shall ensure “the proportion of Vietnamese films broadcast as compared with foreign films, the hours for broadcasting Vietnamese films, and the duration of and hours for broadcasting films for children in accordance with regulations of the government.” Unfortunately, Article 2.4 of Decree No. 96 implementing certain provisions of the Cinematography Law requires that Vietnamese films must be at least 40% of those broadcast on TV.²⁶ Moreover, foreign content is limited to 50% of television broadcast time, and foreign programming is not allowed in prime time. These quotas should be lifted or eased significantly, because they limit exports of audiovisual content to the detriment of U.S. producers.

Regulatory Intervention in the Pay-TV Sector: In March 2016, Vietnam enacted pay-TV regulations (Decree No. 06/2016/ND-CP) requiring the number of foreign channels on pay-TV services be capped at 30% of the total number of channels the service carries. These regulations also require foreign channel operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Most foreign programming is required to be edited and translated by an approved licensed press agent. The regulations also provide that all commercial advertisements airing on such channels in Vietnam must be produced or otherwise “conducted” in Vietnam. Further, these regulations essentially expand censorship requirements to all channels instead of “sensitive” channels as previously provided. This mandate also appears to impose new “editing” fees on international channels. These measures would unduly restrict and severely impede the growth and development of Vietnam’s pay-TV industry. Moreover, the MIC’s draft amendments to Decree No. 06, if implemented, would place additional restrictions on OTT services, which would impede the development of that sector.

Foreign Investment Restrictions: Foreign investors may only invest in cinema construction and operation through joint ventures with local Vietnamese partners, which are subject to government approval and a 51% ownership ceiling. Such restrictions are an unnecessary market access barrier for U.S. film producers and should be eliminated.

Law on Cybersecurity: In June 2018, the National Assembly passed a new cybersecurity law, which took effect in January 2019. Unfortunately, this law did not include any provisions to improve copyright enforcement, which would have assisted in the law’s goal of improving the health and security of Vietnam’s online environment. Implementation of this law should be monitored, however, because it is critical that this law does not impose unreasonable compliance obligations on OTT services, particularly regarding data localization requirements. Overly strict data localization requirements could negatively impact U.S. exports of audiovisual content.

²⁶Decree No. 96/2007/ND-CP dated June 6, 2007 Detailing and Guiding the Implementation of a Number of Articles of the Cinematography Law, Article 2.4.

Barriers Specific to the Video Game Industry

Decree No. 72 Restricts Video Game Right Holders: Decree No. 72 on the management of Internet services and online information creates some room for foreign video game companies to operate in Vietnam, but still may undermine the ability of video game companies to provide various digital or online services in Vietnam. The Decree lifts the 2010 ban on issuance of new licenses for online games and the ban on advertising of online games. However, there remains a strong risk of discriminatory treatment against foreign companies in the provision of online games in Vietnam. Article 31(4) provides, “[f]oreign organizations and individuals that provide online game services for Vietnamese users must establish enterprises in accordance with Vietnam’s law in accordance with this Decree and the laws on foreign investment.”

The Decree establishes four categories of games. In category G1 (multiplayer games in an interactive online environment) the enterprise must obtain a license and approval of the contents of the game from MIC. Other restrictions are imposed, including: restrictions that involve censorship of the content of video games in order for them to be approved; outright prohibition of content within video games (see, e.g., Article 32(3)(b) on content restrictions for multiplayer online games in category G1); restrictions on data collection; restrictions related to the age of users; and license duration limits. The implementation of this Decree must not create structures that unduly impede the ability of foreign right holders to avail themselves of the Vietnamese market or that discriminate against them. We also urge Vietnam to work towards commitments agreed to in previous trade negotiations to eliminate limitations on foreign investment for the provision of online games and related services in Vietnam.

In 2018, Vietnam issued Decree No. 27/2018/ND-CP amending Decree No. 72, but the concerns outlined above appear to remain unchanged.

Barriers Specific to the Music Sector

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 the industries to conduct investigations in Vietnam, hinder anti-piracy efforts. These restrictions effectively mean the Vietnamese Government must enforce intellectual property rights related to U.S. content largely on its own, a task at which it has not succeeded thus far. In order to enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam,²⁷ and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

As outlined above, Vietnam’s copyright protection and enforcement frameworks are inconsistent with its international obligations in many respects. These include the following:

- all infringement on a commercial scale is not subject to criminal liability as required by TRIPS Article 61 and BTA Article 14;
- a number of copyright exceptions are overbroad and inconsistent with the three-step test of TRIPS Article 13 and BTA Article 4.9;

²⁷The importation of cultural products like music is governed by *Decree No. 103/2009/ND-CP on Promulgating the Regulation on Cultural Activities and Commercial Provision of Public Cultural Services and the Regulation on Cultural Activities and Commercial Provision of Public Cultural* (promulgated together with the Government’s Decree No. 10.V200/ND-CP of November 6, 2009). *Decree No. 103* provides that circulation permits for tapes and discs produced or imported by central organizations are granted by MCST, while circulation permits for tapes and discs produced or imported by local organizations and individuals are granted by provincial-level MCST Departments. The Decree provides for application procedures. However, limitations on foreign companies’ setting up subsidiaries to produce or distribute “cultural products” in Vietnam also thereby limit foreign companies’ abilities to apply for circulation permits. The application must be done by a local company. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.

- remedies for civil, administrative, and border enforcement permit “non-commercial” distribution of infringing goods and the materials and means for producing them, which is inconsistent with the obligations of TRIPS Articles 46 and 59 and BTA Articles 12.4 and 15.12;
- inadequate enforcement framework including no criminal infringement cases proceeding to the courts, complicated and non-transparent civil procedures, and inadequate training of enforcement officials which is inconsistent with Vietnam’s obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61, and under BTA Articles 11, 12, and 14;
- limited and inadequate pre-established damages do not meet the requirements of BTA Articles 12.2D and 12.3;
- term of copyright protection falls short of the requirements of BTA Article 4.4; and
- presumptions of ownership are inadequate and do not meet the requirements of BTA Article 3.2.

WATCH LIST

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2019.¹

Executive Summary: A legitimate Internet marketplace for copyright materials in Brazil continues to develop, but sustainability and growth of the market are hampered by the lack of enforcement action against the continuing rampant piracy, idiosyncratic rulings in copyright cases, and a wide range of market access barriers for the creative industries. With a new administration comes the opportunity for the government to take renewed measures to foster a legitimate Internet marketplace for copyright materials, which would fuel reinvestment in Brazilian content, as well as foreign content production, and to take action against the extensive digital piracy operations targeting the Brazilian market. Most importantly, with the change of administration, there is a hope that Brazil will embrace a pro-copyright outlook and connect to the network of 98 countries that have already ratified the WIPO Internet Treaties. The lack of ratification of the WIPO Internet Treaties hinders the development of a healthy online marketplace for creative works and makes the legal environment in Brazil less legally predictable for rights holders and their business partners. While there were no criminal enforcement actions against pirate websites in 2017 or 2018² and prosecution of individuals behind the piracy websites has stalled, in January 2019 the Brazilian federal authorities launched “Operation Copyright” and executed raids against the administrators for *Speedshare* and the private server service *speedboxBR*, which resulted in both services being taken offline along with at least twelve other illegal file-sharing sites. Prior to this development, the online piracy ecosystem—including the growing phenomenon of music “stream-ripping” services, Piracy Devices (PDs), and other online pirate websites and services—remained undisturbed by Brazilian law enforcement. The main obstacles to continuing such efforts and ensuring effective anti-piracy response include inadequate resources, insufficient training, jurisdictional frictions among federal and state authorities, and the lack of a national implementation strategy. Moreover, under the previous administration, there was an attitude of permissiveness towards copyright-infringing services online and a level of skepticism regarding the merits of copyright enforcement. Yet, in order to sustain investment in creative content and artists, it is essential that the private property rights of copyright holders be respected and effectively enforced. This would also contribute to the further development of the legitimate online marketplace and thus, state revenues.

Brazil is demonstrating a new political will to combat piracy, as the cinema regulator (ANCINE) created an anti-piracy chamber and the Ministry of Justice's National Council to Combat Piracy and Intellectual Property Crimes (CNCP) has been reinvigorated. ANCINE's anti-piracy chamber is expected to implement a national strategic plan. Reportedly, both ANCINE and CNCP are also pushing for criminal enforcement against well-established pirate operators and encouraging voluntary cooperation among all online players to work toward a cleaner and more legitimate marketplace. Moreover, Brazil should support the development and implementation of disruptive online anti-piracy actions by law enforcement agencies on the state and federal level, including the exchange of expertise on initiatives in place in other countries.

With respect to the legislative agenda, it is yet to be seen which, if any, of the legislative proposals from the last congress will be taken up by the new administration. While many troubling copyright bills have been on the legislative docket for years, there are also several promising bills, including some site-blocking bills, which can have significant positive impact on copyright enforcement. Lastly, the exorbitant taxes and escalating duties on imported

¹For more details on Brazil's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Brazil's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.

²The last notable online enforcement action was in 2016, against three of Brazil's notorious online marketplaces.



video games and consoles continue to stunt the development of a legitimate market for video games in Brazil, but ANCINE's recommendations to ease these tax burdens is a welcomed step forward.

PRIORITY ACTIONS REQUESTED IN 2019

Enforcement

- Put in place a clear structure, with a high degree of political backing, for the development of copyright policies and copyright enforcement coordination across the country.
- Build on the success of Operation Copyright and ensure that law enforcement agents are properly trained in conducting complex online investigations and have access to the necessary legal tools and framework to launch additional criminal prosecutions against those engaged in major online piracy activities or knowingly providing the means for doing so.
- Ensure that CNCP is relaunched with broad rights holders' membership and has the resources and political backing to engage in cross-industry efforts on Internet piracy and develop a national strategic plan.
- Implement a long-term national program to train judges and prosecutors on IPR law, the WIPO Internet Treaties, and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact. It is notable that some Brazilian copyright cases depart significantly from the global norms relating to the interpretation of certain rights enshrined in the WIPO Internet Treaties, such as, for example, the right of making available. More awareness raising and training, and obviously, ratification of the treaties, are needed to improve the level of copyright protection and legal certainty in the Brazilian market.
- Encourage law enforcement agencies to discuss and clarify jurisdictional issues regarding digital and online piracy for law enforcement, including through public policy decrees from the Ministry of Justice, and if necessary, legislation, to improve inter-agency coordination needed to effectively address online copyright theft.
- Implement better border controls against the import of PDs, such as the HTV box, and video game counterfeit hardware.

Legislation and Regulation

- Accede to, ratify, and implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Enact legislation: (i) implementing the WIPO Internet Treaties, in particular, ensuring that the making available right is applied in Brazil in the WPPT-compatible way and that TPMs are available; (ii) authorizing court orders requiring Internet service providers (ISPs) to block access to offshore websites dedicated to copyright infringement; (iii) providing criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit, and criminalizing signal theft in the home entertainment sector; (iv) covering intermediary liability and advertisements placed on pirate sites; and (v) implementing the cybercrime special courts and special prosecution units.
- Ensure that implementation of the Marco Civil Internet law and related decrees and legislation do not interfere with voluntary notice and takedown efforts or other constructive and cooperative agreements to combat online piracy.
- Adopt and enforce new laws that explicitly protect against the circumvention of technical protection measures and trafficking in circumvention devices; hold Internet Service Providers (ISPs) responsible for facilitating infringement under certain circumstances, including a requirement that ISPs expeditiously take down infringing content when notified by a rights holder representative.

Market Access

- Reduce high tariffs and taxes placed on video game products, as well as on general on-demand content, in order to enable industry growth.

- Mitigate imposition of the “VOD tax” on movies and TV programming delivered on demand; restrain ANCINE efforts to regulate intrusively the digital cinema sector; and eliminate audiovisual quotas that discriminate against non-Brazilian content.

COPYRIGHT PIRACY IN BRAZIL

Internet Piracy: Internet access continues to grow in Brazil and demand for online content has intensified. While consumption largely involves access to legitimate, licensed sources of copyright materials, Internet piracy continues in parallel, which takes away from the growing legitimate market and hampers investment in production and legitimate distribution infrastructure. At least 40 free or low-cost online platforms offer legal viewing options to Brazilian television and film audiences, with Amazon Prime the most recent entry in the market. Most pay-TV operators also provide TV everywhere services, allowing subscribers to access authenticated content across multiple platforms. Recent reports estimate that by 2020 the local online content consumption will reach US\$451 million. Online access in Brazil to legitimate video game play is available through Xbox Live, Nintendo eShop, and PlayStation Network. According to music industry research, more than two-thirds of urban Brazilian Internet users consume music via smartphone, one of the highest proportions in major world markets. A dozen legal online music services compete to deliver recorded music to Brazilian listeners at compelling price points.³ Despite this abundance of legal offerings, the development of a robust legitimate online marketplace in delivering copyright materials to Brazil’s growing population of Internet users continues to be stunted by the prevalence of online piracy. For example, the music industry has not yet achieved the market turnover results that it had in Brazil in the mid-1990s, in the pre-digital era, when Brazil was the world’s sixth largest music market. Since that point, monetization of music in Brazil (music revenue per capita) has fallen from \$8.5 in 1997 to \$1.12 in 2017—a price depression largely attributable to the stifling effect of online piracy on the legitimate online music market. Even as some high-profile piracy sites have been taken down in well-publicized operations in recent years, as discussed below, many popular and well-monetized sites persist, and new infringing sites have proliferated. This reinforces the necessity for having a long-term plan to tackle illegal sites and operators on a frequent basis. Government and private sector studies described in previous IIPA Special 301 submissions documented the huge volume of Brazilian IP addresses engaged in unauthorized downloads using the BitTorrent Peer-to-Peer (P2P) protocol,⁴ and the shockingly high proportion of Brazilian Internet users who relied on illegal sources for their online music or audiovisual consumption.⁵

Internet piracy in Brazil is characterized by three main types of distribution channels: (i) websites targeted to the Brazilian market that link to infringing distribution hubs (including “cyberlocker” services and linking sites); (ii) file sharing via illicit peer-to-peer (P2P) networks and indexing sites for torrent files; and (iii) circumvention of technological protection measures, such as stream-ripping websites. While cyberlockers and linking websites are nearly all hosted and have their domain names registered outside Brazil, they clearly target the Brazilian market. Many appear to have local operators, and rely on local intermediaries (such as advertising providers and payment processors) for monetization channels. The top 105 most active local infringing sites dedicated to music accounted for over 118 million visits in 2018. A study published in January 2016 found that almost 45 million Brazilians (nearly 41% of all those online) used the cyberlocker link site ecosystem to consume infringing audiovisual material.⁶ Access to local or foreign linking and download websites also remains popular among Brazilian video game consumers. There has also been an increase in the number of websites, and an increase in visitors to such websites, that are structured as private forums for infringing links, as they are considered more “stable and safe” for sharing links. Many Brazilian sites also employ

³<http://www.pro-music.org/legal-music-services-latin-america.php>.

⁴See the TruOptik study summarized in IIPA’s 2016 Special 301 submission, at p. 67, available at <https://iipa.org/files/uploads/2017/12/2016SPEC301BRAZIL.pdf> (“IIPA 2016”) at p. 67, documenting higher levels of “unmonetized demand” in Brazil than in almost any other market, regardless of population or level of Internet penetration.

⁵See Comunicado do Ipea - 2012 - Maio - nº 147, *Download de músicas e filmes no Brasil: Um perfil dos piratas online*, available at http://www.ipea.gov.br/portal/images/stories/PDFs/comunicado/120510_comunicadoipea0147.pdf (unofficial translation on file with IIPA), summarized in IIPA’s 2013 Special 301 submission, at p. 106, available at <https://iipa.org/files/uploads/2017/12/2013SPEC301BRAZIL.pdf> (“IIPA 2013”).

⁶NetNames Ltd., *South American Television Piracy Landscape for Alianza Contra La Pirateria de Television Paga*, at 32, available at <http://www.alianza.tv/files/NetnamesAlianzaReport012016.pdf>.

unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent right holders from detecting links to infringing files through automated monitoring.

The second main channel for Internet piracy in Brazil is file sharing via illicit P2P networks, especially BitTorrent, which continue to thrive and pose a serious threat for the entertainment software industry, as well as other sectors. The U.S. video game industry reports that in 2018, for the eighth straight year, Brazil ranked second in the world in the number of connections by peers participating in unauthorized file-sharing of video games on public P2P networks (99% of it using the BitTorrent protocol). The video game industry also reports that Brazil is among the top five countries for detected P2P swarms by volume. Notably, Brazil once again topped the world’s list for volume of unauthorized file sharing using consoles; it again ranked second for PCs and third for mobile devices (up from sixth in 2017).

A third major channel for online piracy, “stream-ripping” websites, is of particular concern to the music industry. Such websites circumvent technological protection measures and enable the illegal permanent downloading of content hosted on popular and legal music streaming services such as YouTube, thus undermining the revenue models and premium tiers of licensed streaming services and of legitimate pay-for-download sites such as iTunes and Google Play. This form of digital piracy, generally monetized through advertising, is growing substantially in the Brazilian market. Brazilian internet users also often turn to stream-ripping sites that have a localized version, but are hosted outside the country. While the closure of *YouTube-mp3* was a positive improvement, new stream ripping sites surfaced with notable audiences: *Flvto.biz* and *2Conv*.

Taken together, these forms of online piracy are a significant obstacle to efforts to develop legitimate online distribution channels for copyright works in Brazil.

Circumvention Devices: An increasing number of Brazilian sites offer so-called video game copiers and other circumvention devices, aimed at nullifying access control technologies used by copyright owners. These devices enable the play of pirate video games on modified consoles (the great majority of game consoles in the country have been so modified). Online marketplaces like *Mercado Livre* are also used to obtain infringing game controllers and circumvention devices. These websites rely on non-responsive host sites and torrent link index sites to distribute illegal copies of video games.

Piracy Devices (PDs): Use of PDs continues to rise in Brazil, exemplified by the increased market penetration of an IPTV box called HTV. HTV offers a grid of 170+ live pay-TV channels and also a VOD service that offers TV shows and motion pictures, many sourced through illegal camcording activity. These PDs are available at retail in Brazilian marketplaces, but are increasingly being delivered to individual customers by mail, thus evading enforcement and seizure efforts at ports and in retail markets. A significant amount of PDs are sold on the Internet, mainly in online marketplaces such as *Mercado Livre*.

Hard Goods Piracy: Even though Internet piracy is growing faster than physical piracy in Brazil, online products demand high bandwidth, so strong demand persists for pirate physical copies (or for unlicensed downloads, such as stream-ripped files). For the audiovisual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly, but remains significant. The HTV box and other PDs have also entered the hard goods piracy market. In the case of video games, hard goods piracy takes several forms in both online and street markets: (i) Pre-loaded devices, discs, and memory cards that are locally burned and assembled with illegal copies of videogames; (ii) circumvention devices with preloaded games and game copiers and mod chips that circumvent access controls and enable the play of infringing copies of games; and (iii) modified consoles. While some of this infringing product enters the Brazilian market through the nation’s relatively porous borders and ports, it is becoming more common for content

from torrent sites to be burned onto imported blank media in small, decentralized burner facilities, often located in private homes.⁷

Camcord Piracy: Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. In Brazil, the problem also takes the form of in-theater audio captures, after which the dubbed Portuguese soundtrack is combined with high-quality video illegally sourced elsewhere. The resulting copies are made available online to Portuguese speakers worldwide, as well as burned onto DVD-Rs and distributed to Brazil's many black markets. In 2018, a total of 32 camcords, six video camcords and 26 audio camcords, of MPAA-member films were traced to Brazilian theaters, up from 16 during the previous year. Brazil must strengthen its enforcement regime to combat this growing problem. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy of independent films, negatively impacting investment in production and legitimate local distribution infrastructure, and hampering the establishment of legitimate online distribution platforms. These camcorded copies continue to feed illegal online sites and businesses, including the sale of streaming boxes with "subscriptions" and apps that provide access to illegal content.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview: Online Piracy

Even after the positive outcome of "Operation Blackbeard,"⁸ Brazil's enforcement effort against online copyright crime remains far short of what is needed to combat this serious problem. In 2017 and 2018, there were no criminal enforcement actions against pirate websites. One positive development that occurred in early 2019 is that the Brazilian federal authorities launched "Operation Copyright" and executed raids against the administrators for *Speedshare* and the private server service *speedboxBR*. The sites were notorious in Brazil for the illegal online distribution of content, including video games. Both services are now offline and the federal authorities are in the process of seizing the domains. Because of the successful raids, at least twelve other illegal file-sharing sites were taken offline by the administrators. IIPA acknowledges that such *ex officio* raids occur in Brazil, but the raids are insufficient to tackle the gravity of the problem. Prosecutors and judges should redouble their efforts to crack down on widespread online piracy. Training, dedication of resources, and infusion of political will among police, prosecutors and judges, along with an overall national strategy for combating this form of cybercrime is needed. The recently created Ministry of Citizenship (to which the former Ministry of Culture is attached as a Special Secretariat) and the relaunched CNCP should play a central role in developing training activities with participation of experts in the private sector. Fortunately, the relationship with federal and state law enforcement continues to improve due to more frequent trainings and meetings with law enforcement agencies, hopefully raising their awareness of online infringement and cooperation for future cases and public policy coordination, as both jurisdictions are relevant for the implementation of any successful nationwide strategy.⁹

Most of the handful of successful prosecutions in recent years have taken place in federal courts, where police and prosecutors are more likely to have the training and resources to handle these cases effectively. Federal cases also proceed more quickly. However, coordinating anti-piracy efforts of state law enforcement institutions would be a force multiplier, especially if more state police and prosecutors received training against cybercrime. The decision of Brazil's Supreme Court in the long-running *Woloski* case, which could come this year, could provide guidance on these jurisdictional issues. Even though that case arose from importation of DVD-Rs containing infringing material, the issue it presents—whether Brazil's international obligations under the WTO TRIPS Agreement are sufficient to establish a federal jurisdictional nexus for infringement cases—has relevance to any copyright cases with an international

⁷See IIPA's 2018 Brazil country report for more details on the hard goods piracy in Brazil, <https://iipa.org/files/uploads/2018/02/2018SPEC301BRAZIL.pdf>.

⁸In 2015 and 2016, federal police executed Operation Blackbeard, shutting down three major pirate sites in 2016. While this was a very promising development for enforcement, IIPA is not aware of any new prosecutions of pirate sites in 2018. Moreover, IIPA is informed that the resulting prosecutions are proceeding slowly, and no trial dates have been set.

⁹The Belo Horizonte conference in March 2017, a closed law enforcement conference co-sponsored by the U.S. Embassy, provided an opportunity for stakeholders and U.S. Department of Justice's Intellectual Property Law Enforcement Coordinator for Latin America to use Operation Blackbeard as a case study to educate federal and state prosecutors and senior law enforcement authorities about investigation and enforcement of online piracy.

component, including those arising from Internet piracy. A favorable outcome in *Woloski* could enable a more efficient federal effort, with assistance on the state level, in tackling online piracy through criminal prosecutions.

Civil enforcement should also be part of the solution, including on the state and even city level. In particular, the power of preliminary injunctive relief has great potential, if orders can be obtained quickly. In several cases, these orders have been used to take down large volumes of infringing content, to require ISPs to block access to a group of pirate music websites, or to seize domain names from pirates. There are promising signs that U.S.-based hosting providers will honor injunctions issued by Brazilian courts. Unfortunately, backlogs and delays in the civil justice system diminish the value of this preliminary relief, and the timeframe for actions and replies from local hosting ISPs is not ideal. The logical forum for implementing a coordinated national effort against online piracy could be the long-standing CNCP, if relaunched with participation of both government and private sector players, especially the copyright industries. While in recent years, CNCP has been relatively inactive, and some copyright industries were even excluded from its membership, in 2017 CNCP obtained a new permanent staff and has gained some momentum. It is now essential that CNCP develop a new strategic plan, and that the new plan give top priority to combatting widespread online enterprises dedicated to copyright infringement.¹⁰ CNCP could largely benefit from more investment in resources, and this is something that the new administration should seriously consider. CNCP has the opportunity to be the voice of the country regarding IPR issues, and should be more active in engaging all right holders and other players in the Internet ecosystem, including ISPs, hosting providers, domain name registrars, search engines, advertising networks, payment providers, and the like, to reach better standards to fight online piracy, as well as to engage in round tables for future MOUs on critical areas for this market.¹¹

Active government involvement could send a strong message that would help to bring industry players together to find effective means to deal with the most serious forms of online piracy and to prevent its further growth. The federal government and some state level administrations have indicated their support of volunteer cooperation among stakeholders and for new public policies regarding IP protection, representing an important shift in this area. The film industry was pleased to see National Cinema Council Resolution 3/2017, creating a working group on anti-piracy that will deliver recommendations for ANCINE. ANCINE recently created a special chamber called the Technical Chamber to Fight Piracy. This forum serves as a stable channel of communication between ANCINE and the private sector. It is composed of public and private stakeholders, with the goal to develop and implement anti-piracy initiatives within the local audiovisual industry.

Enforcement Against Hard Goods Piracy: Many Challenges Remain

The copyright industries in general enjoy good (in some cases, excellent) working relationships with Brazilian enforcement agencies. The National Forum against Piracy and Illegality (FNCP) has assisted authorities in raids and improved enforcement training efforts and results. The Entertainment Software Association (ESA) has also provided training sessions to Customs agents to better identify and investigate the importation of illegal devices and pre-loaded game consoles and to state and federal prosecutors on online open source IP investigations.

According to the Brazilian Customs authority, there was a 10% increase in raids and an 18% increase in seizures of counterfeit goods and infringing products in 2017. Additionally, there was a 200% increase in the value of “cracked” video game consoles seizures, from BRL4.1 million (US\$1.3 million) to BRL12.3 million (US\$3.8 million). However, video game companies reported there were no seizures by Customs of products infringing their video game products in 2018. In 2019, Customs should increase border enforcement against PDs, circumvention devices, and other technology that primarily facilitates infringement.

¹⁰For example, it is past time for the CNCP’s “Cities Free From Piracy” initiative to make the transition to the cyber environment, and to ensure that the local law enforcement agencies and courts, which CNCP has long helped to train in enforcement methods against physical piracy, become fully versed in the techniques and priorities for combating online infringement.

¹¹There are a few informal agreements between certain U.S. companies and local ISPs to remove infringing content, but many players lack the procedures and interfaces to enable processing of high volumes of infringement notices.

While there has been some cooperation, little has been done to tackle the larger, systemic problems that render Brazil's criminal justice system inadequate in deterring the hard goods piracy. The main deficiencies—including inefficient and prolonged investigations; bottlenecks on appointments of “experts”; inadequately trained police, prosecutors and judges; lack of coordinated efforts amongst enforcement authorities; and grossly insufficient sentencing practices—have been described in detail in past IIPA reports.¹² Ultimately, too much of Brazil's judicial system lacks adequate understanding of intellectual property matters, though there are some exceptions (the specialized commercial courts in Rio de Janeiro). Brazil needs to modernize its police and courts to propagate best practices and to train judges and prosecutors.¹³

LEGISLATION AND REGULATION IN BRAZIL

A number of bills remain pending in Congress that would significantly affect the content industries, for better or worse. The new Administration should take advantage of the first part of 2019, prior to the election, to enact some of the more promising proposed legislation and to ensure the defeat of proposed legislation that would undermine copyright owners' rights. IIPA members are concerned about proposals granting total immunity to ISPs and other platforms from any civil or criminal liability, and urge foreign governments to include in these proposals exceptions for IP enforcement, which must then be properly implemented. Additionally, there are concerns with overly broad copyright immunity, for example, provisions that immunize parties who induce or facilitate infringement. Such troubling proposals are also occurring in Argentina and broad immunities are in operation in Chile. Legal incentives that ensure cooperation of ISPs and other online intermediaries with rights holders, are important for online enforcement.

- **Marco Civil da Internet Law:** The implementation of this law requires continued monitoring to ensure recognition of the importance of protecting copyright in the online environment and to ensure that implementation does not interfere with existing voluntary notice and takedown efforts or other constructive cooperation to combat piracy online.
- **Signal Theft:** Bill 239/2007, introduced in 2007 by Senator Aelton Freitas, criminalizes the act of signal and energy theft. This bill awaits a vote in the Lower House Main Floor. Bill 186/2013, introduced in 2013 by Senator Blairo Maggi, also criminalizes the act of signal theft. This bill is pending before the Committee on Constitutional Affairs of the Senate.
- **Intermediary Liability Bill:** Bill 9744/2018 was introduced in the Lower House and calls for civil liability for advertising networks engaging in business with rogue sites. It currently awaits a further report at the Committee on Constitutional Affairs.
- **Site Blocking Bills:** Bill 5204/16, created out of a CPI initiative, expressly authorizes Brazilian courts to issue orders requiring ISPs to block access to websites hosted outside Brazil that are dedicated to the commission of serious crimes punishable by at least two years of imprisonment, including criminal copyright infringement. The bill is still under consideration by the Committee on Science and Technology along with another site-blocking bill (169/17). Bill 200/16 in the Senate and Bill 5130/2016 in the Lower House take a diametrically opposed approach. Both amend the Marco Civil da Internet law to expressly prohibit site blocking under any circumstances.¹⁴ While IIPA urges that those bills be rejected, its introduction underscores how vulnerable and ideologically driven the enforcement ecosystem in Brazil remains.¹⁵

¹²See, e.g., IIPA 2015 report, at p. 76, <https://iipa.org/files/uploads/2017/12/2015SPEC301BRAZIL.pdf> (“IIPA 2015”).

¹³For instance, a few courts have taken steps to prevent the storage of vast quantities of seized pirate product from becoming an insurmountable impediment to prompt and cost-efficient prosecutions. IIPA hopes that this development is a harbinger of other steps the courts could take to expedite enforcement dockets, and to reform sentencing practices to deliver some measure of deterrence. For more details, see IIPA 2016 at pp. 71-72.

¹⁴As described more fully in IIPA's 2015 report, the Marco Civil legislation was amended before enactment to exclude copyright cases from the blanket rule that “providers of Internet applications” cannot take down or remove access to material except in response to a specific takedown order issued by a court. See IIPA 2015 at p. 77. Inclusion under this rule would have eliminated the voluntary notice and takedown activities engaged in by many Brazilian ISPs with regard to hosted infringing content today, a limited but critical example of the inter-industry cooperation against online infringement that is so essential to tackling pervasive online piracy.

¹⁵In a case currently pending before Brazil's Supreme Court, a friend of the court brief asks the court to prohibit any kind of site blocking order. While it is unlikely this case will be resolved in 2018, developments in it should be monitored.

- **Copyright Reform Bill of 2009 (No. 6117/09):** This bill proposes several changes to the Copyright Law—including sensitive items relating to expansion to copyright limitations that go beyond what is acceptable under the three-step test; audiovisual co-authorship; broadcasting exclusive transmission; exhaustion of rights; private copy & TPMs; and compulsory license—that are inconsistent with Brazil’s international obligations and would likely deter investment in Brazil’s creative industries. It awaits a vote in the House Committee on Culture.
- **Enforcement Reform:** Bill 2729/03 (now Bill 63/2012) addresses some of the systemic enforcement impediments referenced above. It was approved by the House of Deputies in 2012 and sent to the Senate, where it received committee approval over three years ago, but still awaits action by the full Senate. Enactment of the bill would streamline criminal prosecutions and reduce the significant costs entailed in storing vast quantities of seized materials until the final resolution of a criminal case. IIPA continues to urge its passage as soon as possible. IIPA would then encourage Brazilian legislators to turn to other long-overdue and critical enforcement reforms, including some that had to be jettisoned from Bill 2729/03 in an effort to expedite its passage.¹⁶
- **Camcording:** Bill 6512/16 punishes camcording without requiring proof of the perpetrator’s intent to profit. It awaits a report at the Lower House Committee on Constitution and Justice.¹⁷
- **Public Performances:** Bills 0206/2012 and 3968/1997 would amend existing law to provide for additional exemptions to payments for public performances, such as providing that the use of a television set in a hotel room is not public performance. Another bill of concern to the music industry is Bill 2850/2003, which proposes to replace the Central Bureau of Rights Collection and Administration (ECAD), a private umbrella collective management organization (CMO), with a new, government copyright authority named CADDA. The bill also proposes to create a “Fund for Supporting the Composer,” taken from CADDA collections. To do so would cause great difficulties for rights holders.¹⁸
- **Data Protection Law:** This bill will be fully implemented in the next 18 months and will be enforced in February 2020. It was heavily inspired by the European GDPR and places Brazil in accordance with many other similarly inspired data protection laws around the world, which is also an important aspect of the country’s application to the OECD. This new law imposes restrictions to open source investigations as it limits the use of Whois data, as well as other information that is useful for the local industry to verify infringements and refers cases to authorities. The bill should be implemented in a way that still allows for proper enforcement against online piracy.
- **Cybercrime Special Courts:** Bill 6832/17 was approved by the constitutional commission of the Chamber of Representatives and will be moving forward to the Senate. The bill extends the jurisdiction of the already implemented “small claim courts” system under the Law 9099/98 to cover minor offenses committed via the internet and other technological tools, which includes multiple IP violations. A small claims court may increase the ability to tackle more simple cases of online infringements.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

While Brazil is not a party with the United States to any bilateral or regional agreements that include obligations with respect to copyright law or enforcement, it is a member of the Berne Convention and of the WTO. The main areas of possible incompatibility with WTO TRIPS standards lie in the enforcement sphere, and specifically whether in practice Brazil provides civil and criminal enforcement that meets the minimum standards of TRIPS Articles 41 and 61.

¹⁶Among other improvements, various pending bills would allow criminal judges to appoint private sector experts; increase government resources allocated to fighting software piracy; criminalize the advertisement of pirated products, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; and facilitate removal of infringing material from Internet sites.

¹⁷A proposed bill for penal code reform would also create a new criminal offense to punish the camcording of audiovisual works and/or soundtracks in movie theaters. However, the same legislation would further erode the enforcement framework for Brazil’s creative industries because it lacks effective punishment for copyright infringement. Action on this bill appears unlikely in the near future.

¹⁸In 2017, the Superior Tribunal Court (STJ) issued an important decision in the ECAD v. Oi.FM case, regarding certain online uses of recordings. ECAD v. Oi.FM (Special Appeal No 1.559.264 – RJ (2013/0265464-7)). The STJ held that interactive and non-interactive streaming (including simulcasts) are separate acts, each requiring the separate consent of the rights holder. This aspect of the decision is positive for rights holders because it confirms that online streaming (including simulcasting) requires a separate license for interactive and non-interactive services. However, the STJ also held that both interactive and non-interactive streaming (including simulcasts) involve the public performance right, which as a default falls under ECAD’s rights management mandate. This portion of the decision goes against the accepted interpretation of existing law: interactive streaming is deemed to involve acts that fall within the producers’ exclusive distribution right. Thus, this decision may undermine rights holders’ freedom to license their exclusive rights. The decision was appealed and the application was unanimously denied by the 1st Group of Judges (1ª Turma) of the Supreme Court (STF). In principle, further appeals may be available, but the prospect of success is low.

Brazil is not a member of either of the WIPO Internet Treaties, though it certainly should be encouraged both to join these treaties and to bring its law into full compliance with them. The new government brings the opportunity to Brazil for joining the WIPO Internet Treaties and discussions on this should be encouraged as economic opportunities for the development of the Brazilian digital economy.

MARKET ACCESS AND RELATED ISSUES

High Tariffs, Taxes and Barriers on Entertainment Software: Brazil's high tariffs and taxes on video game products have long plagued the entertainment software industry. They act as a significant barrier to legitimate market entry, as a spur to the market for infringing games, and as an obstacle to the growth of a legitimate video game industry, which could, if allowed to develop, deliver innovative content to fans and consumers, benefit the national economy, create jobs, and generate tax revenues that are now being lost to mass infringement. Under a 2013 interpretation of the customs law, tariffs and taxes began to be calculated based on the imputed "copyright value" of a video game title itself (i.e., the distribution and marketing fees paid to the copyright holder), rather than on the much lower value of the import medium. By adding 75% to the cost to the Brazilian consumer, this new interpretation further marginalized the legitimate market (since pirate copies, whether smuggled across the border or burned within the country, are not subject to these fees). It also runs contrary to well-established international rules favoring the use of the value of the medium as the basis for tariffs and taxes. We urge that this interpretation be reconsidered. In addition, taxation on imported video game consoles, totaling nearly 90%, makes it almost impossible to bring them into the market legitimately, and has resulted in at least one major game publisher withdrawing from the Brazilian market. ANCINE has recommended that some taxes, like IPI (tax on manufactured products) and ICMS (tax on the distribution of goods and services) should be reduced for the video game market production chain and made recommendations in a report that can be implemented through legislation or presidential decree. Government agencies should begin a collaborative process on possible ways to reduce the tax burden on the video game industry in order to stimulate the development of local talent and creativity.

Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector: Effective September 2011, Law 12.485/2011 imposes local content quotas for pay-TV, requiring every qualified channel (those airing films, series and documentaries) to air at least 3.5 hours per week of Brazilian programming during primetime and requires that half of the content originate from independent local producers and that one-third of all qualified channels included in any pay-TV package must be Brazilian. Implementing regulations limit eligibility for these quotas to works in which local producers are the majority IP rights owners, even where such works are co-productions, and regardless of the amount invested by non-Brazilian parties. Lawsuits challenging the constitutionality of these local content quotas, and the powers granted to ANCINE, are pending before Brazil's Supreme Court.

Video on Demand (VOD) Tax: The provisional measure which creates ANCINE also establishes the VOD tax, called CONDECINE, as part of a broader tax regime on film and television content. The taxes, which apply to films, advertising, pay-TV and "other segments" (which ANCINE considers to include VOD content), represent a unique and serious threat to the growth of the VOD market. The taxes are currently under discussion with industry stakeholders after ANCINE's current President, Christian de Castro, took office in early 2018. CONDECINE is burdensome if levied over VOD services (especially when charged on a "per-title" basis, as prescribed in the currently existent ANCINE regulation) and will limit the choices available to Brazilian consumers in the nascent online content market. An alternative proposal for VOD taxation that promotes, rather than impedes, the growth and development of Brazil's VOD market and robust content choices for consumers has been discussed and was approved by the Superior Cinema Council in late 2018; we urge ANCINE and the recently created Ministry of Citizenship (to which the former Ministry of Culture is attached as a Special Secretariat) to give it favorable consideration, as well as to consider the current VOD CONDECINE charge on a "per-title" basis as illegal and detrimental to market growth.

Screen Quotas: The most recent Presidential Decree on Screen Quotas imposed quotas for 2018 similar to prior years: it required between 28 and 800 days of screening of local content, depending on the number of theaters in the theater complex. The Decree also continues to specify that a widely released title exhibited in complexes may be

limited to exhibition on 30% of the screens (so-called “supplementary quota”). To make local films even more competitive, ANCINE used its jurisdiction to issue a normative ruling (IN 141) to change the Decree’s “day-base” screen quota criteria to a “showing” criteria. The difference is significant: under the old “day-base” methodology, theaters could theoretically comply by showing one Brazilian film per day. The change to a “showing” model—in measuring the actual number of Brazilian films shown in a theater—would encourage more showings of Brazilian films in addition to strengthening the reporting requirements with which theaters must comply. In late 2018, a Federal Court issued an injunction provisionally suspending the above-mentioned supplementary quota, spurring new discussions on the legality of such quotas. MPAA will closely review this new development, as screen quotas are adjusted annually and the 2019 Decree has yet to be issued, which potentially could exclude the supplementary quota.

Accessibility in Theaters: In 2016, ANCINE, Brazil’s audiovisual regulatory agency, sought public comment on a draft ruling to mandate audio description, closed-captioning, and sign language interpretation in Brazilian cinemas. The U.S. film industry supports measures to broaden access to its productions and to better serve patrons with special needs, and appreciates ANCINE’s agreement to extend the sign language deadline and to form a technical committee of key stakeholders. In 2018, the technical committee agreed to a viable implementation timeline, made effective by means of ANCINE Normative Ruling n. 145. In accordance with such regulation, distributors shall be in full compliance with accessibility requirements by June 2019, while exhibitors have until January 2020 to fully implement the measure. On a related note, in late 2018, a Court of Justice issued an injunction demanding both distributors and exhibitors alike to fully implement the requirements by March 2019, but an appeal by ANCINE revoked the injunction. MPAA is working closely with regulatory bodies to ensure that the accessibility features are implemented with a technological solution that is secure, efficient and meets global best practices.

Collective Management Organizations (CMOs): Brazil’s Ministry of Culture had granted the accreditation of three CMOs prior to its abolition. These entities, representing directors, screenwriters and artists of audiovisual works, will collect remuneration for the communication to the public of audiovisual works in every exploitation window, including theaters, free-to-air, pay-TV and digital distribution, provided that the rights that originate such collection have not been assigned to the work’s producer. Such accreditation, which MPAA and other national and international industry stakeholders have appealed, was granted despite the fact that Brazilian law does not afford such rights to any of the mentioned rights holders. Although the concrete effects of these accreditations on U.S. industry are unclear, it is important that a final decision by the new Special Secretary of Culture (within the newly created Ministry of Citizenship) clearly recognizes the absence of underlying legal rights to any collection claim, therefore revoking the accreditation.

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Because, as described in this report, IIPA continues to have significant concerns in Canada, IIPA again recommends that Canada be placed on the Watch List in 2019.¹

Executive Summary: The legitimate digital marketplace for copyright materials continues to grow in Canada, but the market remains hampered by widespread infringement, including stream-ripping services that undermine legitimate music streaming and download offerings; infringing paid subscription Internet Protocol Television (IPTV) and Video-on-Demand (VOD) services; streaming sites and other online sources for unauthorized movies and TV shows; and Piracy Devices and apps, readily available both online and in the retail market, that suppress demand for legitimate digital streaming and Video-on-Demand. The country has made some progress in shedding its reputation as an online piracy haven, but too many Canadian Internet businesses allow their services to be abused by pirate operators, and inter-industry cooperation remains suboptimal. Government at all levels accords insufficient resources and strategic priority to enforcement of copyright laws, and significant market access barriers impede U.S. film and TV producers and distributors.

The ongoing full parliamentary review of Canada's Copyright Act, mandated by the 2012 Copyright Modernization Act (CMA), should be a vehicle for addressing many of these problems. The review presents a critical opportunity to assess both the strengths and shortcomings of Canada's current copyright regime on a host of issues, and to adopt needed measures to improve both the law and its enforcement. Among the most urgent problems to be addressed is the state of the educational publishing market, which continues to decline as a result of the overbroad interpretation of the education as fair dealing exception embraced by the country's educational institutions. In addition, Canada should improve its law to combat growing online piracy by making available effective injunctive relief to stop infringement by flagrantly infringing websites, and providing more effective incentives for legitimate Internet intermediaries to cooperate with rights holders, including by limiting the scope of the safe harbor provisions to apply only to passive and neutral intermediaries that take effective action against infringing content. Furthermore, the internationally unprecedented copyright exception for user-generated content should be repealed. Statutory discrimination against U.S. recorded music producers, and the unjustified radio royalty exemption for broadcast of recorded music, require correction. Making copyright enforcement a priority for police, prosecutors, and courts, and completing the task of harmonizing duration of Canadian copyright protection with that of its major trading partners, are other major pieces of unfinished business.

IIPA welcomes recent reforms to Canada's Copyright Board and is hopeful that the reforms will bring Canada's tariff-setting process into closer alignment with international norms in other developed markets, especially in cases where negotiated settlements have already been achieved. The recently-concluded U.S.-Mexico-Canada Agreement (USMCA) could bring some positive benefits, particularly regarding Canada's commitments to bring its term of protection into alignment with evolving global norms and to provide full national treatment for U.S. sound recordings. In other respects, however, the USMCA appears to have been a missed opportunity to address many of Canada's most pressing concerns, including its deficient online liability legal regime. Moreover, the USMCA's "cultural carve-out" potentially threatens commitments that would otherwise help to open Canada's marketplace for the U.S. copyright industries. IIPA urges Canada to employ the statutory review to recalibrate the course set by the CMA, and to respond to concerns left unaddressed in 2012, in order to better confront the challenges of today's digital networked

¹For more details on Canada's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Canada's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



marketplace, and asks the U.S. Government to remain extensively engaged with Canada on these and other issues in 2019.

PRIORITY ACTIONS REQUESTED IN 2019

The statutory review of the Copyright Act should take a comprehensive approach, including:

- Addressing the crisis in the educational publishing market, including by clarifying the fair dealing amendments in the CMA;
- Making further progress against online piracy in Canada by strengthening legal incentives for Internet Service Providers (ISPs), hosting providers, and all other intermediaries to cooperate with copyright owners, in accordance with international best practices, including by narrowing the scope of safe harbors to apply only to passive and neutral intermediaries that take effective action against infringing content, and by making available effective injunctive relief to stop infringement by flagrantly infringing websites;
- Ensuring that recorded music producers and performers are fully compensated for all forms of radio and TV broadcasting and communication to the public of their recordings, including by elimination of the radio royalty exemption; and
- In accordance with Canada's USMCA commitments, completing the process of bringing the duration of protection for copyright into conformance with evolving global norms.

In addition, Canada should be urged to:

- Prioritize enforcement against online piracy and the trafficking in Piracy Devices/apps and other circumvention tools;
- Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement the resources and training required to implement this priority; and
- In accordance with Canada's USMCA commitments, make progress on easing long-standing market access barriers for U.S. movies and TV programming.

THE DIGITAL MARKETPLACE IN CANADA TODAY

Canada remains one of the leading potential markets for online commerce in U.S. copyright works. The Canadian Internet Registration Authority (CIRA) reports that nearly 90% of Canadians use the Internet, with 86% of Canadians having broadband Internet connections at home.² Two-thirds of the population spends at least one hour a day watching TV or movies online.³ The growth of legitimate digital distribution of creative content remains robust. While the recorded music market in Canada grew 14.4% from 2016 to 2017 (the latest year for which complete statistics are available), total revenues from online streaming of music burgeoned by over 50%, and its share of the total Canadian market increased over 30%, to 45.7% of the market.⁴ Similarly, the legitimate online video market is also growing in Canada, with studios and producers continuing to work with a multitude of partners and platforms. Canadians subscribe to a wide variety of services offering movies, TV programming, or both, online.⁵ Notably, more than half of all Canadians report they subscribe to Netflix.⁶

²CIRA *Internet Factbook 2018*, available at <https://cira.ca/factbook/the-state-of-canadas-internet>.

³Id.

⁴IFPI, *Global Music Report 2018*, p. 87, available at <http://www.ifpi.org/resources-and-reports.php#/recording-industry-in-numbers.php>.

⁵CIRA *Internet Factbook 2018*, supra 2.

⁶Id.

Evidence persists, however, that the digital marketplace for copyright content in Canada is still underperforming, and that the pressure on legitimate services from illicit online sources is part of the reason.⁷ “Stream-ripping” services, now the leading form of music piracy in Canada, are a major contributor to this problem.⁸ Stream-ripping allows users of streaming services like YouTube to convert a stream into an unauthorized download that can be stored and replayed at will, with no royalty payment to rights holders.⁹ By circumventing the technological measures employed by most legitimate music streaming services to prevent copying and redistribution of the recordings streamed, stream-ripping services undermine the legitimate markets both for streaming and for licensed music downloads, such as legitimate subscription services offering offline listening to music for a monthly fee. Dozens of websites, software programs and apps offer stream-ripping services, and they find an eager marketplace in Canada, with 27% of surveyed Canadians engaging in this form of piracy in 2017. Another 22% of Canadians used peer-to-peer (P2P) or cyberlocker sites to obtain unauthorized access to recorded music.¹⁰

As noted in last year’s IIPA Special 301 submission, in recent years Canada has made progress in rectifying its previous long-standing reputation as a safe haven for some of the most massive and flagrant Internet sites dedicated to the online theft of copyright material.¹¹ However, sites associated with Canada still play a leading role in facilitating such theft. Examples include the stream-ripping site *peggo.tv*, the BitTorrent site *Monova.org*, and the cyberlockers *Zippyshare.com*,¹² *Vibeclouds.net* and *Openload.co*. While the true location of the hosting services for some of these sites is obscured through the use of reverse proxy services, all are registered by Canadian domain name registrars (*Peggo.tv*, *Openload.co*, and *Zippyshare.com* by Tucows, and *Monova.org* and *Vibeclouds.net* by easyDNS Technologies), and all five sites employ Canadian proxy registration services (Contact Privacy, Inc. for the Tucows sites, and MyPrivacy.net for the easyDNS sites). While these Canadian intermediaries have been notified many times about multiple customers who use their services to carry out massive online piracy, they have never provided any effective assistance to rights holders.

As with music piracy, online movie and TV piracy remains a formidable challenge in Canada, inflicting major financial harm. Frontier Economics estimated the commercial value of digital piracy of film in 2015 was US\$160 billion worldwide, and found that the displacement of legitimate economic activity by counterfeiting and piracy has a negative effect on economic growth.¹³ Research by Carnegie Mellon University further 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).¹⁴ Even though P2P download sites only accounted for 30% of visits to sites used for online piracy in Canada in 2017 (down from 44% in 2014), an estimated 314 million movies and TV shows were still illicitly downloaded using BitTorrent sites in Canada in 2017, according to data from SimilarWeb and MovieLabs. As of the second half of 2017, 70% of visits to sites used for online piracy in Canada are web-based sites (up from 56% in 2014), including host sites (24% of visits) and link sites (46% of visits). Another growing concern is the presence of deceptively marketed illegal online streaming sites, which offer a Netflix-like interface that enables users to stream and download movies and TV programs with a single click. According to the Government of Canada’s own study published in May 2018, more than one-quarter (26%) of content consumers reported having “consumed”

⁷As CIRA notes, “Canadians are willing to tread on some legal grey areas to access the online content they want.” *CIRA Internet Factbook 2016*, available at <https://cira.ca/factbook/domain-industry-data-and-canadian-internet-trends/internet-use-canada>.

⁸Stream-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>.

⁹The music industry reports that some 87% of Canadians who visited YouTube used the site to access music in 2018.

¹⁰Music Canada, “The Value Gap: Its Origins and Impacts”, at p. 23, available at <https://musiccanada.com/wp-content/uploads/2017/10/The-Value-Gap-Its-Origins-Impacts-and-a-Made-in-Canada-Approach.pdf>.

¹¹See IIPA’s 2018 Special 301 country survey on Canada, at <https://iipa.org/files/uploads/2018/02/2018SPEC301CANADA.pdf> (“IIPA 2018”).

¹²This major cyberlocker service remains, after more than a decade of operation, one of the world’s leading sources of illicit recorded music files available before authorized release.

¹³Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy* (February 2017), at pp. 23-58, http://www.inta.org/Communications/Documents/2017_Frontier_Report.pdf.

¹⁴Carnegie 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.

(downloaded or streamed or accessed) at least one illegal file online in the past three-months, and movies (36%) and TV shows (34%) were among the forms of content most likely to be illegally “consumed.”¹⁵

Both online and offline, the legitimate market is challenged by trafficking in set-top boxes (STBs) sold pre-loaded with infringing applications that enable cord-cutting Canadians to obtain unauthorized access to high-quality digital streaming and VOD content. These Piracy Devices are readily available in large fairs and expositions, and in kiosks in reputable shopping malls, at prices as low as C\$100 (US\$80). Of course these pre-loaded devices are also sold on dedicated Canadian-owned-and-operated websites, and in well-known third-party online marketplaces; but their presence in legitimate retail spaces, where they are deceptively marketed with high quality promotional materials, sows even greater confusion among consumers. To make matters worse, Canadians appear to be increasingly involved in the coding and development of illegal add-ons that enable mass-market set-top boxes to access streaming services without authorization, as well as in the hosting of online repositories that make the illegal add-ons available to the public. These Piracy Devices and illegal add-ons enable users to access unauthorized IPTV and VOD services. Canada has seen an influx of sellers and resellers of infringing paid subscription IPTV and VOD services. These services, which have become widely marketed and widely available, steal legitimate signals through circumvention of technological protection measures (TPMs) and other means to provide their users with unauthorized streaming of motion picture and television content, as well as live television programming.¹⁶ Canadians are also increasingly involved in the illegal theft of telecommunication signals that ultimately feed and provide content to these IPTV and VOD services. Although, as discussed below, legal actions against these abuses are beginning to bear fruit, these problems remain serious and widespread.

Other sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works remain active in Canada, despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, and recent court decisions enforcing these statutes, as discussed below. The video game industry reports that sites operated and hosted in Canada, such as *SwitchHack.com*, *Cavideogames.com*, *gamersection.ca*, and *r4dscanada.com*, continue to offer circumvention devices and game copiers for sale. Computer software that effects a “soft modification” of the security technology of game consoles, and that thereby facilitates the play of pirated video games, remains available on sites hosted in Canada. Significant sites selling circumvention devices that have been subject to DMCA takedown notices from right holders in the U.S., such as *Digitopz.com* and *Digimartz.com* rely on Canadian ISPs such as Crocweb for hosting, thus evading enforcement action under U.S. law. In 2018, multiple notices to Crocweb regarding these websites, which were violating the ISP’s own policies and terms of service, were ignored. This trend breathes new life into Canada’s problematic “safe haven” reputation. Additionally, direct download sites offering hundreds of infringing video game titles for classic and new video game platforms are operated and/or hosted in Canada. Even those sites that have been terminated from payment processing services can generate significant revenue, including from advertisements on the websites, while offering global users unauthorized free content. A disturbing trend is the sale of counterfeits or infringing video game products sold via e-commerce sites that are managed through Canadian e-commerce service providers like *Shopify.com* or *Browse.com*. Video game companies see many local sites registered and created with Shopify but, through cooperation with Shopify, have been able to remove infringing pages. In addition, offerings for installation services (free games and hacking services) through online marketplaces such as *kijiji.com* continue to rise.

¹⁵See Government of Canada, *Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada, Final Report* (March 2018), p. 27, [https://www.ic.gc.ca/eic/site/112.nsf/vwapi/07648-eng.pdf/\\$file/07648-eng.pdf](https://www.ic.gc.ca/eic/site/112.nsf/vwapi/07648-eng.pdf/$file/07648-eng.pdf).

¹⁶According to Sandvine, emergent forms of piracy such as the “Fully-Loaded” Kodi ecosystem and subscription television piracy represent a real threat to the revenue streams of network operators: 10% of Canadian households have at least one set-top box, computer, smartphone or tablet running the Kodi software, a higher proportion than in the U.S. (6%); 70.9% of these households in Canada with Kodi devices have unofficial add-ons configured to access unlicensed content; and 8.3% of Canadian households are using known subscription TV piracy services. See Sandvine, *Video Piracy in Canada* (2017), <https://www.sandvine.com/video-piracy-in-canada>.

KEY TOPICS FOR THE COPYRIGHT REVIEW

In December 2017, Canada's Parliament launched the comprehensive review of the CMA.¹⁷ Hearings before the Parliament's Standing Committee on Industry, Science and Technology were held from April to December 2018. The review is not expected to conclude until after the 2019 federal election. The mandated parliamentary review provides an invaluable opportunity for Canada to assess whether the CMA has kept pace with rapid changes in technology and markets, and to upgrade, improve, or correct the Copyright Act where it falls short of being fit for purpose for today's digital environment, including issues that went unaddressed in the 2012 amendment process and commitments Canada made in the USMCA. We offer the following evaluations of the strengths and weaknesses of Canada's current copyright law and enforcement regime, and urge the U.S. Government to encourage Canadian officials to take these issues fully into account in carrying out the copyright review. We encourage the Government of Canada to ensure that this review is carried out in a timely manner so that substantive reform is effectively achieved.

1. Strengths of the Canadian Regime—Recent Positive Developments

Several recent decisions from Canadian courts reflect positive trends that the copyright review should affirm and seek to build upon. Some directly involve provisions of the CMA. In addition, IIPA applauds recent reforms of the Copyright Board, which should bring Canada into closer alignment with comparable developed markets regarding its tariff-setting process.

A. Legal Tools Against TPMs Circumvention

As previously reported, in March 2017, Canada's Federal Court issued its first substantive decision on the provisions of the CMA that codified (in Section 41.1 of the Copyright Act) meaningful prohibitions against trafficking in tools and services to circumvent TPMs used to control access to copyright works. In *Nintendo v. King*¹⁸, the court found an Ontario-based provider of game copiers, mod chips and modding services (both online and through a retail location) liable for trafficking in circumvention devices and services (as well as the act of circumvention) in violation of Section 41.1, and made important interpretations of several provisions of the new law. Notably, the court gave robust effect to the remedial provisions of the statute, deciding that statutory damages for the violation should be calculated on a per-work basis, and imposing the maximum C\$20,000 (US\$15,972) damages for each of the 585 Nintendo videogames protected by the circumvented TPMs. It also imposed C\$1 million (US\$798,665) in punitive damages, based on the violator's deliberate and recidivist sale of circumvention devices. IIPA remains hopeful that this strong precedent will be followed in future cases, and, particularly in light of Canada's commitment to strong TPMs protections in the USMCA, urges that any efforts to weaken existing TPMs provisions in the law be firmly resisted.

B. Injunctions Against Websites Hosting Add-ons for Set-top Boxes and Against Set-top Box Retailers

In February 2018, the Federal Court of Appeal upheld an interim injunction, as well as a related order, authorizing the shutdown and seizure of piracy websites that made available illegal add-ons enabling set-top boxes to access streaming video without authorization.¹⁹ The Court also granted an interlocutory injunction until the trial against the owner and operator of the websites. The Court noted that the add-ons were "clearly designed to facilitate access to infringing material" and that the exception to infringement "where one merely serves as a 'conduit'" should not apply.

In March 2017, the Federal Court of Appeal affirmed a trial court interlocutory injunction against retailers of "plug and play" set-top boxes preloaded with applications that allow consumers to access TV programs and movies

¹⁷This process has its roots in Canada's Copyright Modernization Act (CMA), adopted in 2012, and 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.

¹⁸2017 FC 246, available at <https://www.ippractice.ca/files/2017FC246.pdf>.

¹⁹*Bell Canada v. Lackman*, 2018 FCA 42.

without authorization or subscription.²⁰ The appellate court specifically affirmed the finding of irreparable harm to distributors of copyright works if defendants were allowed to continue to sell the pre-loaded boxes.

While these decisions indicate that effective remedies against these Piracy Devices and their enabling apps are available under current law, the copyright review should consider whether further enhancements are desirable to disrupt this growing illicit marketplace, especially in light of the alarming growth of infringing IPTV and VOD services.

C. De-indexation of Sites Dedicated to Intellectual Property Infringement

The landmark June 2017 decision of the Supreme Court of Canada (SCC) in *Google v. Equustek Inc.*²¹ affirmed that Canadian courts can issue global de-indexing orders against search engines to stem illegal activities on the Internet. The injunction required Google to de-index from search results (both in Canada and worldwide) the websites infringing Equustek's trade secrets. The SCC's conclusions—that “the only way to ensure that the injunction attained its objective was to have it apply where Google operates—globally” and that the search engine was “the determinative player in allowing the harm to occur”—set a favorable precedent for using Canadian courts to combat sites dedicated to copyright infringement as well. Google's attempt to vary the SCC's decision based on a U.S. court ruling it obtained was rejected in 2018 by a lower court, which concluded that “there is no suggestion that any U.S. law prohibits Google from de-indexing.”²²

D. The “Enablement” Prohibition

The CMA provision (Section 27(2.3)) establishing civil liability for providing online services primarily for the purpose of enabling acts of copyright infringement was an important step forward. It continues to provide a useful tool for copyright industry efforts to shut down Canadian-connected sites dedicated to piracy, and to help purge the Canadian online environment of outlaw services that undermine legitimate digital markets for copyright materials worldwide. But, as will be discussed below, its scope is limited, and it falls well short of providing the cornerstone for an effective legal regime to confront the challenge of digital copyright theft.

E. Copyright Board Reform

In a positive development, Bill C-86²³ includes amendments to overhaul the legislative framework governing tariff-setting proceedings before the Copyright Board, which should improve the timeliness, clarity, and efficacy of the proceedings. The amendments substantially revise the timelines for proposing and objecting to the tariffs, and allow tariffs to be filed earlier and remain effective longer. This should help to avoid the extreme delays that currently make economic forecasting nearly impossible for stakeholders (including users as well as 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. The amendments will also streamline procedures and formalize 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. IIPA is hopeful that forthcoming regulations will specify time frames for stages of the Board proceedings, such as delineating when the Board must issue a decision.

Importantly, the amendments will introduce statutory rate-setting criteria that requires the Board to consider, among other things, the willing buyer/willing seller principle in determining the royalty rates. While the proposed amendments permit the Board to consider other factors, including “any other criterion that the Board considers appropriate,” if implemented properly, the proposed criteria should be a welcome improvement over the current system. Currently, the Board's assertion of unlimited discretion to set tariff rates leads to results that are not only unpredictable,

²⁰Wesley dba MTLFreeTV.com v. Bell Canada, 2017 FCA 55, affirming Bell Canada v. 1326030 Ontario Inc. dba ITVBox.net, 2016 FC 612.

²¹2017 SCC 34.

²²2018 BCSC 610.

²³Bill C-86 included amendments to the Copyright Act regarding the Copyright Board of Canada and Canada's “notice and notice” system for online infringement. The bill was introduced in the House of Commons in October 2018, received Royal Assent in December 2018, and will enter into force in April 2019.

but often wildly out of step with the evidence presented at hearings, including rates agreed to in freely negotiated agreements and in comparable markets.

The amendments broaden enforcement prohibitions to cover users who have offered to pay proposed tariffs in addition to (under current law) users who have paid or offered to pay tariffs that have been approved. It is critical that, in implementation, this broadened enforcement prohibition does not delay or undermine the ability of CMOs to collect royalties from active users.

IIPA applauds Canada's commitment to reforming its tariff-setting process, and hopes that the amendments will be implemented to bring Canada's system into closer alignment with comparable rate-setting and dispute resolution entities in major developed markets by improving timeliness, ensuring greater predictability, and yielding tariffs that more accurately reflect the economic value of the rights.

2. How Canada's Legal Regime Falls Short

Experience in the Canadian market reveals significant deficiencies in its overall copyright regime, and unintended adverse consequences from the adoption of the CMA. Correcting these issues should be the primary focus of the copyright review.

A. The Educational Publishing Crisis, and Other Fallout of New/Expanded Copyright Exceptions

The bulk of the 2012 CMA consisted of a number of new or significantly expanded exceptions to copyright protection. None has had a more concrete and negative impact than the addition of the word "education" 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 dismantling of the well-established collective licensing regime to license and administer permissions to copy books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada.²⁴ This system generated millions of dollars in licensing revenues for authors and publishers on both sides of the U.S.-Canadian border. Authors relied upon it for a considerable part of their livelihoods, and it provided publishers with a return on investment that enabled new investments in innovative means to deliver and facilitate access to textual materials. A detailed study released by PricewaterhouseCoopers (PwC) in June 2015 documents and quantifies the damage stemming from severe reductions in licensing royalties as educational institutions across English-speaking Canada stopped paying remuneration for their use of copyrighted materials.²⁵ The PwC study summarized the situation in Canada as follows: "[t]he education sector now takes the position that its members are effectively not required to pay for the copying of this content by virtue of the 'fair dealing' exception in the Copyright Act."²⁶ At the time, the PwC study estimated the annual loss from the demise of revenue from licensing to copy parts of works at C\$30 million (US\$22.9 million). In its 2017 Annual Report, Access Copyright reported that the income it distributed to authors and publishers had declined "a full 46% from 2016."²⁷ In addition to declines in licensing revenue, the educational publishing industry also saw significant declines in full textbook sales, with PwC concluding that massively expanded unlicensed copying "competes with and substitutes for the purchase of tens of millions of books" by educational institutions each year.²⁸

USTR's 2018 Special 301 Report noted the U.S. Government's continuing concerns with "the ambiguous education-related exception to copyright that has significantly damaged the market for educational publishers and authors."²⁹ Unfortunately, there has so far been little progress in rectifying the current situation in the ongoing CMA

²⁴See IIPA 2017 at 97-100;

²⁵PricewaterhouseCoopers, *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines* (June 2015), available at http://accesscopyright.ca/media/94983/access_copyright_report.pdf (hereafter "PwC").

²⁶ PwC at 6.

²⁷ Access Copyright Annual Report 2017 at 7, https://www.accesscopyright.ca/media/1289/access_2017ar.pdf.

²⁸PwC at 6, 7.

²⁹See USTR, 2018 Special 301 Report at 60, <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>.

review. The July 12, 2017 decision in the long-running case brought by Access Copyright against York University provided a glimmer of hope for ameliorating the disastrous impact on licensing in the educational publishing market. The main issue in the case was whether the university could copy materials within the limits of its “fair dealing guidelines” without regard to the tariff issued by Access Copyright for post-secondary institutions and approved by the Copyright Board. The court’s answer was no, marking a clear rejection of the very expansive interpretation of the statutory exception favored by Canada’s educational establishment. The court concluded the university’s guidelines were “arbitrary and not soundly based in principle,” and that Access Copyright had proved “that the market for the works (and physical copying thereof) has decreased because of the Guidelines, along with other factors.”³⁰ York University has announced that it is appealing the decision.

The sense of impunity from copyright responsibility that Canada’s educational establishment increasingly displays has decimated not only copyright owners’ licensing revenue for copying, but has contributed to an overall attrition of revenues from the sale of textbooks and other educational works in Canada. While the 2015 PwC study provided examples of potential revenue loss,³¹ a fresh example emerged in 2017, when it was revealed that Concordia University’s Center for Expanded Poetics was creating high-quality scans of the entire contents of current 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.³² 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.

Until the legal framework is clarified, the crisis in the educational publishing sector will worsen. Because “education” is not defined in the statute, and given the expansive interpretation of fair dealing favored by Canadian courts, the amendment creates an obvious risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions). Nor is the educational fair dealing amendment the only problematic CMA provision for educational publishers. The broad exception in Section 30.04 of the Copyright Act is also concerning. It immunizes nearly anything done “for educational or training purposes” by an educational institution or its agent with respect to “a work or other subject matter that is available through the Internet,” so long as the Internet site or the work is not protected by a TPM.

Canada’s government is well aware of the dire state of its educational publishing market. Canadian federal authorities, and its Parliament, should be encouraged to address this crisis expeditiously. Thus far, Canada has not acted with the necessary urgency to clarify the scope of the education fair dealing exception. 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. Because the amendments made by the CMA have played such a central role in creating the instability and sense of impunity from copyright responsibilities that now prevails in this sector in Canada, advancing this goal should be a top priority for the parliamentary review of copyright law mandated by Section 92 of the Copyright Act.

IIPA’s oft-stated concerns about the breadth of the new exceptions in Canadian law are by no means limited to those impacting the educational sector. In particular, Section 29.21, entitled “Non-commercial User-generated Content,” 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 (including a commercial intermediary), 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 the exclusive adaptation right that Canada is obligated to provide under the WTO TRIPS

³⁰Canadian Copyright Licensing Agency (“Access Canada”) v. York University, 2017 FC 669.

³¹See PwC at 9, 71; see also *This is What Falling Off a Cliff Looks Like*, available at <http://publishingperspectives.com/2016/06/canadian-textbook-publishers-copyright-law/>.

³²Kate Taylor, “Concordia University caught on the wrong side of copyright,” <https://www.theglobeandmail.com/arts/books-and-media/concordia-university-caught-on-the-wrong-side-of-copyright/article34263532/>.

Agreement (TRIPS) and the Berne Convention, and its breadth raises serious questions of compliance with the three-step test for permissible limitations and exceptions.³³ This provision compounds the problem (discussed below) of Canada's inadequate online liability regime, by giving incentives to digital services to make protected content available without licenses or on terms that do not reflect market value of the content. Its application threatens to lead to abandonment of established licensing arrangements, as has already occurred with regard to educational publishing. Although enactment of the exception was globally unprecedented, it has spawned would-be imitators, such as the proposal for a similar exception to the Hong Kong Copyright Ordinance. This underscores the importance of re-examining the Canadian user-generated content (UGC) exception in the context of the copyright review.

B. Incentives are Lacking for Necessary Players to Cooperate Against Online Infringement

Despite the narrow "enablement" provision in Section 27(2.3), Canada's Copyright Act fails to respond adequately to the broader challenge of online infringement.³⁴ The statute lacks important tools that many copyright legal regimes now routinely provide for dealing with infringement that takes place in connection with legitimate online services; and the tools it does provide fall demonstrably short of addressing the problem. As a whole, Canadian law lacks adequate incentives for cooperation by a range of essential legitimate players, such as advertisers, payment processors, and domain name registrars and their affiliated privacy/proxy registration services. As described above, these services, including those offered in Canada, are all too often abused to facilitate online copyright theft.

The enablement provision itself 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 set-top boxes pre-loaded with software applications designed to enable unauthorized access to online streaming services, or even trafficking in such software tools, may fall outside the scope of the "enablement" provision. Section 27(2.3) also does not apply to those who provide offline services for the purpose of enabling copyright infringement. The enablement provision's significant gaps should be corrected to address all actors in the value chain who enable acts of infringement.

Beyond enablement, the Canadian legal regime against online infringement relies heavily on the "notice and notice" system, which came into force in January 2015. There is no evidence that this system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so: it was intended merely as an educational tool aimed at end-users, but there is no evidence that it is contributing to any significant change in infringing consumer behavior. Simply notifying ISP subscribers that their infringing activity has been detected is ineffective in deterring illegal activity because receiving the notices lacks any meaningful consequences under the Canadian system. Indeed, it creates little meaningful incentive for service providers to try to rid their service of illicit material, in effect providing free rein to build services on the back of unauthorized content. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system.³⁵ ISPs have insufficient incentive to respect the legislated "notice and notice" system, because their failure to forward notices from rights holders does not affect their exposure to copyright infringement liability.³⁶

Fundamentally, the "notice and notice" regime was never even intended to address a different and very serious problem: hosting service providers that fail to disable access to infringing materials that they are hosting, even after it is brought to their attention. So long as known infringing content remains readily accessible online, the battle against online piracy is seriously compromised. Canada's steadfast refusal to adopt any impactful legislative requirements as a condition for limiting the liability of hosting providers leaves it an outlier in the global environment, and substantially diminishes both the utility of the legislative mechanisms in place, and the efforts and interests of rights

³³See, e.g., Article 13 of the WTO TRIPS Agreement. In the U.S.-Mexico-Canada Agreement (USMCA), Canada reinforced its commitment to confine copyright exceptions and limitations to the three-step test. See USMCA Article 20.65.

³⁴The shortcomings of the legislation are detailed in past more extensive analyses of the CMA by IIPA. See e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013 ("IIPA 2013"), available at <https://iipa.org/files/uploads/2017/12/2013SPEC301CANADA.pdf>, at 127-131, and other sources referenced therein.

³⁵See IIPA 2017 at p. 96 for a summary of concerns.

³⁶See Section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

owners and stakeholders impacted by widespread infringement online. The law simply lacks effective incentives for legitimate Internet intermediaries to cooperate with rights holders to combat online infringement. For example, the law's conditioning of liability for hosting infringing material on obtaining a judgment against an end user³⁷ is unworkable in practice, particularly regarding valuable, time-sensitive material such as pre-releases, and creates a disincentive for hosting providers to cooperate or take any effective action in the case of material they know or ought to know is infringing. Canada should revise its law to introduce incentives for intermediary cooperation, including by limiting the scope of the safe harbor provisions to apply only to passive and neutral intermediaries that take effective action against infringing content. It is unfortunate that the USMCA exempted Canada's flawed system and will not require Canada, at an absolute minimum, to require takedown of infringing content in response to a proper notice (or upon the service having knowledge or awareness of the infringement).

The amendments in Bill C-86 are another missed opportunity. While they further clarify the content to be included in notices of claimed infringement issued to ISPs, the amendments fail to include any meaningful incentives for intermediaries to cooperate with rights holders. 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.

Taken as a whole, these 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. In the current copyright law review, Canada should look for ways to make its current regime more effective, and to provide meaningful incentives to stimulate inter-industry cooperation against online piracy.

C. Injunctive Relief Needed Against Online Infringement

Against the backdrop of Canada's inadequate legal regime for online enforcement, in 2018, FairPlay Canada, a coalition of communications and media companies, creative and production organizations, and unions, filed an application with the Canadian Radio-television and Telecommunications Commission (CRTC) to create an independent agency to administer a website-blocking system to address online piracy. A growing list of countries around the world have taken such effective action to address the serious problem of illegal marketplaces hosted in one country that target consumers in another. This is necessary because of the failure of the host country for services based there to take effective action against its own "homegrown" notorious markets, which pollute the markets of neighboring countries or trading partners. Increasingly, responsible governments have pushed back against this "offshoring" of enforcement responsibility, by developing means and processes for blocking access to these foreign pirate sites from within their borders. In October, the CRTC denied FairPlay Canada's application without considering the merits of the proposal, ruling that the CRTC does not have jurisdiction under Canada's Telecommunications Act. While CRTC acknowledged the harm caused by piracy, it held that copyright enforcement falls solely within the statutory scheme of the Copyright Act. As part of its Copyright Act review, Canada should look at incorporating tools to effectively address with the problem of flagrantly infringing online marketplaces that are hosted outside of Canada, including providing effective injunctive relief to disable access to such infringing content.

D. Discrimination and Duration

Other issues require attention as part of Canada's statutory review.

i. Recorded Music Royalties Should be Extended to U.S. Repertoire

The Canadian music marketplace suffers from Canada's denial of protection to producers of U.S. sound recordings for communication of their recordings by commercial radio broadcasters. Canada also refuses any compensation for online simulcasting, webcasting, or other forms of communication to the public by telecommunication of virtually all pre-1972 U.S. sound recordings (those first or simultaneously first published in the United States).

³⁷See Section 31.1 of the Copyright Act.

Performers on all these sound recordings suffer similar denials. This discrimination applies only to sound recordings; musical works are fully protected.

Canada's unfair and discriminatory policy does not befit its status as our neighbor and major trading partner. IIPA highlights that U.S. law provides for full national treatment, regardless of whether the country of origin provides reciprocal rights, and Canada committed in the USMCA to provide full national treatment regarding protection of intellectual property. Moreover, any pretext for discrimination against pre-1972 U.S. sound recordings has been eliminated by the enactment of the 2018 Music Modernization Act (MMA), which ensures full compensation for uses of these recordings in the United States. While we applaud Canada's long-delayed entrance into the community of nations that accord sound recording producers the broad scope of exclusive rights needed to manage digital dissemination of their products, Canada's discriminatory practices should end.

ii. The Radio Royalty Exemption Should be Removed

Another key concern for the music industry is the statutory exemption from protection of recorded music used by commercial radio stations in Canada. Each of Canada's nearly 700 commercial radio stations, regardless of their size, revenues, profitability, or co-ownership, is statutorily exempted from communications royalties for sound recording broadcasts on their first C\$1.25 million (US\$951,000) of annual advertising revenue.³⁸ Other than a nominal C\$100 (US\$176) payment, radio stations pay the Copyright Board-approved tariff only for revenues in excess of the C\$1.25 million threshold. Even the Copyright Board concluded that there is no economic rationale for this provision, which it called a "thinly veiled subsidy" to "large, profitable broadcasters."³⁹ As with the discrimination against U.S. repertoire detailed above, 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 satellite radio, restaurants or background music suppliers), none of which is subject to such an exemption from paying royalties to sound recording producers and performers. Canada is the only country in the world that grants such a subsidy to its commercial radio stations. Since 1997, when the radio royalty exemption was enacted, record labels have been deprived of nearly C\$140 million (US\$111,649 million) that they would have received in the absence of the exemption. Nor, arguably, does the Canadian system guarantee the "equitable" remuneration that Canada is obligated to provide by Article 15 of the WIPO Performances and Phonograms Treaty (WPPT) and that Canada committed to provide under the USMCA.⁴⁰ The C\$1.25 million commercial radio royalty exemption should be removed, whether as part of the ongoing copyright law review, or otherwise.

iii. Term of Protection

A notable example of a needed modernization of Canadian copyright law that simply was not addressed by the 2012 amendments is the disparity in duration of copyright protection between Canada and its largest trading partner (the U.S.), and indeed, the vast majority of OECD economies. While Canada extended the term of protection for sound recordings in 2015, it should also join the growing international consensus by extending the term of protection for all works measured by the life of the author to life plus 70 years. It is commendable that Canada made this commitment in the USMCA, as well as committing to extend its term of protection for sound recordings an extra five years to 75 years. Notwithstanding uncertainty surrounding ratification of the USMCA and the two-year grace period for Canada to meet this commitment, Canada should not delay bringing its law into line with this de facto global norm.

COPYRIGHT ENFORCEMENT

The 2015 entry into force of Bill C-8 (the Combating Counterfeit Products Act) addressed many of the legal insufficiencies that hampered Canada's copyright and trademark enforcement regime over the previous decade or

³⁸See Section 68.1(1) of the Copyright Act.

³⁹Copyright Board, Public Performance of Music Works 2003-2007 and Public Performance of Sound Recordings 2003-2007, October 14, 2005, p. 32, 37-38.

⁴⁰See USMCA Article 20.62.

more (with the notable exception of the denial of *ex officio* authority with regard to in-transit infringing goods).⁴¹ But Bill C-8 did nothing to address the underlying problem—the lack of resources devoted to copyright enforcement, and the accompanying shortfall in political will to address the problem as a priority. A clear change in direction is needed.

For Canada's main federal law enforcement agency, the Royal Canadian Mounted Police (RCMP), intellectual property crimes in general and copyright crimes in particular are neither a strategic nor an operational priority. Indeed, the RCMP has been transferring its case files to municipal police forces, which, like the RCMP, too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. Thus, while local police agencies have generally responded well to anti-piracy training programs offered by industry, they are simply not in a position to deal effectively with organized copyright piracy, and thus increasingly fail to pursue even well-documented referrals from industry. Recently, local law enforcement has engaged with rights holders regarding a few illegal subscription IPTV cases that involved the more traditional or real-world criminal act of signal theft. More resources are needed to address this growing problem. On the whole, because the Canadian law enforcement commitment to act against copyright piracy remains under-resourced, and too few agencies consider it a priority, the non-statutory barriers to effective enforcement, as identified in parliamentary reports going back more than a decade, remain basically unchanged.⁴²

Similar problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, and too often dismiss the file or plead the cases out, resulting in weak penalties. Crown Counsel are now declining training offered by rights holders; since police are no longer referring files to the Department of Justice, there are no cases to prosecute. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.⁴³ The weak penalties typically imposed on offenders further discourage prosecutors from bringing cases, creating a vicious cycle that encourages recidivism. And in too many cases, law enforcement action never materializes, even when law enforcement is notified of a sale of a physical product that threatens public safety (such as a Piracy Device that fails to comply with electrical safety standards).

The continued deterioration of Canadian enforcement efforts comes at a singularly inopportune time, just as the nature of the criminal enterprise involved in physical goods piracy is becoming more sophisticated and complex. Instead of low volume production and sales of counterfeit optical discs, the threat, as noted above, increasingly involves widespread sale of Piracy Devices, such as set-top boxes pre-loaded with applications that enable significant infringement. The problem extends to the sale of devices intended to circumvent access controls on video game consoles, as well as counterfeit video game copies whose use is enabled by such circumvention, including through sites on Canadian e-commerce services. But since Canadian law enforcement authorities are almost completely unengaged in criminal enforcement against online piracy of any kind, their inability to deal with the sale of physical goods such as these Piracy Devices is even more discouraging.⁴⁴

Thus, it is more important than ever for the U.S. Government to press Canada to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy, including specialized training regarding Piracy Devices and other products that enable circumvention of TPMs. Since the availability of pirated products (and of Piracy

⁴¹In practice, the impact of the legislation has been minimal. Its central feature, giving border agents *ex officio* power to intercept counterfeit and pirated goods at the border, has been invoked only 72 times in the first two years under the legislation, and in only 59 such cases were rights holders even contacted to assist in interdicting the infringing imports. IIPA is encouraged, however, that Canada has committed in the USMCA to provide *ex officio* authority for its customs authorities, including regarding goods in transit. See USMCA Article 20.84(5).

⁴²For instance, a report from the Industry, Science and Technology Committee in 2007 called for a higher priority for enforcement at the retail level. See http://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391_INDU_Rpt08/391_INDU_Rpt08-e.pdf. A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See <http://www.ourcommons.ca/Content/Committee/391/SECU/Reports/RP2985081/securp10/securp10-e.pdf>.

⁴³This is another long-standing deficiency. The Industry, Science and Technology Committee of the House of Commons opined as long ago as 2007 that “the justice system should be imposing stiffer penalties for such offences within the limits of current legislation,” and recommended that the government “immediately encourage prosecutors” to do so. There is no evidence that this has been done.

⁴⁴As noted in text above, the affirmance of an interlocutory injunction against retailers of “plug-and-play” Piracy Devices strikes a more positive note for enforcement through civil litigation.

Devices or other circumvention tools) will not be reduced without criminal prosecutions against traffickers and the imposition of deterrent sentences, particularly jail time, Crown Counsel must take on and fully prosecute more copyright infringement and TPMs circumvention cases, and should be provided with the training and other support needed. Rights holders remain at the ready to assist and have extended offers to provide such training. Canadian courts should be looked to for more consistent deterrent sentences, including jail time for piracy cases.

MARKET ACCESS

Significant market access issues continue to impede participation by U.S. film and TV producers and distributors in the Canadian market. Ratification and then implementation of the USMCA could have a positive impact on the following issues, as long as Canada does not rely on the exception to its obligations regarding the “cultural industries” under Article 32.6.⁴⁵ These longstanding issues include:

- *Television Content Quotas*—The CRTC imposes quotas that determine both the minimum Canadian programming expenditure (CPE) and the minimum amount of Canadian programming that licensed Canadian television broadcasters must carry (Exhibition Quota). Such quotas are discriminatory and artificially inflate the amount expended on, or the time allocated to, Canadian programming.
 - *CPE Quotas*—Large English-language private broadcaster groups have a standardized CPE obligation equal to 30% of each group’s gross revenues from its conventional services and discretionary services (specialty and pay-TV) combined, but there is some flexibility as to allocation among the services within the group. As their licenses are being renewed, CPE obligations are being assigned to independent signals and to discretionary services that have over 200,000 subscribers. These quotas became effective September 1, 2018 and are based on historical levels of actual expenditure.
 - *Exhibition Quotas*—Private conventional broadcasters must exhibit not less than 50% Canadian programming from 6PM to midnight. The overall 55% exhibition quota was removed in 2017. Private English-language discretionary services (specialty and pay-TV) that are not part of a large private broadcasting group must exhibit not less than 35% Canadian programming overall.
- *Non-Canadian Signal and Service Restrictions*—Canadian broadcasting distribution undertakings (BDUs), such as cable and direct-to-home satellite, must offer more Canadian than non-Canadian services. These protectionist measures inhibit the export of U.S. media and entertainment services.
 - BDUs must offer an all-Canadian basic tier for not more than \$25 per month. This basic tier may include one set of “U.S. 4+1” (ABC, CBS, FOX, NBC and PBS) signals from the same time zone as the BDU’s headend, where available, or, if not available, from another time zone. BDUs may also offer an alternative basic tier that includes the same set of U.S. 4+1 signals. A BDU may only offer a second set of U.S. 4+1 signals to its subscribers if it receives authorization by the CRTC pursuant to a condition of license. Unless otherwise authorized by condition of license, the second set of U.S. 4+1 signals may be offered only to cable or satellite subscribers who also receive at least one signal of each large multi-station Canadian broadcasting group originating from the same time zone as the second set of U.S. signals.
 - Except as permitted by a BDU’s license from the CRTC, all other non-Canadian signals and services may only be carried on a discretionary basis and must be selected from the list of non-Canadian programming services authorized for distribution (the Authorized List) approved by the CRTC and updated periodically. A service will not be added to the Authorized List if a competitive Canadian pay or specialty service (other than a national news service) has been licensed. A service may be removed from the Authorized Lists 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.

⁴⁵IIPA expects that if Canada does resort to this “cultural carve out” to avoid implementing any of its obligations under the agreement, USTR will use the robust retaliation provision under Article 32.6 to ensure that Canada meets its commitments.

- *Broadcasting Investment Limitations*—The Broadcasting Act provides that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay and specialty television) and distribution undertakings (cable 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 subsidiary must be beneficially owned and controlled by Canadians. In addition, the parent corporation or its directors cannot exercise control or influence over programming decisions of its licensee subsidiary where Canadians own and control less than 80% of the voting shares and votes, the CEO of the parent company is non-Canadian, or less than 80% of the directors of the parent corporation are Canadian. In such circumstances, the CRTC requires that an “independent programming committee” must be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on the independent programming committee. No other developed market in the world maintains such discriminatory foreign investment limitations.
- *Simultaneous Substitution for the Super Bowl*—Since Super Bowl LI in 2017, simultaneous substitution is no longer permitted for Canadian broadcasts of the Super Bowl. This is the result of a 2015 CRTC decision, which is currently on an appeal at the SCC. If the CRTC’s decision is upheld, the simultaneous substitution ban will continue to be applied to only one program, with significant prejudicial impact on the ability of the National Football League (NFL) and the existing Canadian licensee to monetize the Super Bowl in Canada. IIPA is pleased that the USMCA includes a provision directly addressing this concern and, importantly, the “cultural carve-out” explicitly does not apply to that provision.⁴⁶
- *Québec Distribution Restrictions*—The Québec Cinema Act severely restricts the ability of film distributors not based in Quebec to do business directly in the province. Since 1986, the Motion Picture Association of America (MPAA) member companies may apply for a Special License for any film produced in English that meets the less-restrictive requirements set out in an Agreement between the MPAA and the Québec Minister of Culture. The Agreement was revisited in 2015 and was extended for seven years.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Canada’s international agreements involving the U.S. that are most relevant to copyright obligations include the TRIPS and the North American Free Trade Agreement (NAFTA).⁴⁷ Canada recently made further commitments regarding copyright in the USMCA, as discussed above, although that agreement has yet to enter into force. As noted above, some aspects of Canada’s current copyright regime may raise significant issues of compliance with these agreements (for example, whether the breadth of some of Canada’s copyright exceptions, as applied, comply with the well-established “three-step test”),⁴⁸ and with Canada’s commitments under the USMCA.

⁴⁶See USMCA Annex 15-D.

⁴⁷IIPA commends Canada’s accession to the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WPPT), which were enabled by bringing the CMA into force.

⁴⁸See TRIPS Article 13.

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2019.

Executive Summary:¹ In 2018, Colombia took necessary steps to update its copyright law and significantly improved copyright protection through its legislative reform. However, these reforms did not introduce enforcement mechanisms for countering online copyright piracy and ineffective enforcement continues to stifle the legitimate online market for creative content in the country. For example, while legitimate music services have been operating in the Colombian market, their growth rate, while high, could have been much higher were it not for the prevalence of pirated material. In the Medellin and Bogota areas, illegal camcords continue to occur in Colombian cinemas and notorious physical markets, street markets, and illegal fairs are still prevalent. Yet, there is no evidence that Colombian law enforcement has put forth a serious effort to prosecute administrators and owners of websites, stream-ripping services, forum sites, and digital and physical marketplaces involved in the distribution of illegal content. Operations should be coordinated by the cybercrime unit on multiple fronts, including a centralized nationwide initiative. Another serious concern is the “Pepe Sanchez” Law, which is an arbitrary and unfair interference with the freedom to contract agreements relating to audiovisual works. With a new government, there is an opportunity to re-establish the necessary enforcement of IPR in Colombia and promote a stronger agenda for law enforcement on IP protection online, including effective remedies for dealing with foreign infringing websites and services, which would enable a safer environment for investors and entrepreneurs.

PRIORITY ACTIONS REQUESTED IN 2019

- Ensure effective enforcement of Colombia's new copyright law and offer effective remedies against copyright infringing websites operated from outside the jurisdiction.
- Organize trainings for the judiciary and the law enforcement agencies to increase their awareness of the online piracy problem and the legal tools at the authorities' disposal.
- Devote law enforcement and specialized prosecutorial resources to combatting online piracy with coordinated operations and actions for a sustainable agenda of IP protection.
- Convene and facilitate public/private round tables with all stakeholders to promote cross industry cooperation to tackle online piracy based on MOUs and industry best practices.
- Increase police enforcement and initiate coordinated actions and investigations of physical notorious markets.

COPYRIGHT PIRACY IN COLOMBIA

Online piracy is a growing problem in Colombia, with Internet penetration over 61% and the number of active smartphones in the country almost on par with the population size; yet, the problem has gone unaddressed by the Colombian Government, despite the existence of legal and investigative resources available to cybercrime police, judges, and prosecutors. Piracy in Colombia comes in many forms, and the audience to infringing websites and online marketplaces for creative content continues on an upward trend, with torrent traffic growing over 12% annually. Online marketplaces are extremely popular in Colombia and a constant focus of e-commerce infringement and fraud. Pirated video games, movies, TV series and paid-TV channels are accessed via Piracy Devices (PDs). Illegal music streaming and music stream-ripping websites and services are popular (the top three most popular sites in the country are driving over 72 million visits yearly). Additionally, direct download sites, peer-to-peer (P2P)

¹For more details on Colombia's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Colombia's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



protocols, and the distribution of illegal links to cyberlockers via social networks, forums, blogs and hosted sites are prevalent. Repeat infringers are also becoming a major question to be addressed, as many physical notorious markets vendors migrated to these online platforms.

While the legitimate digital music market in Colombia is growing, Internet piracy occupies the vast majority of the total digital music market in the country. Stream-ripping of music videos from online platforms like YouTube is increasingly prevalent. One of the most popular stream-ripping websites in the Latin American region, *Bajaryoutube.com* (and its mirror *descargaryoutube.com*), are operated by a Colombian company and counts for more than 190 million visits yearly. The video game industry also reports that digital account resales, both primary and secondary video game accounts, are becoming a growing trend in Colombia. It is estimated that this illegal business model accounts for 50% of all game titles available on local online marketplaces, specifically *Mercado Libre*. They are also available on local infringing websites in the Colombia video game space. The motion picture industry reports that in 2017, the top 180 Spanish-language audiovisual piracy websites received 525 million visits from Colombia. Meanwhile, physical piracy continues to plague the *San Andresitos* flea markets, where vendors sell burned CD-Rs and DVD-Rs on the streets, and distribution hubs supply pirate products for the rest of the country. Individuals also utilize social media to promote and sell infringing copies of movies in Colombia. In 2018, three video camcords and four audio camcords of MPAA member films were traced to Colombian theaters.

The Colombian Government has not acted to protect new legitimate markets and the emerging digital economy from unfair competition by pirate operators. One problem is the absence of a national anti-piracy campaign that recognizes the importance of copyright protection in the context of the country's economy and culture. Moreover, although most of the online notorious markets are hosted and operated outside of Colombia, numerous pirate websites (mostly stream-ripping and MP3 download sites) have ".co" top level domain names and are administered by a company called Neustar INC., operating in Colombia as .CO INTERNET SAS, which is appointed by the Colombian Government via a concession contract with the Ministry of Technology and Information. The Colombian Government should require its top level domain registrars to adopt and apply due diligence policies and cooperate with rights holders in tackling IPR violations by their customers.

COPYRIGHT LAW IN COLOMBIA

Copyright Act Amendment: In early July 2018, Colombia's legislature amended the copyright law that updates Colombia's copyright framework. The law contains some helpful provisions, including: an extension of copyright term to 70 years for sound recordings and corporate rights holders; a making available right; a civil liability rule for circumvention of TPMs; a statutory damages provision for copyright violations and circumvention measures; and authorization to destroy seized infringing goods. However, the law contains anti-circumvention exceptions and copyright limitations that may harm rights holders. Further, while it criminalizes the retransmission or reception of illegally decrypted satellite signals, a profit requirement may complicate enforcement.

Other International Treaties: On June 15, 2017, the Colombian Congress voted to ratify the Beijing Treaty (signed by Colombia in 2012), making Colombia the third country in the region to ratify the instrument after El Salvador and Chile. However, the main treaty obligations are already a part of Colombia law. Back in 2000, Colombia ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Colombia still needs to fully implement the WPPT and WCT.

Arbitrary Interference with Freedom to Contract: In June 2017, the Colombian Congress passed the "Pepe Sanchez" Law (No. 1835-Jun 9-2017). The legislation creates a remuneration right for directors, screenwriters, composers, and other creators involved in the production of audiovisual works for the communication to the public, the making available of the works, and the rent of audiovisual works. The remuneration is collectively managed and applies to all audiovisual productions regardless of any contractual transfer of such rights, including agreements signed before the law came into force. The law amounts to an unfair intervention in the parties' freedom of contract and creates an obstacle to the development of the digital content market in Colombia. This legislation is primarily

problematic for the audiovisual sector where remuneration rights for creative participants in U.S. works are highly regulated and satisfied by contract. Mandatory remuneration rights unnecessarily interfere with negotiated agreements that already generate remuneration to creative participants—including authors, directors, and performers—driven by proceeds from the exploitation of U.S. works in every medium and in every world market. Imposition of a collectively licensed additional royalty chills the market for consumers (by increasing exploitation costs) and results in potential double payments for creative participants in U.S. works. Moreover, this legislation could be also problematic for the music industry insofar as it could be applied to cover music videos as audiovisual works. *Asociación para la Protección de los Derechos Intelectuales sobre Fonogramas y Videogramas Musicales* (APDIF), a Colombian trade association that represents phonogram and music video producers, has been advocating for an amendment that would confirm the carve out for music videos from the scope of this law. The law also includes a new exception for public performance of audiovisual works that allows businesses to use audiovisual works on their premises for the entertainment of their employees. APDIF has also been fighting for withdrawal of this exception on the basis of non-compliance with the three-step test.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Due to the lack of coordinated actions to tackle online and physical piracy and to enforce the existing legal protections for copyright, enforcement actions in Colombia have become more difficult and local consumers find few hurdles in purchasing or locating illegal content. The cybercrime unit of the Colombian police, the Directorate of Criminal Investigations and Interpol (DIJIN), and the Cyber Police Center (CAIVirtual) report a 28% increase in the volume of online frauds last year (a total of 6,372 cases) and indicate that 55% of all online crimes reported to the police by citizens are related to problems with e-commerce. Sixty percent of those (3,846 cases) are directly related to problems with online shopping. The cyber police have a strong framework and have applied effective strategies against cybercrime in the country, however, similar efforts are needed in the copyright infringement area. Moreover, law enforcement agencies, including the DIJIN and CAIVirtual units, provide rights holders with access to important tools to enforce copyright protection and to fight online piracy and have initiated a promising exchange of information to analyze some high profile cases. Still, the problem remains.

Poor enforcement may be a result of Colombia's lack of a national anti-piracy campaign to address piracy and the belief that online piracy is either not a problem or is one that only affects foreign interests. The Attorney General's Office established the National Unit Specialized in Prosecuting Crimes against Intellectual Property Rights and Telecommunications, responsible for investigating and prosecuting Internet piracy and crimes against intellectual property rights. However, coordination among police officers, prosecutors, and judges to combat online piracy needs to significantly improve, and increased resources should be dedicated to the National Police and prosecutors. This National Unit is not prosecuting any music piracy cases. The sole creation of the National Unit will not make any difference on the piracy problem unless resources and proper training are present. The Copyright Office ("Dirección Nacional del Derecho de Autor" (DNDA)) should play a coordination role on the education and training activities for governmental offices in Colombia. However, the DNDA is not playing any role in that regard.

Further, the Attorney General's specialized unit for IP crimes should increase its focus on a broader range of anti-piracy cases. Unfortunately, the DNDA, the department that is most competent in copyright-related issues, is not legally empowered to conduct enforcement actions. The DNDA operates under the jurisdiction of the Ministry of the Interior, which makes its role in the government less relevant. Many proposals to move the DNDA's functions under the jurisdiction of the Ministry of Commerce, Industry, and Tourism (as is the case in other countries in the region) have failed, mainly because of the lack of political will to prioritize the copyright sector. The "orange economy" (or creative economy) initiative that the new government is instituting as a major public policy may be a powerful hook to engage authorities to more actively protect IP and the digital economy in Colombia.

ISP Cooperation: While many ISPs in Colombia are willing to cooperate with rights holders to combat online piracy, such cooperation is limited due to flaws in the underlying law and a lack of an MOU in place. The government should hold public/private round tables with all stakeholders to promote cross industry cooperation to

tackle online piracy based on industry best practices and effectuate an MOU. Another possible negative influence on ISPs is the former Colombian president's failure to sign the national anti-piracy agreement, which effectively downgraded the weight attached to anti-piracy enforcement by civil servants and the public. Hopefully the new president will sign this agreement and shift the perception on the importance of an anti-piracy campaign. Colombia must follow through with legal reform to incentivize and compel cooperation by all intermediaries to effectively combat and end online piracy. To do so, it must modernize copyright enforcement avenues to provide for a legal basis that requires ISPs to take action against copyright-infringing websites.

MARKET ACCESS

Actors Bill: In 2016 and 2017, an Actors Bill was proposed in Colombia's Congress. If passed, the Bill would have the effect of increasing production costs for film and television made in Colombia by imposing (i) excessive burdens on producers of audiovisual works in terms of costs and production schedules; (ii) limitations on talent engagement; and (iii) a set of compensations and encumbrances that curtail the legitimate ability to commercially exploit audiovisual works. In sum, this Bill would significantly raise costs for producers, render local production unviable, and make Colombia less competitive as a location for audiovisual production. The Bill was reintroduced in March 2018 and passed in the House on April 19, 2018. The Bill is still pending approval in the Senate, and due to its local popularity, is likely to move forward in 2019.

Implementation of VAT on Digital Services: Colombia Law 1819 applied the 19% VAT to digital services. The law was supposed to take effect in July 2018, but the tax authority published the implementation resolution (Resolution 51) on October 19, 2018. The Law is, however, retroactive to July 1, 2018.

ECUADOR

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR retain Ecuador on the Watch List in 2019.¹

Executive Summary: Over the last five years, Ecuador has completed a major revision of its intellectual property law, including copyright law, and unlike anywhere else in Latin America, took the political decision to weaken the protection of IP rights holders across the board. Critical developments in Ecuador's intellectual property regime, the Code of the Social Economy of Knowledge, Creativity, and Innovation (COESCI), call for acute attention to ensure Ecuador improves or at least restores legal protection for copyright holders, which has been reduced compared to prior years. In 2016, the U.S. Government noted strong outstanding concerns with respect to Ecuador's then-draft COESCI. Despite clear messages from governments and rights holders, the law has been adopted, and it contains expansive exceptions and limitations to Intellectual Property Rights (IPR), which will significantly weaken copyright protection in Ecuador. Many of these exceptions exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement. Some will require a close examination to see if there is basis for potential challenges in the near future. With the passage of the new COESCI law, there are now 30 exceptions and limitations on rights (up from 11 in the prior law), including a 5-factor "fair use" clause, which is an unwelcome first for a Latin American country and is broader than the fair use provision found in U.S. law. Indeed, the entire COESCI states that public domain is the norm and IP rights, including copyright, are the exception. The Ecuadorian legal system, unlike the United States, is a civil law system and does not follow judicial precedent. Additionally, judges have no experience or training on the doctrine of fair use. This constitutes a fatal flaw for the operation of a fair use doctrine and will likely further undermine copyright protection and the predictability of the legal environment in Ecuador.

COESCI includes several other provisions that will weaken copyright protection. For example, the recording industry is particularly concerned with expansive exceptions to the scope of the exclusive public performance and broadcasting rights attached to sound recordings (introduced through presidential amendment after the National Assembly's vote). The amendments exempt the following acts from authorization or remuneration requirements: (i) the communication to the public (including public performance) of sound recordings by "micro" and "small" enterprises (i.e., medium to small businesses, which account for about 95% of all the businesses in the country); (ii) the communication to the public (including public performance) of sound recordings in public transport vehicles; (iii) broadcasting and communication to the public, including online, by "community radios" (that account for 30% of the total number of stations nationwide); and (iv) reproduction and lending certain works by libraries; and (v) linking, reproduction, and storage by search engines where such actions are necessary for its operation and where no "protected content" is violated. These changes, combined with the general weakening of the level of copyright protection since the COESCI, could significantly damage the market for music licensing royalties and further reduce legal certainty for rights holders. After an outcry from the music community in Ecuador, the government made promises to correct or minimize the impact of those exceptions through implementing regulations to the COESCI. Those regulations were expected to be circulated by the end of 2017, but have yet to materialize. Other troubling provisions would interfere with the ability to contract and freely transfer rights, complicating transactions in the creative industries. Moreover, Articles 129-130, which normalize circumvention of technical protection measures wherever users assert the right to benefit from any of the exceptions under the COESCI, including the open-ended exception, are fatally flawed. The Government of Ecuador should take action to amend the COESCI and reverse its many deficiencies and shortcomings to comply with its international obligations. In particular, rights holders' organizations are expecting an initiative from the government to amend COESCI's biggest deficiencies.

¹For more details on Ecuador's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Ecuador's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



The Ecuadorian Government should also direct considerable attention to its enforcement efforts to combat piracy and maintain a legitimate creative marketplace. Although improving slightly, camcording remains an issue, with Ecuador ranking third in the region for camcording, behind Mexico and Peru. Additionally, the largest state-owned cable network in Ecuador, CNT, refuses to pay performance rights royalties to music rights holders. For content creators to have a fair shot at success in Ecuador's market, Ecuador must make large strides in strengthening its copyright protection and enable rights holders to exercise that protection in practice. Finally, SENADI (the national authority in charge of intellectual property matters) should take clear steps in order to put the Ecuadorian government in compliance with national copyright legislation setting the right example for the country.

PRIORITY ACTIONS REQUESTED IN 2019

- Encourage the government to urgently issue implementing decrees to reduce the exceptions and limitations in the COESCI, and, in the longer term, modify primary legislation to reverse this rollback of protection.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theatres, without requiring proof of commercial intent.
- Ensure that state broadcasters and cable operators are not above the law and pay royalties for the music and sound recordings that they use.

COPYRIGHT LAW IN ECUADOR

Domestic Laws: In December 2016, Ecuador adopted a new IP law known as the COESCI. The exceptions and limitations to copyright in the COESCI, enumerated in Article 211 ("Fair Use") and Article 212 ("Acts that do not require authorization for use"), are extremely overbroad and risk undermining important protections for rights holders. They also raise serious questions regarding consistency with the three-step test governing exceptions and limitations under Article 9(2) of the Berne Convention and Article 13 of TRIPS and in the WIPO Internet Treaties. The COESCI fair use provision appears to be modeled after Section 107 of the U.S. Copyright Act; however, it is broader than the U.S. provision as it includes reference to five factors—the fifth being "use and enjoyment of other fundamental rights." Simply extracting the U.S. fair use law and implanting that statutory provision (plus an additional criterion) in Ecuador is extremely problematic and risky because U.S. fair use is based on many decades of case law and precedent, which guides the application of Section 107. Ecuador is a civil law country and does not follow the legal principle of stare decisis nor is it bound by judicial precedent in the same way as common law countries. This makes enactment of the fair use provision even more problematic. Moreover, to the extent that precedent is relevant to Ecuador's application of fair use, Ecuador does not have, to our knowledge, any body of case law on fair use to ensure implementation of this provision is compliant with the three-step test. The provision dictates that it is to be applied in line with International Treaties to which Ecuador is a party to, but in light of the issues discussed above, this will almost certainly not be the case. Further, the problems and risks associated with Ecuador's fair use provision are exacerbated by consideration of an additional element not found in Section 107 of the U.S. Copyright Act: "The enjoyment and effective exercise of other fundamental rights." This extra element complicates the application of Ecuador's fair use provision and likely expands it beyond the scope of U.S. law. On the positive side, the fair use provision is explicitly made subject to the three-step test, although given the open-ended and anything but certain scope of the provision, it is difficult to see how it could be rendered compatible with the test.

In addition to the fair use exception under Article 212, the new Ecuadorian copyright law contains a vast and extensive list of exceptions and limitations to copyright protection. This list is one of the most troubling areas of the COESCI. The President of Ecuador, using his presidential veto powers, increased Congress's previous broad and far-reaching catalogue of exceptions and limitations at the last minute. Notably, the added exceptions were included for the benefit of about 95% of all businesses performing music in their stores, about 30% of all radio stations ("community radios") competing in the broadcasting market, and for transport companies with respect to the public performance of sound recordings on public transport. In turn, they act to the detriment of rights holders.

Pursuant to Articles 211 and 212, each provision is meant to be enforced without prejudice to the other. This means that beyond fair use, the law is granting 30 additional ways to limit copyright protection regardless of whether the use would be considered fair. The 30 additional exceptions are overbroad and cover uses that clearly fall outside the scope of the three-step test. Among others, the following exceptions call for specific concern and attention:

Exception 9² is one of the more troubling exceptions due to its breadth and far-reaching application. This exception allows libraries and archives to freely reproduce a copyrighted work for three purposes (including to deliver to another library or archive who also has the authority to make another copy of the work once received) and lists an additional eight actions that the library or archive can perform. Those actions include reproducing fragments of works at the request of the library or archive for personal use and creating translations of works, both of which, if the scope is not narrowed, can harm the legitimate market of publishers and copyright owners. Similarly, exception 10³, which allows for public lending of an audiovisual work by a video library, cuts into various potential markets for audiovisual rights holders. Permission to reproduce and lend copyrighted works in such broad terms does not align with the internationally accepted standards for exceptions and limitations.

Exception 24⁴ creates a troubling exception that operates like a statutory license in favor of an ISP to use any protected content, provided that there is no “violation” of the protected content. This exception represents an example of damagingly-vague drafting given that any “use” of copyrighted content in ways restricted by copyright, by definition, amounts to a “violation” of copyright (unless authorized by rights holders). The exception provides search engines with broad freedom to exploit copyrighted works in ways that will prejudice the rights of copyright holders and harm the legitimate online markets for copyrighted works. This is notwithstanding the attempt at narrowing language in the exception, which is circular and lacks clarity as drafted, allowing ISPs to operate with total impunity in practice. For instance, it is unclear the line at which there is a “violation of protected content,” where a search engine claims that the unauthorized reproduction of protected content (otherwise a violation) is necessary for operation.

Exception 26⁵ plainly fails to comply with the three-step test. The exception conflicts with the normal licensing of sound recordings in various venues open to the public and fundamentally undermines rights holders’ legitimate economic interests in 95% of the Ecuadorian market. Given the high number of enterprises falling within the scope of the microenterprise or small enterprise concept, it is inevitable that the exception would not be limited to “certain special cases” and would cause material harm to the economic interests of the rights holders. It is also inconsistent with Ecuador’s current international obligations under the WPPT. This is one of the most damaging exemptions introduced by COESCI and for that reason, a clarification has been sought in the context of the implementation decree, which has been in preparation by the government for more than two years, with no final result in sight.

Exception 27⁶ would remove music rights holders’ ability to license to transport companies for the public performance of their works and recordings. This is especially the case with coaches and “*busetas*,” which are popular forms of transportation in the region and a potential market for music rights holders. Public transport is a non-negligible sub-sector of the Ecuadorian economy and constitutes an important market for music licensing. Thus, excepting or carving out this entire market category from the scope of legal protection for music copyright holders would violate the three-step test because the exception would not be “limited” and would clearly conflict with the normal exploitation of rights. As such, it would negatively impact the legitimate interests of music rights holders and further weaken compliance with international treaty obligations.

²Under this exception, the individual reproduction of a work made by a library, archive, or museum is allowed so long as it fits within the long and far-reaching list of acts that a library or archive may perform.

³This exception allows individual public lending of an audiovisual work by video library or other collection of audiovisual works, when the corresponding copy is in the repertoire of the video library or collection.

⁴This exception permits search engines to link, reproduce, and store copyrighted works as necessary for their operation, “provided that no violation of protected content is involved.”

⁵This exception permits communication to the public of sound recordings by microenterprises or small enterprises provided that a single, home-style device is used and that the use by enterprises in question is not for the purpose of affecting the ambience of the premises.

⁶This exception permits communication to the public in public transport vehicles that are not intended for tourism or entertainment use.

Lastly, exception 30⁷ is incompatible with the three-step test, meaning it also conflicts with Ecuador's obligations pursuant to Article 13 of the TRIPS Agreement. The radios covered by this exception account for about 30% of the radio broadcasts in the country. Therefore, the exception would not be limited or negligible in terms of its impact on the normal licensing and economic interests of rights holders. It is worth noting that the community radios identified in this exception operate as commercial businesses, sell advertising, and compete with other broadcasters. Thus, the introduction of this unwarranted exception based on the not-for-profit status of community radio is prejudicial not only to the music sector as content producers, but also to the competitive position of the various broadcasters and other licensors. Moreover, the exemption allows for "public communication," which is very broad and can encompass any means by which works are made accessible to the public, including through digital mediums.

In addition to the foregoing exceptions to protection that cause concern, there are additional provisions that the IIPA seeks to highlight. A number of provisions provide for various rights and 'default' contractual clauses that would govern contracts within the creative sectors unless expressly excluded and sometimes even despite such an exclusion. Such provisions would frustrate the freedom of contract in the creative industries, significantly increase legal uncertainty, and only serve to complicate rights transfers.

The COESCI replaced the Intellectual Property Code of Ecuador, which was very comprehensive. The COESCI, on the other hand, is a poorly drafted text, full of political statements on public policies. These characteristics contribute to the difficulty in interpreting many of its legal provisions. Some rights holder groups in Ecuador have already called for amendments to the COESCI. Since the Ecuadorian music community pointed out fundamental legal and economic problems with the new law and urged the government to reconsider the fair use and exceptions and limitations provisions, there is an expectation that those problems might be corrected or minimized through implementing regulations. The government was supposed to circulate implementing regulations by the end of 2017, but nothing has been released yet.

International Treaties: In December 2016, the Ecuadorian National Assembly approved a report that ratified the country's accession to a trade agreement with the European Union (EU), Peru, and Colombia, which went into force January 1, 2017. The trade agreement's copyright provision requires compliance with the Berne Convention, the Rome Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty (WPPT). It also provides for a minimum level of protection with respect to broadcasting and public performance rights in sound recordings that goes above and beyond the protection in the WPPT. Rights holders in the copyright sector have already pointed out the incompatibility of the various exceptions and limitations introduced in COESCI with the obligations and minimum standards of protection under these international copyright conventions and the FTA with the EU.

COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN ECUADOR

Despite the attempts to advance copyright legislation in the country, enforcement of IPR in Ecuador remains very weak. Rights holders struggle to enforce their copyright in practice, and attempts to do so through administrative authorities often linger for procedural reasons. A lack of deterrent sentencing and *ex officio* actions continues to hamper effective enforcement and protection against infringing acts.

Online Piracy: Popularity of stream-ripping sites and BitTorrent continued to grow during the last year. Most of the sites and tools used by Internet users in Ecuador are foreign infringing music sources, including stream-ripping sites known globally. At the same time, regional Latin Mp3 download sites are popular among local users. For example, *uTorrent* and *2CONV/FLVTO* have recorded an average growth rate of 20% monthly, with *uTorrent* having

⁷This exception allows public communication, transmission and retransmission provided by a body of community broadcasting, as long as it conforms to the provisions of the relevant legislation. The relevant legislation is the telecommunications law that provides technical requirements for a station to obtain an operating license. It also states that "community radios" are not-for-profit entities. However, in recent years, community radios have started engaging in commercial activities by selling ads just like other commercial broadcasters do.

a monthly rate of over 90% in 2018. During this period there were no operations against infringing websites or platforms by law enforcement agencies in Ecuador. It is alarming that there is no official plan available in the National Police formal agenda for such actions. At the same time, SENADI has the opportunity and power to use the administrative tools available to protect the local innovation ecosystem to promote IP protection and assist development of local culture. Ecuador is the only country in the region where serious piracy is treated as a misdemeanor with fines instead of prison terms. The situation is incompatible with Ecuador's obligations under the TRIPS Agreement and is a result of another unfortunate legal reform passed during the Correa administration. Ecuadorian authors, artists, and producers today are exposed to almost zero enforcement of their rights against piracy, and there is an alarming lack of resources devoted to studying and combatting the copyright piracy problem by the government. SENADI should pay more attention to the problem that is harming the chances of growth for a still incipient digital music market. The number of licensed digital music services in Ecuador (eight), lags behind similar markets in the region (Peru, Columbia, Chile, and Uruguay respectively have 12, 12, 13, and 11 licensed digital music services), and music sales are considerably lower, as well. In sum, online music piracy requires governmental attention, coordination with private sector representatives, and devotion of resources. It should be one of the most important topics in the SENADI's agenda in order to create conditions for a flourishing and prosperous e-commerce market.

Camcording: Camcording is a problem in Ecuadorian movie theatres. In 2018, the MPAA reported eight camcords sourced from Ecuador (down from 11 in 2017); also, eight audio-only camcords sourced from Ecuador (down from 11 in 2017). While this represents a slight decrease from the same period in 2017, Ecuador still ranks third in the region after Mexico and Peru for camcording.

Performance Royalties: Further, the recording industry reports that it is often impossible to collect performance royalties for music and sound recordings, including from state-owned broadcasters like CNT. The Government of Ecuador should set a good example and promote the fair payment of required license fees, which would support the development of Ecuador's creative industries. Two bad cases are clear examples of the situation. First, phonogram producers and members of the music licensing company (CMO) Soprofon filed numerous administrative actions before SENADI's predecessor against DirecTV based on the unauthorized communication to the public of vast music catalogs. DirecTV lost in all cases and was fined three years ago for more than half million dollars. However, an appeal to all decisions is still pending and DirecTV continues operating with no license or payment to producers and artists. SENADI is responsible for resolving the appeal. Second, Soprofon submitted a claim against state-owned CNT, the biggest cable operator in the country, for its refusal to get a performance rights license from every right holder group or organization in Ecuador. CNT is setting a bad example, thereby causing tremendous damage to the efforts developed by rights holders in Ecuador to license in the cable/satellite mark. The case was submitted to SENADI, which is pending to deliver a technical opinion on the matter to CNT.

INDONESIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Indonesia be lowered to the Watch List in 2019, in recognition of improvements made in the areas of market access and Internet enforcement. IIPA further recommends that the U.S. Government terminate the Generalized System of Preferences (GSP) investigation into Indonesia's intellectual property system once it is satisfied that adequate progress has been made on the concerns outlined in this report.¹

Executive Summary: With over 250 million people—the fourth most populous country in the world and one that is hungry for content—Indonesia is an up-and-coming Asia-Pacific market for the creative industries. For the motion picture and television industry, Indonesia ranks within the top 20 markets in terms of box office revenues. The government has instituted a number of positive changes to its copyright law, enforcement system, and investment framework, but much remains to be done. The country continues to grapple with high piracy rates and maintains some harmful market access barriers, which the government should address in the coming year.

Since 2017, when the Government of Indonesia agreed to an IPR work plan as part of the U.S. Trade and Investment Framework Agreement (TIFA), a number of steps have been taken to improve Indonesia's IPR protection and market access policies for some content industries, though not for others. The TIFA anti-piracy working group, including, among others, the Motion Picture Association, APROFI (Indonesia Producers Association), ASIRI (Indonesian Recording Industry Association), and PPPI (Indonesian Advertisers Group) together with BEKRAF (Creative Economy Agency), launched an Infringing Website List (IWL) program designed to encourage advertisers and marketers not to support pirate websites with advertising revenue. In addition, under the revised Copyright Act, and Regulations Nos. 14 and 26 of 2015, the Indonesian Government has issued numerous administrative orders to block over 480 copyright-infringing websites and those that primarily facilitate infringement. Although these Regulations are a good start, they should be clarified with a provision to address “domain hopping”—a common tactic pirates use to evade government-ordered site-blocking. In the meantime, Indonesia's piracy problem remains serious, despite the government's best efforts.

To support its battle against online piracy, IIPA recommends that the Government of Indonesia update aspects of its IPR legal framework as well. The key priorities would include (1) addressing illegal camcording and live streaming by clearly outlawing these activities, followed by a government commitment to implement measures and reduce instances of the same; and (2) revisiting a number of unaddressed provisions in the 2014 Copyright Law that create legal and commercial uncertainty, including amendments to reconcile provisions on the full transfer of rights with the provision on reversion of rights, amendments to provisions that create an overbroad exception to the making available right, and setting forth clear principles of secondary copyright liability. The government should also take the opportunity to extend the copyright term to the life of the author plus 70 years, or 70 years for sound recordings, in line with international best practices.

Indonesia's status as a fair market for the creative industries remains an open question. In 2016, the government took the very positive step of allowing 100% direct foreign investment in film and sound recording production, as well as film distribution and exhibition. IIPA notes, however, that the broadcasting and radio sectors remain closed and the government is reportedly drafting regulations on the over-the-top (OTT) sector. The 2009 Film Law remains a blight on the horizon, causing significant uncertainty for all rights holders and the local exhibitors. That law, if implemented, could impose a harmful prohibition on dubbing of imported films for theatrical distribution, exhibition,

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and broadcast on television; the imposition of a 60% screen quota for Indonesian films; and other restrictions on the film industry. It is in the government's interest to avoid creating new barriers that could undermine Indonesia's plan to attract foreign direct investment in the film sector. For the music industry, the mandatory multi-layered collective licensing system remains a problem, especially when the government-appointed national CMO (LMKN) determines tariffs and distribution matters without adequate rights holders' representation and are allowed to take as much as 10% of the collections from rights holders as "operational costs." Finally, the country has still not joined the WTO Information Technology Agreement (ITA) Expansion Agreement to establish best practices on digital customs issues.

PRIORITY ACTIONS REQUESTED IN 2019

Enforcement:

- Continue *ex officio* enforcement of the Copyright Law and Regulations Nos. 14 and 26 of 2015, including blocking of additional primarily infringing websites, across all content sectors.
- Combat illegal camcording and live streaming piracy by enacting regulations or guidelines confirming these activities' illegality, followed by implementation of a government program to enforce the laws strictly to reduce such instances.
- Ensure the IWL is operating properly to reduce or choke off advertising revenues to infringing websites.
- Monitor the marketplace to ensure that piracy devices and apps (including set-top boxes) are not used for piracy, and if they are, strictly enforce against such activities.

Legislation:

- Amend or clarify Regulations Nos. 14 and 26 of 2015 on site blocking to prevent "domain hopping" by providing that additional domains, URLs, or IP addresses that resolve to "materially the same website" as one already approved for blocking can be added to the blocking list quickly and easily.
- Eliminate Articles 18 and 30 of the Copyright Law, which provide that the rights in music and performances transferred by sale revert back to the author or performer after 25 years.
- Repeal the broad copyright exception related to Internet uses (Copyright Law Article 43(d)).
- Eliminate provisions from the Film Law that serve as barriers to market access and may damage local exhibitors, such as local screen quotas and the prohibition on dubbing imported films.
- Provide clear guidelines explaining that live streaming and camcording in cinemas is illegal and violate exclusive rights.
- Narrow the scope of applicability of Circular Letter No. 5 (2016), and revise the Circular Letter to clarify takedown requirements, establish punishments and sanctions for failure to comply with regulations, and set forth safe harbor provisions for platforms, if any.
- Extend the copyright protection term to the life of the author plus 70 years (and for corporate works or related rights, to at least 70 years) to be in line with international best practices and to avoid local creators and artists' being discriminated against.
- Ensure that any new OTT regulations comport with Indonesia's treaty commitments and international best practices that protect copyright and related rights, do not interfere with the exercise of these rights, and promote competition through light-touch regulation on commercial and content review matters.
- Improve the collecting society regulations by ensuring that the management of the National CMO (LMKN) is well represented by music rights holders, and in the long run, eliminate the LMKN, which is an unnecessary extra layer to the CMO system.

THE NATURE OF PIRACY IN INDONESIA

Indonesian creators are suffering losses from high levels of piracy in the country, in a market that is just as difficult for U.S. book, motion picture and television, music and video game creators. While the Indonesian Government has made efforts to fight online piracy, for example, through implementing administrative site blocking orders, all actions taken by the government are based on applications by or information from the industry. Popular sites engage in domain hopping, *i.e.*, even after several administrative site blocking actions brought by the industries and implemented by the government, the sites remain available through alternative domains. This issue of domain hopping should be addressed by the government by swiftly issuing orders related to the “hopped” domains.

Illegal live streaming in the cinemas through social media apps, including the live streaming of the blockbuster *Jurassic World: Fallen Kingdom*, and instances of unauthorized camcording of major releases have also been reported in 2018. The government should issue clear guidelines and regulations on, and should take the initiative to reduce instances of, illegal camcording and live streaming piracy as a priority. Indonesia must also improve its efforts to address other forms of piracy, which continue to negatively impact its marketplace for creative content. For example, Piracy Devices (PDs) and apps have emerged as a significant means through which pirated motion picture and television content is accessed. In addition, although Indonesia’s market for publications shows great promise for growth, piracy of published materials makes it one of the worst markets in Asia for publishers. Signal theft and pay-TV piracy remains a problem throughout the Indonesian archipelago, as does retail piracy.

Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law: The Indonesian government should be commended for its recent actions to address Internet piracy. These improvements will benefit all creators, Indonesian and foreign alike.

Broadband Internet access in Indonesia is low compared to other emerging (and less geographically dispersed) markets, but the Indonesian market has leapt to the mobile Internet stage and mobile penetration has exceeded 100% for several years.² The legitimate commercial market for online dissemination of copyright works is gaining a foothold: iTunes, Spotify, JOOX, Netflix, iFlix, CatchPlay, Vue, Genflix, HOOQ and several other international streaming services operate in Indonesia. However, infringing cyberlocker, video linking and streaming sites, and direct download sites with pirated content continue to harm the market in Indonesia, inhibiting legal distribution channels from reaching their full potential.

Following implementation of Regulations Nos. 14 and 26 of 2015, and working with the motion picture and music industries (including local associations, APROFI, and ASIRI), the government has taken effective action by disabling access to over 480 primarily infringing websites between 2015 and 2018. These actions have resulted in significant reductions in visits to the blocked audiovisual and music piracy sites. Notably, traffic to the most popular music piracy websites, *Planetlaga* and *Laguaz*, dropped substantially in 2018. *Laguaz.net*, the second most visited piracy music service in Indonesia, ended its service in November 2018. On the other hand, these drops in traffic are intermittent as well-known piracy sites employ a strategy of domain hopping—redirecting domains to circumvent the results of site-blocking efforts. For example, *Planetlaga* constantly changes its domains, although its monthly visits are now only a small fraction (around 2 million monthly visits) as compared to the peak in 2017 (around 36 million monthly visits). Infringing music apps have also become a problem. For example, two app developers, *xyzmedia* and *9media*, created hundreds of mobile apps available on the Android market and offer infringing music streaming services to mobile users. In addition, the motion picture and television industry reports that two of the most popular infringing sites, *indoxxi* and *lk21*, are the most significant threats due to their popularity and domain hopping. The government can easily add additional domains to those blocked and should streamline the process for rights holders in the case of

² International Telecommunications Union, *Measuring the Information Society Report (2018)*, available at <https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2018/MISR-2018-Vol-1-E.pdf>.

domain hopping. Accordingly, notwithstanding the government's positive actions, more progress is necessary to ensure adequate and effective intellectual property rights protection and enforcement.

Music Piracy: Stream-ripping is now the most popular method to obtain unlicensed music content online in Indonesia. Many new infringing websites provide stream-ripping function for users to download music files. For example, *clip2mp3.org* started its service in October 2018 and has already gained almost 10 million monthly visits in December 2018. Some stream-ripping services have been blocked by administrative orders, but soon are revived due to domain hopping. The government must improve the law to address domain hopping without the need for filing new applications.

Book Piracy: Continued piracy of published materials in the country makes Indonesia one of the worst markets in Asia for publishers. Unauthorized photocopying of academic textbooks remains a significant concern for publishers. While industry efforts to disrupt unauthorized photocopying at dozens of copy shops situated near universities in Jakarta and Yogyakarta were successful, sustained unauthorized photocopying activities unfortunately continue. The Government of Indonesia should encourage university administrators to adopt appropriate use and copyright policies in order to better promote the use of legitimate published materials in schools and universities.

Unauthorized Camcording and Live Broadcasting of Movies: In recent years, camcording piracy has evolved to take advantage of mobile phones. In 2016, Indonesia ranked 13th in the world in terms of mobile revenue.³ In 2018, there was a rise in piracy in the form of live streaming (broadcasting) of films directly from cinemas, using mobile social media apps, such as Facebook Live, Instagram and BIGO Live. As noted above, the motion picture and television industry reports that in 2018, a one-hour live stream through Facebook Live of the blockbuster *Jurassic World: Fallen Kingdom* was detected at Cinemaxx Lippo Plaza Manado City. A forensic report also found an illegal camcording incident involving *Slender Man* from one of the XXI cinemas (Beachwalk XXI) in Denpasar, Bali. Illegal camcording and live streaming piracy remain big concerns, and the government should issue clear guidelines and regulations on, and should take the initiative to reduce instances of, illegal camcording and live streaming piracy as a priority.

Piracy Devices and Apps: Piracy Devices (PDs) include media boxes, set-top boxes, or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed, often on smart TVs in homes. The devices are sometimes advertised as enabling infringement of copyright or other illegal activities. Chief among these activities is enabling users to access unauthorized motion pictures or television programming, often through apps to remote online sources, and which may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale as an "after sale" service, or by the users themselves. PDs and apps are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The film industry reports that stores located in the *Ratu Plaza*, *Glodok Plaza*, and *Plaza Pinangasia* are selling PDs, which are also offered for sale on e-commerce sites promoting them and their related add-ons or apps such as *Bukalapak.com*, *Lazada.co.id*, *OLX.co.id*, *Q0010.co.id* and *Tokopedia.com*. The Indonesian Government must take steps to crack down on piracy apps and on device manufacturers or resellers who preload the devices with apps that facilitate infringement. Moreover, the government should take action against key distribution points for devices that are being used illegally.

Signal Theft: Signal theft and pay-TV piracy remains a problem throughout the Indonesian archipelago. Local industry reports that illegal television channels host up to 100 pirated films at a time. Pirate cable operators in the provinces routinely rebroadcast channels without authorization. It is critically important, with the oncoming convergence of online networks and advances in digital technology, that the government take an active role in supporting legitimate pay-TV services and take actions against those engaged in the unauthorized trafficking, dissemination, decryption, or receipt of pay-TV (or related devices/technologies).

³<https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2018/MISR-2018-Vol-1-E.pdf>, p. 69.

Hard Copy Piracy: Some industries report that retail piracy in markets, kiosks, and malls remains a problem in the major cities across Indonesia. While the U.S. copyright industries have shifted their priorities to improving the health of Indonesia's online marketplace, unauthorized Optical Discs, CDs, and DVDs continue to pervade the physical market for music, movies (including pirate movies in, or claiming to be in, Blu-ray format), and video games. Retail pirates also offer to load illegal copyrighted files onto various mobile devices or carriers.

ENFORCEMENT UPDATES

While the online enforcement environment in Indonesia continued to improve in 2018, with continued enforcement of the new copyright law implementing regulations, other enforcement areas remain challenging. There are few enforcement raids, fewer prosecutions, and the legal system continues to be challenging for rights holders, generally. The government should continue additional enforcement rounds in 2019 to allow legitimate online distributors the opportunity to increase their market share. Moreover, the website-blocking regulations should be revised to streamline applications to prevent domain hopping.

Site-blocking (Joint Regulation of the Ministry of Law and Human Rights and the Ministry of Communications and Information Technology (Kominfo)): Implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015, which address infringing websites, continued to be successful in 2018. Industry groups report piracy sites electronically and in writing to Kominfo for review by a verification team formed by the Director General of Intellectual Property. The verification team then makes recommendations to the Director General of Informatics Applications for the partial or full shutdown of infringing content. In all, access has been disabled to more than 400 infringing websites (and many more domains) reported by industry groups through December 2018. So far there has been excellent compliance by the largest ISPs. For the record industry, all 133 websites submitted for website blocking from 2015 to 2017 are inaccessible in Indonesia. Unfortunately, while the Indonesian Government is quite willing to issue administrative site blocking orders based on industry information about infringing sites, the government does not accept website blocking applications against infringing cyberlockers. Such a policy should be reviewed so that those sites which are blatantly infringing or facilitating infringement of IP rights and not merely passive hosting platforms, are also blocked.

IIPA recommends that the government prioritize IP-related cases in issuing site-blocking orders, and improve the regulations to allow for "dynamic injunctions" to address the practice of domain hopping by providing that additional domains, URLs, or IP addresses that resolve to "materially the same website" as one already blocked can be added to the blocking order quickly and easily.

Public-private Anti-piracy Taskforce, Collaboration with the National Police: In September 2015, the National IP Task Force of BEKRAF, a group of officials from the agency, and several film and music associations, including APROFI, ASIRI, and the Indonesian Association of Artists, Singers, Composers and Recording Businessmen (PAPPRI), announced plans to collaborate with the National Police's detective division on anti-piracy actions. The international motion picture and television industry association has actively participated in BEKRAF's anti-piracy task force. In May 2018, the motion picture and television industry sponsored a very well attended educational event highlighting the impact of piracy in the local film industry and the effectiveness of site blocking in reducing piracy traffic, which included discussions by government officials, BEKRAF, academics, producers, and exhibitors. IIPA encourages the task force to address book publishers' issues, as they are equally damaged by piracy that, to date, has not been addressed.

Infringing Website List (IWL): In October 2017, APROFI, ASIRI, and PPPI Jakarta (Advertisers Association), supported by BEKRAF, launched an IWL program. The IWL identifies key piracy websites for the purpose of informing advertising brokers and networks, and the brands that are advertised on them, of the illegal nature of these websites, and encouraging them not to place advertisements on such sites. While piracy websites will take money from any source to make a profit, starving them of such easy money can be an extremely effective tool in addressing online piracy.

Comprehensive Enforcement Reform: The National IP Task Force has taken the first steps toward the kind of multi-faceted enforcement reform process needed to make significant progress against piracy in Indonesia. Under the direction of the Task Force, and with the oversight of the Anti-Corruption Commission, the following steps should be undertaken:

- First, a separate police team for IPR crimes should be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels.
- Second, the IP Office's civil service investigators (PPNS) team budget should be expanded in order to increase the number of copyright piracy raids each year.
- Third, Ditreskrimsus and "Type A" Police Commands should announce a plan for sustained IPR police investigations with deterrent results.
- Fourth, a select group of IP prosecutors should be established, with a mandate to handle piracy cases.
- Fifth, the National IP Task Force should create a website to track prosecutions, including identifying parties to the cases; legal bases for prosecutions; penalties assessed; and evidence found during raids. At present, case records are manually written into a log book in each District Court, making it difficult to identify outcomes in particular cases, obtain copies of court decisions, contact public prosecutors requesting updates, and ultimately, leverage publicity and create deterrence in copyright infringement cases.

Judicial Reform: IIPA encourages judicial reform in Indonesia, including:

- The Anti-Corruption Commission should work with the Supreme Court Ethics Committee to appropriately draft guidelines for the court.
- Courts should publish judicial decisions to improve transparency.
- The Government of Indonesia should implement necessary training sessions on IPR cases, including on calculating damages; issuing provisional orders; implementing injunctions; and conducting IPR border seizures. Training should not be limited to Jakarta, but extended to Commercial Courts outside Jakarta, especially in Medan, Semarang, Surabaya, and Makassar.

Despite the 2009 Attorney General letter categorizing IP cases as "Important Cases ... to accelerate case prosecutions,"⁴ few cases proceed to a conviction, and most result in extremely low and non-deterrent criminal fines.

COPYRIGHT LAW AND RELATED ISSUES

Copyright law in Indonesia is governed by the Law Concerning Copyright (2014), which replaced the prior 2002 law and went into force in October 2014, and Regulations Nos. 14 and 26 of 2015, which implemented key provisions concerning online and digital forms of infringement, including provisions in line with Indonesia's international obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).⁵ Some provisions of the Copyright Law raise serious concerns that remain unaddressed. Others require further clarification in implementing regulations.

Concerning Provisions in the Copyright Law

IIPA raises the following concerns with respect to the Law as enacted:

Internet Exception: The Law provides a broad exception under Article 43(d) for "making [available] and disseminating copyright content through information and communication technology media that is non-commercial and/or non-profit in its effect on the author or related parties, or in which the author has expressed no objection to such making or disseminating." Both parts of this provision set an undesirable precedent and could be interpreted at some

⁴Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009.

⁵Indonesia joined the WIPO Copyright Treaty (WCT) on June 5, 1997 (in force March 6, 2002) and the WPPT on February 15, 2005.

point to undermine rights to control the manner and means in which rights holders authorize the making available and disseminating of their content through information and communication technologies. This provision on its face collides with Indonesia's international obligations under TRIPS, the Berne Convention, WCT, and WPPT. For these reasons, it should be deleted in its entirety.

Termination of Transfers: Articles 18, 30, and 122 of the Law provide for a reversion of right 25 years after the transfer of right with respect to literary works, performances, and musical works." It is unclear how these provisions operate. For example, the provisions do not state explicitly that an author needs to invoke the termination in order for it to be effective. Nor do they address what happens to existing contracts at the time of termination. In any event, these provisions should be removed.

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

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

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

Rights Management Information (RMI) Violations: The Law provides that RMI violations occur only when moral rights are affected. WCT and WPPT clearly require "adequate and effective legal remedies against ... acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of *any right covered by this Treaty [or the Berne Convention]*" (bracketed text in WCT only; emphasis added).

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 work previously registered as a ground for refusal. There has been a concern about abuse of the voluntary copyright registration process in Indonesia because many invalid copyrights get registered, including by IP infringers, so it is hoped that this substantive examination will enable the authorities to review and invalidate false applications or registrations. IIPA suggests that a more forceful deterrent be introduced, including fines and penalties, against anyone who knowingly files a false application or applies in bad faith. Also, nothing with respect to the registration or recordation system may create prohibited formalities. Article 83 appears to impose a requirement to record licenses, with lack of recordation meaning a license "shall have no legal effect on third parties." This would seem to suggest a Berne-prohibited formality, if, for example, lack of recordation was used to deny the exercise of

copyright from a particular licensor or licensee. Implementing regulations should clarify that in no way will a failure to record transfers and other changes 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 will take too long to obtain. Under the Indonesian law, there are no legal remedies available to the claimant before the submission of the claim, such as preliminary injunctions. However, a claimant can request the attachment of the defendant's assets during the proceedings in the context of a full trial.

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

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

The site blocking regulations are a welcome addition to the enforcement regime and are working very well, with over 480 websites being blocked to date. However, there is currently no way to prevent domain hopping other than to file a separate application to block the "hopped" domains, which is time consuming and cumbersome. The regulations should be amended to provide for a quick and easy process of adding additional domains that resolve to "materially the same website" to the report and recommendation for the original website, without the need for a separate application. This would bring Indonesia's regulation in line with other countries' site-blocking provisions or rulings, which allow for such "dynamic" injunctions (examples include the United Kingdom and Singapore). Specifically, new subsection (3) to Article 6 of the Regulations should be amended to provide: "Additional domains, URLs or IP addresses that resolve to materially the same website in the report shall be added to the receipt report register of Copyright infringement and/or related rights, when reported to, and verified by, the Director General of Intellectual Property, from time to time, and subject to the same recommendation."

Draft Broadcasting Law, Data Localization Decree, OTT Laws

A new broadcasting law is under development by the legislature and awaits publication sometime in 2019. It is anticipated that the new law will address convergence issues, such as the intersection between traditional broadcasting/pay-TV and OTT.

Indonesia is also currently updating its data localization laws and a draft decree implementing law GR82 is being considered for approval. The draft GR82 decree outlines data localization and protection obligations commensurate with the importance of the data (i.e. national security, high risk, and low risk). We understand the draft decree is being considered for approval, along with guidelines on data classification. The drafters should avoid mandates for the location of servers or data for audiovisual content services. We also understand that a draft OTT regulation is being considered, which also contained some potentially problematic provisions. The draft should take a soft approach to OTT regulation (e.g., no local base requirement, no mandated national payment gateway, and no data localization) and avoid measures that could stifle business developments and/or add burdensome barriers to market entry.

Other Needed Legal Reforms

Unauthorized Camcording and Live Broadcasting of Motion Pictures and Television Content: The Explanatory Memorandum to the 2014 Copyright Law indicates that the unauthorized use of an audiovisual recording device in a movie theater (camcording) can be addressed under the reproduction right. This important recognition by the Indonesian Government of the serious nature of the problem of unauthorized camcording should be followed with enforcement, including: (i) fostering greater cooperation with cinema owners to fully uphold and enforce the Law; (ii) taking and supporting targeted enforcement actions; and, (iii) where warranted, proceeding with prosecutions against those engaged in this damaging activity.⁶ The motion picture and television industries reported a jump in camcording to seven total incidents in 2018 (five video camcording incidents, and two audio captures), which is a significant rise in camcording piracy in Indonesia. Moreover, mobile penetration has led to new types of piracy. In 2018, live streaming directly from a cinema was observed in Manado City. These reports demonstrate the need for enforcement against such forms of piracy, and regulations should be introduced that would provide a clear legal basis to prohibit live streaming and camcording in cinemas and to strengthen enforcement remedies available.

Term extension: The term of protection for sound recordings, cinematographic works, and video games should be extended to at least 70 years, in line with international norms. This will not only provide greater incentives for production, but also provide producers with a stronger incentive to invest in local industry, spurring economic growth and tax revenues, and enabling producers to continue offering content to local consumers in the latest formats. After the 2014 Copyright Law amendment, certain categories of works are protected for 70 years, including books, music, dramas, visual art, and architectural works. However, the protection for other categories, including sound recordings, cinematographic works, and video games, remains at 50 years. There is no justification for such varied treatment, and protection should be extended accordingly.

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

E-Commerce Roadmap and UGC Prohibitions

E-Commerce Roadmap: In November 2016, Kominfo released its “E-Commerce Roadmap,” which lists 30 key initiatives related to the development of e-commerce in Indonesia. The first regulatory document related to the roadmap is the Circular Letter discussed below.

On December 30, 2016, Kominfo issued Circular Letter No. 5 (2016), which sets out guidelines for e-commerce platforms hosting user-generated content (UGC) and for those who upload UGC content and contains de facto ISP safe harbors. Included among the specific types of prohibited content is content that infringes intellectual property and content that contains “goods or services that contain hacking services content and/or provide access without rights.” It is unclear exactly what is meant by this, but it could mean content that demonstrates or effects circumvention of TPMs. The Circular Letter provides for a form of notice and takedown, requiring platforms to offer a reporting facility that allows them to receive complaints about prohibited content and to conduct an examination of the report, delete or block the objectionable content, notify the merchant (uploader) that the content has been flagged, and provide a means for the merchant to disclaim that the uploaded content is not prohibited. Once a specific instance of a particular infringed work is notified to a service provider, that service provider should take steps to ensure that all other copies of, or URL links to, that same work are also removed. It appears that for content that infringes intellectual

⁶Preferably, an express provision would have been added, defining the act of using (or attempting to use) an audiovisual recording device in cinemas to camcord, record, or transmit a film, in whole or in part, as a strict liability criminal offense. The Asia Pacific Economic Cooperation (APEC) Ministers and Leaders, including from Indonesia, agreed in 2011 on “Effective Practices for Addressing Unauthorized Camcording,” and the steps recommended therein should also be taken. These include: (1) educating the public about the problems posed to businesses and the consumer by unauthorized camcording; (2) working with the private sector to identify and prevent unauthorized camcording in cinemas; and (3) developing and implementing legal measures to effectively deter unauthorized camcording. *Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, 23rd APEC Ministerial Meeting, Hawaii, United States, 11 November 2011.

property, the blocking or deletion period need not be carried out for 14 days, which is excessively slow. The Circular Letter also requires platforms to monitor user activities on UGC trading platforms. It does not specify any punishments or sanctions for users or platforms that fail to comply. The Director General of Kominfo has indicated that further comprehensive regulations for all Internet platforms will follow, and these proposals will be open to public consultations. IIPA urges the Government of Indonesia and Kominfo to provide opportunities for stakeholders to comment and consult on further regulations, specifically with respect to narrowing the scope of applicability of this Circular Letter, clarifying the takedown requirements, establishing punishments and sanctions for failure to comply with regulations, and setting forth safe harbor provisions for platforms, if any.⁷

Amended Law for Information & Electronic Transactions: The Ministry of Communication and IT announced an amended Law for Information & Electronic Transaction (UU ITE) No. 11 Year 2008, effective November 28, 2016.⁸ While the revisions, for the most part, do not directly implicate IPR (focusing on defamation, cyber bullying, and the “right to be forgotten”), some of the provisions for enforcement and penalties may serve as models for anti-piracy efforts. Revised provisions give the government the authority to block negative content or to order ISPs to do so. The revisions also synchronize confiscation, arrest, and detention procedures with the Criminal Code.

MARKET ACCESS AND RELATED ISSUES

Issue Clear Guidelines on Implementation of the Decree Removing Film and Recording Sectors from the Negative Investment List and Continue Removing Barriers to Entry for Other Sectors: In May 2016, the Government of Indonesia issued Decree No. 44, removing film and recording studios from the negative investment list (NIL) and enabling 100% foreign direct investment in film and sound recording production, as well as film distribution and exhibition. This very positive move should be accompanied by the issuance of clear guidelines on the implementation process of the decree and removal of market barriers. Also, many media sectors remain on the NIL, preventing direct foreign investment in other Indonesian media industries.⁹

IIPA notes the longstanding promise made by the Indonesian Government that it would open investment in media companies to foreigners as soon as the Indonesian market was opened to the direct distribution of any other foreign goods (which occurred many years ago). While the removal of the film industry sectors from the NIL begins this process, broader investment in the distribution structure for all media sectors would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials. The same investment access opened to the film industry should be afforded to the radio and television broadcasting service sectors.

Eliminate Problematic Provisions from the Film Law: Directly counter to the positive step of removing film from the NIL, the Ministry of Culture and Education has drafted implementing regulations to enforce the 2009 Film Law, which would impose significant new barriers in the film market. These draft regulations have many troubling provisions.

First, the draft regulations include a 60% screen quota for Indonesian films and measures to limit the importation of foreign films by local distributors and exhibitors. If implemented, such protectionist measures would likely lead to lost revenue in local theaters and to limited choices for Indonesian consumers. Such measures would also limit local industry's exposure to the expertise and skill of foreign producers. Moreover, such quotas often leave a huge opening for the purveyors of pirated content.

⁷Such provisions should clarify that any safe harbor covers only truly neutral and passive activities. The law should also clarify that safe harbors, if introduced, should provide protection only from monetary damages and criminal penalties, but the service provider can be subject to injunctive relief regardless of whether the safe harbor provisions apply. It is also critical to state expressly in the law that even entirely passive and neutral sites and services that are also structurally infringing cannot benefit from safe harbor protection.

⁸The full text of the law, and an English translation, are available at: <https://www.bu.edu/bucflp/files/2012/01/Law-No.-11-Concerning-Electronic-Information-and-Transactions.pdf>.

⁹The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

Second, IIPA also objects in principle to Article 43 of the 2009 Film Law, which, if enforced, would ban dubbing of imported films. This is a discriminatory and protectionist policy, which is contrary to the interests of Indonesia's own citizens. Dubbing of imported films into a local language is a commercial decision that should be based on business considerations and market forces.

Third, the 2009 Film Law includes some ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct, such as restrictions on vertical integration. These could be interpreted in such a way that would result in unintended consequences such as restricting foreign participation in the market and curbing business efficiency. Indonesia should revise the draft regulations and incorporate international best practices, notably recognizing the exclusive right of rights owners to determine whether, how, and where their works are made available. Doing so will avoid creating new barriers that could undermine Indonesia's plan to attract foreign direct investment in the film sector.

Collective Management Organizations: After the introduction of broadcasting and public performance rights into the law in 2014, the government has focused on CMO-related organizational issues including tariffs. In December 2018, the government amended the Regulation for Collective Management Institutions (Regulation No. 36/2018). This amended regulation does not improve the collective licensing issues faced by the music industry. CMOs for musical works and sound recordings continue to be placed under the single-window entity called LMKN as a "national CMO" that adds an unnecessary extra layer to the collective licensing system. LMKN sets the tariff, collects the remuneration (through agents), and decides how the collections are split among different groups of CMOs; yet, the management of LMKN is not well represented by rights holders, with the majority being government officials, academics, and copyright specialists. Rights holders thus have little control over LMKN's governance and operations. Despite that LMKN delegates the collection function to some of the CMOs, the regulation permits LMKN to deduct 10% from the collections as operation costs at the expense of rights holders' interests. Further, the problem of the government's accreditation of numerous CMOs to manage the same categories of rights remains, which has caused unnecessary confusion and inefficiencies in collective licensing.

Advertising Restrictions: Indonesia's Broadcasting Law (No. 32 Year 2002) includes a requirement that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced. This is a concern for the pay-TV industry. Although regulations issued in 2007 provided a series of exemptions, the Indonesian Broadcasting Commission's (KPI) statements raised concerns about the possible deleterious effects of such a requirement. The rule, if implemented, would have harmful effects on Indonesian consumers' access to foreign TV channels. The timeline for revising the Broadcasting Law to address this concern remains unclear.

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

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

Local Replication Requirement: Regulation No. PM 55 issued by the Minister for Culture and Tourism (MCOT) in 2008 required that all theatrical prints and home video titles released in Indonesia be replicated locally effective January 1, 2009. However, the effective date was repeatedly postponed, and this regulation never went into effect. In December 2015, the new government transferred the film sector responsibility from MCOT to a newly formed Ministry of Culture and Education and claimed unofficially that PM 55 is no longer enforceable, as MOCT no longer exists. This regulation appears to be defunct and should be permanently and officially abrogated.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

In November 2018, USTR, pursuant to the 2012 investigation, held a public hearing to review country practices in Indonesia regarding intellectual property rights and market access issues, and to determine whether Indonesia still qualifies for beneficiary status under the GSP. Under the statute, the President of the 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.”¹⁰ IIPA, recognizing the progress Indonesia has made towards meeting the GSP criteria, recommends that the U.S. Government terminate the investigation once it is satisfied that adequate progress has been made by the Indonesian Government to remedy the deficiencies outlined in this report.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

While passage of the Copyright Law of 2014 made progress toward fulfilling Indonesia’s obligations under TRIPS, the Berne Convention, WCT, and WPPT, several provisions of the Copyright Law raise serious concerns under these agreements. As set forth in more detail above in the “Copyright Law and Related Issues” section, the broad exceptions and compulsory license provision, limited RMI violations provision, and recordation requirement appear to be out of compliance with Indonesia’s international obligations.

¹⁰19 U.S.C. §§ 2462(c)(4) and (5).

PERU

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Peru remain on the Watch List in 2019.

Executive Summary:¹ Trade with Peru has almost doubled since the entry into force of the U.S.-Peru Trade Promotion Agreement (TPA) on February 1, 2009. Peru initially made promising steps to implement the comprehensive Intellectual Property Rights (IPR) chapter of the TPA, which contains high standards for copyright protection and enforcement in some areas. However, Peru has yet to complete reforms to achieve the high standards of copyright enforcement required. For example, Peru's law lacks a provision that provides statutory damages for civil copyright infringement. Peru must also ensure that infringing services cannot avoid liability. Most importantly, however, Peru needs to make more use of the existing judicial powers, especially those relating to injunctive relief in copyright infringement actions, and invest more effort into enforcement based on the legal tools already at the authorities' disposal.

While there has been some improvement in enforcement due to several notable enforcement actions, online and physical piracy continues to be a serious problem in Peru and attention to enforcement should continue to end Peru's status as a safe haven for pirate sites distributing content throughout Latin America. Online piracy has continued to grow strong, undermining the market for legitimate content in Peru and across the region. Individuals based in Peru operate many websites offering vast movie and music catalogs from national and international artists to stream and/or download. These sites are highly popular in places such as Argentina, Mexico, and Chile. Pirate businesses, which generate profits by selling advertising and user data, flourish as a result of the lack of coherent action by the government. For example, the website *SetBeat* had around half a million visitors from across the region in the last six months. Urgent action is required from the government to tackle this music piracy problem that is severely damaging Peruvian creative industries and the rights of composers, artists, performers, publishers, and producers. Notably, Peru lacks a specific law dealing with camcording and remains one of the main sources of camcorded materials in the region. To facilitate enforcement against this form of piracy, criminal penalties without a need to prove a profit intent should be enacted. The Internet piracy market managed within Peru is steadily increasing, and its impact is affecting not only Peru, but also other countries in the region. The websites attract hundreds of thousands, and for some countries millions, of visitors.

Additionally, while Peru needs to complete legislative reforms in several copyright areas, it is imperative that any legislation should be developed in consultation with rights holders and through the ordinary legislative process. However, neither such consultation nor the ordinary legislative process were followed by the government when Decreto Legislativo No. 1391 of 4 September 2018 was passed by the government in the exercise of delegated authority to legislate for 60 days without Congressional involvement in matters relating to economic management, the fight against corruption, and the protection of persons at risk of violence. It is highly concerning to see that these exceptional, delegated legislative powers were used to pass legislation concerning the operation of collective management organizations and that neither copyright holders nor the CMOs representing them were consulted, whereas the resulting legislation has a direct, negative impact on the licensing operations.

¹For 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://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2019

- Pass legislation to introduce clear secondary liability principles for online copyright infringement, establish obligations for ISPs to apply preventive technical measures to combat digital piracy, and provide for statutory damages for copyright infringement.
- Devote significantly more resources and political support to combat digital piracy.
- *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI), the agency charged with promoting and defending intellectual property rights, should work to consistently build upon the recent positive examples of IPR enforcement against administrators of piracy websites, who continue to find Peru to be a safe haven. Equally, INDECOPI should also take into consideration contractual practices within industries such as film and music and adequately enforce the existing rights of music rights holders to authorize public performance of music in movie theatres and other venues open to the public.
- Repeal Decreto Legislativo No. 1391 of 4 September 2018, consult with affected rights holders and their CMOs, and resume work on any reforms in this area, if necessary, through an ordinary legislative procedure.
- Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.
- Improve the efficiency and effectiveness of the judicial system.
- Grant country-wide jurisdiction to Lima's IP prosecution offices.

COPYRIGHT PIRACY IN PERU

Internet Piracy: Internet-based piracy is widespread in Peru. While Peru is not a leading country in broadband penetration, the number of Internet users is steadily increasing and the number of smartphone subscriptions has increased significantly. At present, there are approximately 22 million Internet users in Peru, representing about 68% of the population.² Mobile broadband penetration is growing rapidly. In 2016 there were 62 active mobile broadband subscriptions per 100 inhabitants, up from 55 the previous year.³ Fixed broadband is not nearly as prevalent, with only 6.7 fixed broadband subscriptions per 100 inhabitants (up from 6.4 in 2015).⁴

Streaming of pirated audiovisual content is prevalent in Peru, with a tendency towards an increase in consumption of internet protocol television (IPTV). This has materialized through all forms of streaming, including through websites, Piracy Devices (PDs) such as Android and Kodi boxes pre-loaded with piracy software, and mobile piracy apps and add-ons. In 2018, the top 180 Spanish-language audiovisual piracy websites received more than 200 million visits from Peru. Two websites the MPAA identified as notorious markets in 2018, *Pelispedia.tv* and *Pelispplus.tv*, are also highly popular in Peru and offer tens of thousands of infringing links to movies and television series. Such piracy websites as well as PDs and apps, affect the legitimate market in the entire region and must be addressed with urgency. Although Peru has seen an influx in modes of infringement with PD entering the market. The prosecution office is currently expanding the time and effort it dedicates to digital piracy. This helps prevent the piracy situation from worsening, even in light of the increased possibilities and methods for users to infringe.

Peru saw a significant increase in digital sales of recorded music in the last year, with almost all growth coming from licensed streaming platforms usually accessed on smartphones, often through a bundled subscription service. That increase is compensating for the steep decline in physical sales (physical sales revenue has gone down from \$0.6m to \$0.2m in just two years).⁵ However, unfair competition created by pirate websites, that are operating openly in Peru and offering millions of illegal music tracks to consumers, mainly via mobile devices, dampens the rate of market growth for the music sector and negatively affects the prospect of users switching to premium tiers of the various legitimate music services. If the legitimate music market is to develop to its full potential,

²See www.Internetworldstats.com.

³Data from International Telecommunication Union, *Measuring the Information Society Report 2017*, p. 144, https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017_Volume1.pdf.

⁴Id.

⁵IFPI, *Global Music Report* (April 2018), at p. 112, available at <http://www.ifpi.org/recording-industry-in-numbers.php> ("GMR 2018").

urgent action is required to tackle endemic piracy problems. Many websites offering vast music catalogs from national and international artists have numerous domain names registered abroad, but were created, and are administered by, individuals operating within Peru. Digital piracy businesses have flourished with different functionalities spanning from streaming and stream-ripping websites, download websites, and linking websites. These websites allow users to access and/or copy thousands of music tracks without authorization from rights holders and compete with legitimate services in the music market. Peruvian pirate websites profit by selling advertising placements and user data. Because the Peruvian Government does not take any substantive action towards the problem, these illegal businesses succeed. Beyond Peru, these websites are highly popular in places such as Argentina, Mexico, and Chile. Examples of the websites are *Foxmusica* (now subject to an INDECOPI order, see below), *FullTono*, *Enladisco*, *BuenTema* and *SetBeat*. All of these websites have a strong regional audience. *SetBeat* for example received around half a million monthly visitors in each of the last six months of 2018. The Peruvian Government needs to take the music piracy problem seriously because it damages the intellectual property rights of Peruvian and international composers, artists, performers, publishers, and producers. It should also shift the focus and training at INDECOPI to better address the problem of digital piracy. Further, as explained below, there is also little to no support from online intermediaries, who are not incentivized to work meaningfully with rights holders to tackle piracy due to a lack of clear secondary liability principles in place. Engagement between rights holders, ISPs, and other key Internet intermediaries should be encouraged.

Hard Goods Piracy: Some industries, such as the motion picture and software industries, have found that hard goods piracy is still prevalent in the Peruvian market, though Peruvian customs has been cooperative. In the notorious black markets such as *Polvos Azules*, *Polvos Rosados*, *Hueco*, and *Mesa Redonda* (which is located one block away from the police and Public Ministry headquarters), pirates operate during daylight hours. There are also some popular shopping galleries and arcades that sell pirate products. The sale of pirate discs through street vendors, small stores, and stands located in informal discount retail centers continues to be the main channel of pirate commerce, and the one that most affects the audiovisual industry. Lima, Arequipa, Trujillo, Chiclayo, and Tacna have the most wide-spread hard goods piracy problem. The purchase of pirate and counterfeit hard goods through websites and online marketplaces is becoming more popular as Peruvians embrace e-commerce. For example, *mercadolibre.com.pe* hosts listings of hacked video game consoles that come installed with infringing video games, as well as listings of circumvention devices and counterfeit consoles bundled with hundreds of infringing video games ("legacy" titles). In addition to advertising listings on *Mercado Libre*, many top sellers also run their own proprietary e-commerce sites where they traffic in video game circumvention devices and services. Optical disc piracy is a major problem in Peru, where large numbers of blank media (e.g., CDs, DVDs) are imported and then used for burning copyrighted content. These discs are then sold in street markets and over the Internet. There are thousands of street vendors selling burned DVD-Rs containing the latest Hollywood releases, available for US\$1.00 each. It is no longer possible to evaluate the dimension of piracy based simply on the volume of optical disc imports. The decline in reported imports of blank media in recent years does not necessarily mean that the amount of blank CDs and DVDs used by pirates has decreased in recent years (down to 16.2 million units in 2007, more recent data is not available).

Camcording: Camcording piracy has grown exponentially over the last few years in Latin America. With the developments in camcorder technology, the camcorded copies are nearly perfect and make detection extremely difficult. Peru remains one of the leading sources of unauthorized camcords in the region and does not have a specific law regulating this issue. Sixteen illicit audio and/or video recordings of MPAA member films were sourced from Peruvian theaters in 2018. While this is an improvement compared to the same period in 2017, Peru is still among the top four sources for camcorded films in South America, along with Mexico, Brazil, and Ecuador. 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.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The U.S.-Peru Trade Promotion Agreement (TPA) entered into force on February 1, 2009.⁶ As part of the TPA, Peru also signed IPR-related Side Letters, including one on ISP liability and another on retransmission issues. While Peru acted expeditiously to implement many IPR provisions of the TPA,⁷ it has not yet achieved the objectives of the TPA, which were to improve the level of effective enforcement of copyrighted content online, including through the availability of statutory damages (TPA Article 16.11.8). This long-overdue reform is needed to provide deterrence and encourage settlement of civil claims of infringement.

OTHER COPYRIGHT LAW AND RELATED ISSUES

Bill on Performer Remuneration Rights: The motion picture and recording industries are concerned with a mandatory licensing bill introduced in June 2017, known as either the Cultural Workers Bill or the Art Worker Bill. This bill, if implemented, would grant an unwaivable, nonassignable remuneration right for audiovisual and music performers on top of the existing contractual payments they receive, and even when such rights have been transferred or assigned through contract. The bill also creates an unwaivable remuneration right for made for hire authors of musical works and a mandatory remuneration payable when a recorded performance is copied to a new format. The remuneration claims will be subject to mandatory collective management. This would benefit the collecting societies involved at the expense of restraining trade for U.S. works because performer compensation is collectively bargained for and subject to worldwide exploitation. Peru has already implemented the rights of performers and other rights holders as provided in the international treaties. The proposed bill would only complicate the launch and operation of legal audiovisual and music services. Furthermore, it would frustrate the freedom of contract in the industries. The bill awaits consideration in the Culture and Cultural Heritage Commission and the Labor and Social Security Commission. However, the bill's sponsor resigned in 2018, thus reducing the likelihood of any imminent movement on the initiative.

Copyright Levies: Peru is one of the few markets in the region that has implemented a private copy levy (along with Paraguay, Dominican Republic, and Ecuador) to compensate rights holders for the private use exception applicable to blank media. Unfortunately, the provision has become seriously outdated in that the levies are limited to blank media from the analogue and early digital eras and do not include the typical devices on which private copying takes place these days. INDECOPI needs to urgently update the list of media to which the levy applies in order to keep up with and accurately reflect the current consumption habits. Also, new regulations need to include provisions that empower customs to enforce the levy.

Necessary Legal Reform: Anti-camcording legislation is necessary to address the rapid increase in camcording. Peru should adopt a legislative framework specifically criminalizing illicit camcording in theaters without requiring proof of profit intent. The lack of anti-camcord laws to criminalize unauthorized movie recordings makes it difficult to obtain cooperation from law enforcement and prosecutors. In a promising move, INDECOPI recently proposed a modification to the Criminal Code that aims to improve enforcement against illicit camcording in movie theaters. While the initial proposal appears to remove the need to prove a profit motive, the IIPA urges lawmakers to maintain this provision, which is key to enabling stronger enforcement as the legislative process unfolds in the coming months.

Additionally, with no clear secondary copyright liability principles in place, online intermediaries are not incentivized to participate at a level that will create a sustainable and lasting effect on the piracy situation, and some businesses even engage in copyright-restricted acts while claiming to be mere neutral intermediaries. In addition to

⁶The final text of the TPA Intellectual Property Rights (IPR) Chapter is posted on USTR's website at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

⁷Peru passed several pieces of legislation that implemented various copyright and enforcement measures. Legislative Decree No. 1076, published on June 26, 2008, amended the copyright law in a number of positive ways to implement the TPA, especially with respect to technological protection measures (TPMs) and judicial remedies.

supporting the implementation of clear provisions on liability principles, INDECOPI should encourage engagement between rights holders, ISPs, and other key Internet intermediaries. This would be further accomplished by imposing legal obligations on ISPs to act or otherwise risk secondary liability.

Copyright Law Amendments: An unexpected amendment was passed in September (Decreto Legislativo No. 1391 of 4 September 2018). The partial amendment to the Copyright Law, sponsored by INDECOPI and approved at Congress without consultation with any rights holder' groups or copyright organizations in Peru, included provisions intended to modify the legal regime for collecting societies (CMOs). Among other modifications, the amendment imposes a limitation on the number of votes that a member can have at a particular CMO. Before these amendments passed, votes at general meetings were assigned to members in proportion to the distributions received from the CMO. The system allowed members with significant catalogs, such as international rights holders, to secure direct participation at governing bodies. However, the amendments introduce considerable uncertainty into CMO governance, including with respect to the CMOs performance regarding collection and distribution.

Another concerning provision in the amendments is the limitation on the operational expenses incurred by a CMO acting on behalf of another CMO in the market. In such instances, a CMO is limited to 30% of total collections. This provision, however, will negatively affect CMOs generally, by constraining the ability of CMOs to assist other CMOs and by depriving CMOs in need of assistance from receiving it. This operational expense limitation will reduce the operational capacity of CMOs by depriving them of needed resources, including significantly constraining their ability to hire personnel and address other basic business expenses.

Synch Rights and Cinematic Works: Two administrative decisions⁸ by INDECOPI against the Peruvian Association of Authors and Composers (APDAYC) on the same day in May 2017 raised concerns regarding sync licensing and public performance rights. INDECOPI held that once a musical work is synched for a film, the owner of the musical work forfeits its remaining rights. The decisions are misinformed as to the operation of sync contracts and the practices in the music and film industries and depart as a matter of law from the correct interpretation of the existing Peruvian law, including even the INDECOPI's own prior guidance on the application of the public performance rights. As a result of the ruling, APDAYC cannot license, enforce, or collect royalties for musical works. This has in turn hampered the ability of the American Society of Composers, Authors, and Publishers (ASCAP) to license U.S. musical works because ASCAP relies on APDAYC to license public performances of its repertoire in Peru. An appeal was filed by the APDAYC against one of the decisions and ADPAYC was supported by the recording industry in their efforts to overturn the administrative decisions in question.

COPYRIGHT ENFORCEMENT IN PERU

On balance, enforcement has improved in the past two years, though criminal and administrative enforcement against piracy is hampered by a distinct lack of resources devoted to combatting piracy, and, in particular, online piracy. That being said, industry sectors generally report good cooperation with the criminal enforcement authorities (prosecutors, police, administrative, and tax authorities) handling hard goods piracy, but continuing difficulties exist in obtaining prosecutions and administrative measures that would result in effective sanctions to deter piracy. Peru has a cross-commission established by law, *Comisión de Lucha contra los Delitos Aduaneros y la Piratería*, to "fight against border-control infringements and piracy."⁹ This commission should focus on establishing priority enforcement targets from each affected industry to make combatting piracy a governmental

⁸Asociación Peruana de Autores y Compositores (APDAYC) v Cineplex SA, 24 May 2017 (case reference 002902-2016/DDA, Resolution number 278-2017/CDA-INDECOPI) and APDAYC v Cinemark del Peru Srl, 24 May 2017 (case reference 002903-2016/DDA, resolution number 279-2017/CDA-INDECOPI).

⁹The commission is comprised of the Ministry of Production; the Ministry of Economy and Finance; the Ministry of Trade and Tourism; the Ministry of Internal Affairs; the Ministry of Defense; the Commissioner of Tax Administration; a representative of the General Prosecution Office; the President of *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI); and representatives of the National Association of Industries, the Finance Intelligence Unit of Peru, the National Group of Commerce Chambers, Small and Medium Company Associations, the Association of Border Agents of Peru, the Association of Exporters, the State Governments, the Committee to Fight Against Piracy (*Contracopia*), the Peruvian Books Chamber, the Association of Phonographic Producers, the Association of Cities of Peru, the National Association of Authors and Composers (APDAYC), and the National Council of Cinema (CONACINE).

priority. The U.S. Secret Service agency deployed to Lima has conducted trainings and assisted local police efforts against organized crime, which is usually related to the large and organized distributors of pirated media content. In the longer term, this effort should counteract piracy and counterfeiting activity in Peru. Additionally, the deployment of a Department of Justice Law Enforcement Coordinator (IPLEC) to Latin America should help coordinate training efforts across the region. However, more needs to be done to ensure effective and proper copyright enforcement.

Criminal Anti-Piracy Enforcement in Peru

Police actions and prosecutions: The copyright industries have excellent relationships with the Fiscal Police, as well as with the specialized prosecution division in Lima for Intellectual Property and Border Enforcement (*Fiscalia Especializada en Delitos Aduaneros y Contra la Propiedad Intelectual*). However, this specialized prosecution division has very limited geographic jurisdiction, which limits its effectiveness. For example, the jurisdiction of the specialized IP prosecution offices in Lima are based on territory. Cases outside of Lima need to be prosecuted by local prosecutors, many of whom are not specialized in this matter. Specialized prosecution offices should have jurisdiction over the entire country. There is also a continued need to allocate more public resources to support the special IPR unit of the Fiscal Police (*Division de Investigacion de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations, support the National Police, and provide troops when large raids are conducted. Moreover, the National Police lacks sufficient resources to develop intelligence plans that would support investigating and discovering large warehouses of pirated goods.

The four IPR prosecutors in Lima's special prosecution division work with INDECOPI when they are requested to do so. Unfortunately, filing a complaint before a judge can take four to six months after the raid has occurred; in fact, some cases have seen delays as long as two years from the time of the raid before getting to court. Amidst all of these challenges, Peru has made some positive strides in enforcement. On September 13th, 2017, the High-Technology Police Unit in Lima, Peru (DIVINDAT) and the 2nd IP Prosecution Office executed raids on four premises belonging to the operators of the websites *Pelis24.tv*, *Series24.tv*, and *Pelis24.com*. These sites were constantly amongst the five largest Spanish-language websites in the LATAM region. These raids were executed following a court order seizing electronic equipment, documents, and any evidence related to the three mentioned websites; temporary arrest of the three operators of the websites; and suspension of the websites. In April 2018, the three operators of these websites were each convicted to 2 years, 11 months, and 20 days of imprisonment for the crime of Copyright Violation, specifically public communication and reproduction of the works without authorization and with a profit intent. The judge further issued an order seizing all assets in relation to the illegal activity and transferring the three domains definitively to the Motion Picture Association of America (MPAA). The result of this case was very positive and produced the first-ever precedent on a digital copyright infringement criminal case in the country. It was the first of its kind, in Peru, to recognize an injunction as an adequate means to interrupt the continuous, criminal, intellectual property violations. Additionally, the court order solidified that this type of activity may constitute an act of infringement by distributing copyrighted works to the public and that the monetization through advertisement suffices as indicating a profit intent. While these victories are well-received, more resources need to be invested in enforcement to ensure sustainable change.

Problems with the judiciary—non-deterrent results and delays: Few criminal IPR cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. Judges do not appear to perceive the importance of IPR or see IPR crimes as 'dangerous'; as a result, sentences are non-deterrent. Criminal sentences take between 3-5 years to be issued, and cases often languish even longer. For example, a criminal case involving circumvention devices that was filed in 2011 was repeatedly delayed due to excessive bureaucracy and appeals, but was finally concluded in 2017 when the Supreme Court of Peru rejected an appeal by the defendants. The defendant was found guilty of Article 220-B of the Peruvian Criminal Code: Products made to circumvent a technological protection measure. Despite this positive outcome, many cases remain "pending" and languish in the courts. Some cases for some of our members have been pending for nine years or more as a result of multiple appeals and administrative delays. Such delays cause brand owners to incur prolonged legal fees, which become even more burdensome when courts do not impose deterrent sentences. Furthermore, the Peruvian Criminal Procedure Code

permits sentences of four years or less to be suspended. This has continued even after several positive amendments to the criminal code, including: (1) the 2004 amendments, which provided an increase of minimum sentencing to four or more years for copyright infringements, and (2) amendments made in November 2006 to penalize repeat offenders with stronger sanctions and establish additional penalties for more crimes.

INDECOPI and Administrative Enforcement

INDECOPI serves as an administrative enforcement agency for the copyright sector. It has been active in public awareness and educational campaigns, and it also collects royalties for the public performance right. INDECOPI is supposed to be self-funded through its income from patent and trademark registrations and from the fines imposed by its administrative bodies. However, significant fiscal restrictions have adversely affected *ex officio* enforcement activities. Additional resources should be allocated to support INDECOPI's *ex officio* enforcement efforts.

Need for consistent administrative enforcement: Despite some legislative deficiencies, INDECOPI must work within the current legal regime to take action against pirate sites, suspend their domain names, and fine the operators. INDECOPI needs to maintain consistent enforcement and strengthen its commitment towards the digital piracy problem. Unfortunately, due to its wide range of activities and competences, INDECOPI tends to get pulled in different directions, resulting in a lack of consistent action or lasting effort on individual issues.

Increasing deterrent sanctions: Through Legislative Decree No. 807, INDECOPI has the authority to issue fines against individuals or businesses that refuse to be investigated. Article 28 of this law stipulates that if an individual or business is served with an injunction or receives a fine from INDECOPI and fails to comply, the maximum allowable penalty for the violation will be imposed. If the non-compliance persists, then INDECOPI may impose a new fine, the amount of which will be doubled at established intervals. INDECOPI can file a criminal complaint with the Office of the Public Prosecutor. To support greater enforcement against piracy, IIPA suggests that regulations be issued increasing and establishing fines, which would also help fund INDECOPI's actions.

Developing a digital anti-piracy campaign: Record producers have filed a number of cases with INDECOPI to address digital piracy. These collaborative efforts should remain consistent and develop into a long-lasting, anti-piracy campaign. On October 10, 2017, INDECOPI issued a first suspension order to a significant pirate service operating under the domain name *Foxmusica.me*. Further, 2018 saw the implementation of Peru's first site-blocking decision in an administrative case filed before INDECOPI. The decision was directed at *Roja Directa*, a site dedicated to the illegal streaming of soccer matches. IIPA expects that these actions will be followed by more orders. At this point, 19 additional cases have already been filed. While this is a positive step, rights holders have identified more pirate domains that should be the subject of future orders. INDECOPI's continued interest in, and attention to, digital piracy will be crucial for tackling these pirate sites.

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendations: IIPA recommends that Switzerland remain on the Watch List in 2019.¹

Executive Summary: For almost a decade now, right holders have been deprived of the possibility of enforcing their copyrights in civil and criminal cases involving the online environment. In 2013, the multi-stakeholder *Arbeitsgruppe Urheberrecht 2012*, or Working Group on Copyright (AGUR12) issued a “compromise” recommendation to reform the legal and enforcement regime, partly steered by the government. In November 2017 the Federal Council adopted a “dispatch” (i.e., an explanatory report) and a legislative draft. In December 2018, the National Council held a first vote on the legislative proposal, including its own amendments. Despite some welcome proposals, the copyright bill as adopted by the first chamber of parliament does not address the majority of copyright enforcement priorities and represents a vote for the status quo. In fact, the parliament press release presented the results of the December vote as follows: “With this reform, consumers who download films illegally do not need to worry. Downloading for private use through peer-to-peer networks shall remain legal. Access to illegal sites will not be blocked.” The Federal Council has opted for self-regulation by site hosts in the fight against piracy.² While certain aspects of the draft amendments provide positive and welcome changes, such as an increased term of protection to match that offered elsewhere, they contain a number of troubling provisions, which would result in limitation of existing copyright protection. Moreover, the draft amendments omit important and much-needed protections. In particular, the government and first chamber of parliament persists in the position that individual downloads from illegal sources are not themselves actionable.³ And while the draft offers one isolated enforcement instrument (a stay-down duty for certain hosting providers), it leaves large parts of Switzerland’s enforcement deficit unresolved (including by not providing for an access blocking mechanism or a legal basis for obtaining injunctions against intermediaries). It also introduces a troubling collective management remuneration right for Video on Demand (VOD) that will interfere with industry practice in the audio-visual and broadcast sectors, as well as in the Swiss music industry, and a retransmission exception for hotels and similar entities that ignores Berne rules on national treatment, including remuneration of rights. Moreover, the parliament has introduced an amendment exempting several sectors of the economy from the existing obligation to pay for the public performance of music. The government’s dispatch and public comments on the draft demonstrate an unwillingness to address either of these two key issues, siding with Internet Service Provider (ISP) preferences against enforcement needs. Moreover, until the Copyright Act amendments are enacted, which may occur this year, unprecedented restrictions remain in place, arising out of the *de-facto* ban on the use of IP address evidence in civil and criminal copyright actions as a result of the 2010 *Logistep* case, which effectively eliminates the ability of right holders to enforce their rights online.

The copyright amendment bill, inclusive of the amendments by the National Council, will be next debated by the Council of States in early 2019 and the legislative amendments are expected to be adopted in 2019. Legislative reform remains delayed, with the absence of a meaningful reform bill appearing to indicate a reluctance on the part of Swiss leadership to live up to the country’s obligations under international agreements to provide remedies that prevent and deter infringements. This is deeply worrying and out of place for a country reliant on intellectual property rights. IIPA urges the U.S. Government to send a clear message that the proposed amendments are unsatisfactory

¹For more details on Switzerland’s Special 301 history, see previous years’ reports at <https://iipa.org/reports/reports-by-country/>. For the history of Switzerland’s Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.

²Avec la réforme, les consommateurs qui téléchargent illégalement un film ne seront pas inquiétés. Le téléchargement pour un usage privé sur un réseau pair à pair restera autorisé. L’accès à des sites illégaux ne sera pas bloqué. Le Conseil fédéral a privilégié l’autorégulation pour lutter contre la piraterie au niveau des hébergeurs de site” (Parliamentary press release of 14 December 2018).

³Press release, “Federal Council adapts copyright law to the digital age,” November 22, 2017, available at <https://www.ejpd.admin.ch/ejpd/en/home/aktuell/news/2017/2017-11-221.html> (“the principle that consumers who take advantage of such illegal offers will not be criminalised.”).



and do not sufficiently comply with Switzerland's obligations to provide for effective and deterrent remedies against any act of copyright infringement, and for criminal remedies, at least in the case of infringements on a commercial scale. The enforcement deficit remains deeply problematic, particularly within the context of our otherwise strong bilateral trade relationship. IIPA further urges the U.S. Government to work closely with the Government of Switzerland to improve Swiss ISP cooperation as part of the work needed to address the international piracy with links to Switzerland, which benefits from the dire enforcement situation and raises serious questions about Switzerland's compliance under the WTO TRIPS Agreement to provide a remedy for any form of infringement, including on a cross-border basis. The Government of Switzerland should address online piracy now and revise the draft amendments to the Copyright Act to bring it in line with the current best practices in Europe, including by providing a site-blocking mechanism.

PRIORITY ACTIONS REQUESTED IN 2019

- Improve the draft Copyright Act amendments to provide efficient tools against all types of piracy, regardless of technical details and including cross-border piracy. This should include a mechanism to block access to copyright infringing websites, the ability of right holders to use information such as IP addresses in connection with civil claims, a limitation on the private use of copyrighted works obtained from illegal sources, and effective remedies with regard to intermediaries or ISPs.
- Confirm the positive developments in the draft Copyright Act amendments, for example, the extension of term of protection for producers and performers to 70 years.
- Eliminate from the draft Copyright Act amendments proposed new provisions that impede VOD exploitation and the development of on-demand/non-linear services in Switzerland, notably the proposed collective VOD remuneration. If elimination is not possible, insert a clear carve out of U.S. works from the scope of mandatory remuneration for VOD exploitation in draft Copyright Act amendments. Any kind of statutory license for VOD cannot be imposed without a corresponding remuneration obligation.
- Eliminate from the draft Copyright Act the new exception introduced in Article 19, which would exempt several sectors of the economy from the scope of protection under the existing music public performance right and would be incompatible with Switzerland's international obligations under the WPPT Article 15. Also, eliminate a new measure that would create a retransmission exception for hotels and similar entities, in violation of Switzerland's Berne and TRIPs obligations.
- Require datacenters and ISPs to implement better "know-your-customer" policies and enforce that requirement.
- Publicly affirm that Switzerland's exceptions to copyright permit single copies for private use only if they derive from a legal (authorized) source. Also, end the Federal Arbitration Committee's levy on "Catch-Up TV," which is based on the presumption that the recording and making available of entire TV channels is covered by the private use exception.
- Endorse the standing opinion of the Federal Data Protection and Information Commissioner (FDPIC) clarifying permissible evidence collection practices under the Data Protection law in criminal online copyright enforcement actions, and extend this to civil enforcement actions.
- Clarify those areas of the Swiss Film Act that currently negatively affect the distribution of audio-visual works in Switzerland, including, most notably, VOD, and limit the accompanying reporting obligations to apply only to distributors or platforms located in Switzerland.
- End the discrimination against neighboring rights under collective rights management by deleting the 3% cap in Article 60(2) of the Swiss Copyright Act.

THE NATURE OF PIRACY IN SWITZERLAND

Overall, enforcement showed no improvement in 2018 and unfavorable outcomes generated in enforcement cases may well cement a low level of protection, subject to Federal Court decisions to come. As discussed throughout this submission, the government has refused to take action against the commonplace consumption of works from clearly illegal sources, whereas the options open to right holders for tackling illegal sources are very

limited, as there is no website blocking remedy. Thus, Switzerland suffers from high domestic piracy rates for music, film, video games, and entertainment software, which makes the country into a potentially attractive base of operations for some ISPs dedicated to piracy on a global scale. In particular, there is a serious problem with host and data centers based in Switzerland that provide hosting services to other ISPs, including pirate services, often without checking into the identities or businesses of their customers.

At the same time, Switzerland's legitimate online market is growing, with Netflix's entry into the market and the building of Subscription Video on Demand (SVOD) libraries by local telecom operators. There are 28 legitimate digital services available for recorded music in Switzerland.⁴ Recorded music revenue in 2017 was \$137.8 million, up from \$125.3 million the previous year.⁵ But legitimate music services face stiff and unfair competition from illegal offerings. Piracy undermines and disrupts the growth of the legitimate digital content market and leads to lower willingness to pay for legitimate offerings. Although the Swiss music market has been growing for the last three years, it still accounts for less than one-third of the revenue it generated 20 years ago. Thus, it is as important as ever that the Government of Switzerland strongly enforce against piracy that could disrupt the growth of the legitimate market.

Illegal streaming platforms operated from remote or unknown jurisdictions continue to be highly popular in Switzerland, and carry copyrighted material that undermines the legitimate market, such as films early in their exploitation cycle. This is facilitated by a general understanding (supported by the government) that private use of such platforms is legally permitted. Peer-to-Peer (P2P) BitTorrent activity for the purposes of sharing infringing material remains popular. Stream-ripping sites and applications, which permit users to create a local copy of unauthorized streamed content, are still widely used. Downloading and streaming of unauthorized content for private use are likewise viewed by many as legal in Switzerland, as long as no uploading occurs.

Cyberlocker services for storage and sharing of illegal files also continue to be a concern. For example, the popular cyberlocker site *oboom.com*, which notes being "Swiss made" on its home page, is hosted via SwissBrothers AG. Industry reports a number of host and data centers based in Switzerland that provide hosting services to other ISPs, often without any review to ensure their customers do not include pirate services. For example, before it was removed by RIPE, which controls the allocation of IP addresses in Europe, Panama Connection, a Switzerland-based "bulletproof" ISP, offered "no questions asked" hosting services and was also involved in other criminality. Following the removal action by RIPE, the company dissolved. Likewise, some ISPs that purport to be based in the Seychelles in fact have data centers in Switzerland. Another example is Private Layer, which provides hosting services for numerous copyright infringing sites, which benefit from access to P.O. box services and possibly server capacity. Private Layer, apparently a Panama based organization with no known operation in Switzerland, seems to use server capacity at an ISP in the Zurich area. It also appears to use Swiss telephone numbers. These distributors of pirated content rely on and refer to Switzerland's legislation that sets high value on privacy protection. Further revisions to the draft Copyright Act amendments should require host and data centers to implement a "know-your-customer" policy to avoid providing hosting to pirate services.

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 remain to rely on the *.ch* domain, such as *eztv.ch*, *1channel.ch*, *arenabg.ch*, *couchtuner.ch*, *levidia.ch*, and *project-free-tv.ch*. The IIPA recommends that the Government of Switzerland expand its enforcement actions, as its jurisdiction is not necessarily limited to sites with a *.ch* domain.

⁴See <http://www.pro-music.org/legal-music-services-europe.php>.

⁵IFPI, *Global Music Report* (April 2018), at p. 123, available at <http://www.ifpi.org/recording-industry-in-numbers.php> ("GMR 2018").

COPYRIGHT ENFORCEMENT IN SWITZERLAND

Copyright industries in Switzerland have made efforts to resume criminal and civil actions against online infringement under Swiss law, which almost entirely ceased in the aftermath of the 2010 *Logistep* decision of the Swiss Federal Supreme Court. Prosecutors—although now beginning to voice their own frustration with the situation—have interpreted the *Logistep* precedent broadly as a *de-facto* ban barring the collection and use of any IP address data identifying defendants in criminal copyright cases.⁶ With some exceptions, prosecutors tend to consider copyright enforcement cases as low priority. While some prosecutors do pursue investigations against cyberlockers and structurally infringing sites, they seem unsure how to enforce existing laws and lack resources to freeze assets or secure evidence residing on servers (which may contain significant quantities of infringing materials). A criminal trial against the notorious cyberlocker *Cyando/Uploaded* should have ended with a judgment in the fall of 2018, but no outcome has been made public so far. And in September 2018, the founders of a major hosting service that facilitate piracy went on trial in Switzerland, with a verdict expected this year. The proposed Copyright Act amendments would clarify that IP address data may be used for criminal copyright cases—however, as explained later in this submission, it does not change the status of IP address collection for civil cases. Until the draft amendments are enacted, right holders remain proscribed from collecting and analyzing the IP addresses of suspected infringers for purposes of establishing the existence of an underlying direct infringement, or as part of a secondary liability claim.

A test case on website blocking is pending in the Swiss courts. This litigation seeks an access-blocking order against the market leader ISP in Switzerland and has been pending since 2015. Prior to this litigation, courts declined to order the blocking of access to illegal sites due to a lack of clear legal grounds for doing so. The claim was brought in absence of any provision of law specifically dealing with access providers' responsibilities. The case was dismissed in mid-2018 in the first instance, with the court ruling that there were no legal grounds for such claim under Swiss law. It is currently pending before the Federal Court as final instance, with a judgment expected during the first half of 2019. Access providers have refused to agree on any access-blocking mechanism during the pendency of this civil case.

Proceedings were also filed by a number of broadcasters challenging the collective licensing/remuneration practice for Replay/Catch-Up-TV recording and making available services (under private copying rules). These services currently have a scope of seven-days full recording of entire TV programs of several hundred channels, amounting to several tens of thousands of hours of content, including film and series available to the public at any given moment. The proceedings were dismissed in the first instance on the grounds that there was no procedural capacity to appeal. This is currently pending before the Federal Court as final instance on this procedural issue, with a judgment expected during the first half of 2019.

A distributor of a device commonly preloaded with piracy software, called the Kodi Box, operating in the French part of Switzerland, continues to be in business despite an ongoing criminal investigation. IIPA is informed that prosecuting authorities now seem to be taking the case seriously, after a two year delay. However, the future of that prosecution remains uncertain given the unclear legal status of linking as infringement, and the stated position of the government that private use of works from illegal sources is not actionable. Notwithstanding investigations, criminal proceedings continue to lag and distribution of Piracy Devices continue.

The current uncertainty around ISP liability, and Switzerland's application of its privacy laws, have favored ISPs and have inadvertently led to protecting even repeat infringers from prosecution. The website hosting industry's trade association has established a code of conduct agreeing to a stay-down provision, though it administers the code of conduct autonomously and defends against interference by government or right holders. Hosting providers affiliated with the trade association purport to take down infringing content subject to notification, while

⁶While enforcement of copyright law against private users may still be technically possible, as highlighted by the Government of Switzerland in its public comment regarding the 2016 Special 301 report, industry sectors report that prosecutors remain unsure how to reconcile the *Logistep* case with the need for IP address based evidence.

"sharehosters," such as *Uploaded.net*, practice takedown but do not prevent (and even support) quick re-upload, thus avoiding effective stay-down. These provisional measures, in principle, could work well; however they fail to mitigate online infringement due to the lack of clear and tested liability rules. The Government of Switzerland should require ISPs to work together with right holders to improve current processes and to agree on measures that have proven to effectively prevent or restrain infringement. It is also crucial that it move as swiftly as possible to implement legislation establishing such a process and imposing liability for ISPs that host infringing content in relevant circumstances. Moreover, "know your customer" policies for ISP hosting services are needed in order to prevent ISPs from providing hosting services to online platforms that facilitate infringing activity. The government should revise the draft Copyright Act amendments to require or encourage host and data centers to adopt and enforce such policies, which reflect the basic duty of care applicable to businesses operating in this area.

COPYRIGHT ACT AND RELATED LAWS IN SWITZERLAND

While the Swiss Government made some progress this year toward reforming the country's Copyright Act, one glaring position threatens to undermine the entire effort: downloading by individuals from illegal sources is still considered legal if it is a "private copy," and there are no effective options for tackling this problem.

Copyright Reform

On November 22, 2017, the Federal Council adopted a bill with draft Copyright Act amendments and an explanatory memo providing an article by article commentary (a "dispatch"). The dispatch and the draft amendments were debated and voted on by the National Council on December 14, 2018 and a new, consolidated version of the draft Copyright Bill has now moved to the Council of States for a March debate and vote. The project grows out of the AGUR12 working group,⁷ but falls short of implementing the full AGUR12 compromise recommendations which were already a big compromise on the part of copyright right holders. Substantial revisions to the draft amendments are needed to adequately address right holder concerns and raise the level of copyright enforcement in Switzerland to that available elsewhere. Worryingly, in the press release regarding the draft amendments, the government steadfastly announced that it did not intend to criminalize or otherwise sanction so-called "private use" of materials obtained from illegal sources. This is a blow to right holders as it cements the notion that private use of illegal sources is permitted, which is inconsistent with Switzerland's international obligations.

The draft Copyright Act amendments include a few positive changes to the Act. In particular, the draft amendments extend the term of protection for sound and audiovisual recordings and recorded performances from 50 years to 70 years, in line with the term for other works (Article 39, paragraph 1). This will provide greater incentives for the production of 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 recordings to local consumers in updated and restored formats as those formats are developed. This would also bring Switzerland in line with the EU term of protection. Broadcasts, on the other hand, receive only a 50 year term of protection; this should be increased to 70 years, as well, in line with international trends.

However, certain changes and late additions to the amendments raise serious concerns or fail to meet the promises of the AGUR12 compromise.

Revisions to Article 77i are meant to address the *de-facto* ban on the use of IP address evidence in civil and criminal copyright actions arising out of the 2010 *Logistep* case. However, while the proposed amendment allows right holders to use personal information (including IP addresses) for the purposes of filing criminal complaints, it does not allow for collection or processing of this information solely to bring civil claims. The proposed amendment and explanatory comments do state that the information may be used to assert civil claims in the context of a criminal proceeding or after criminal proceedings have concluded. However, this needlessly limits right holders' ability to pursue their rights. To properly address the privacy concerns raised in the *Logistep* case, the proposed amendment

⁷For a full description of the AGUR12 process, see prior years' IIPA Special 301 reports, at <https://iipa.org/reports/reports-by-country/>.

should be modified to simply limit data collection to that which is reasonably necessary for the pursuit of violations of law (this would mirror the standing opinion of the FDPIC,⁸ as well as the recommendation of the AGUR12).

The amendment offers an enforcement instrument, a “stay-down” obligation for certain hosting providers that create a “particular danger” for copyright infringement, such as those that incentivize illicit uploads and undermine take-down efforts (Article 39d). While this may help deter the operation of cyberlocker businesses that thrive due to copyright infringement, it is left to the courts to determine whether the hosting provider in fact has such a business model, which will create legal uncertainty. The website hosting industry’s trade association has agreed to a stay-down provision, enhancing the chances of its being passed by Parliament. However, the amendment should create an obligation on the part of all hosting services to take measures demonstrated effective in preventing and restraining infringement, including, among other things, disabling access to the specific location of identified infringing content.

One unexpected and negative change appeared for the first time in this draft amendment. Under the original AGUR12 recommendations, a compulsory collective right to remuneration for authors and performers of audiovisual productions for exploitation of these works on online platforms (VOD) had expressly exempted concert films and music videos because of the specificity of these sectors. This clear carve-out, unfortunately, was removed from the draft amendment without notice. This collective right of remuneration only applies to audiovisual works produced in Switzerland or other nations with a similar collectively enforced right of remuneration. This approach disregards the AGUR12 consensus and could pose major problems and market uncertainties for Swiss record producers and producers of music videos and other audiovisual works. If enacted, artists may earn substantially less money from the online exploitation of music videos under this provision than they do presently as a result of agreements negotiated by their record company with online platforms. Moreover, prior to introducing any new or novel rights, the Swiss Government should concentrate on addressing the existing problem of discrimination in the collectively managed rights area. The compulsory collective right of remuneration provisions are in Articles 13a and 35a and should be deleted. If elimination is not possible, U.S. works should be carved out from the scope of mandatory remuneration for VOD exploitation in draft Copyright Act amendments. Consistent with Switzerland’s international copyright obligations under Berne and TRIPs, any VOD exploitation under a compulsory license for mandatory collective management of licensing should trigger remuneration for right holders on a national treatment basis.

Other potentially problematic provisions in the draft amendments include:

- (i) **Exemption for certain public performances of musical works and sound recordings (Article 19).** A surprise new exception providing that certain establishments open to the public—hotels, rental accommodation, hospitals, and prisons—would become exempt from the obligation to pay for the public performance of musical works and sound recordings. Such exception would not be compatible with Switzerland’s current obligations under the WPPT and would also represent a significant rollback of copyright protection in Switzerland, especially compared to the protection offered by EU countries.
- (ii) **Extended collective licensing (ECL), i.e. collective licensing schemes including non-affiliated rights owners, with a case-by-case opting-out option (Article 43a).** Although the proposal is purportedly motivated by the desire to make content accessible that otherwise is barred due to licensing difficulties, such as large archive stock, its scope is not so limited. This creates a risk that extended collective licenses could be applied in areas where they undermine individual licensing, such as online services, where individual licensing is the norm. An opt-out provision, as proposed, does not render an extended collective license voluntary, and the language of the provision suggests that opting out must be declared for each individual license, and right holders would have to monitor ECL announcements. There is substantial risk that extended collective licenses applied in the online space would depress the

⁸A standing opinion of the Federal Data Protection and Information Commissioner (FDPIC) made in the wake of the *Logistep* decision—even as it stood by the Federal Court’s opinion—underscores, in the context of online piracy cases, that “we still believe that there is an overriding interest involved which would justify a violation of privacy rights as a result of the data processing.”

value for creative works, setting a tariff “norm” that could undermine licensing terms for right holders who choose to exercise their exclusive rights and opt-out. In addition, requiring opt-out in order to exercise exclusive rights could constitute a formality prohibited by international law, including the Berne Convention and TRIPS. In short, extended collective licenses are wholly inappropriate with respect to services that are already licensed directly around the world, even with opt-out rights.

- (iii) **An orphan works provision (Article 22b), including compulsory licensing of extended orphan works.** This provision allows works to be considered “orphan” after “research performed with appropriate thoroughness.” The dispatch on this article troublingly notes 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 “diligent search” set out in the Orphan Works Directive.⁹ The draft provision should be amended to make clear there is no recordation requirement for right holders to protect their works, or this could constitute a formality prohibited by international law, including the Berne Convention and TRIPS. Also, the provision does not specify that the institution (such as a public or publicly accessible library, school, museum, collection, archive or broadcaster) possessing the orphan work copy must be domiciled in Switzerland; it merely requires that the copy have been created, copied or made available in Switzerland, including, potentially, copies made available from foreign sources, thus opening the provision to content hosted outside of Switzerland.
- (iv) **A free reproduction license for scientific research (Article 24d), meant to cover “text-and-data mining.”** There is a potential for this license to exceed its intended purpose. For example, if combined with other exceptions such as the existing, unusually broad permission of use inside companies and organizations, (Article 19 (1) c).
- (v) **Protection of photographs regardless of their “individual character” or level of creativity (Article 2, paragraph 3bis).**

As expected, the draft amendments do not include a legal basis for website access-blocking. According to the Swiss Government, this element “would not find a majority” in the parliament. However, IIPA notes that in spring 2017, parliament adopted a website blocking provision regarding illegal foreign gambling sites. This provision was confirmed in a public referendum held in June 2018. There is additionally a revision of the Telecommunications Act soon to be discussed in Parliament that would introduce website blocking in the context of child pornography. Illegal copyright piracy sites should receive similar treatment.

Additional Concerns Under the Copyright Act and Related Laws

IIPA continues to have other long-standing concerns with certain aspects of the Copyright Act and related laws in Switzerland. None of these concerns have been remedied by the proposed Copyright Act amendments, and 2018 saw no positive developments on this front.

Private Copy Exception: The private copy exception in Article 19 of the Copyright Act is too broad, and has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. The Swiss Government has confirmed in numerous statements that downloading from an illegal source is to be permitted, and the current draft amendments do not make any changes to Article 19. This broad private copying exception, together with serious concerns regarding the protection of technological protection measures (TPMs) (see below), constitute significant hurdles for the protection against stream-ripping services that dominate the list of top pirate services. Moreover, the Swiss Federal Arbitration Commission has imposed a levy on catch-up TV, placing these services within the scope of the private copy exception. Cable and over-the-top (OTT) providers, including major

⁹Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, Article 3 and Recital 14 (“A diligent search should involve the consultation of sources that supply information on the works and other protected subject-matter as determined, in accordance with this Directive, by the Member State where the diligent search has to be carried out. In so doing, Member States could refer to the diligent search guidelines agreed in the context of the High Level Working Group on Digital Libraries established as part of the i2010 digital library initiative.”).

telecom corporations, offer seven-day catch-up services on integral recordings of hundreds of TV programs, relying on this government-approved collective remuneration tariff. This precludes direct licensing by right holders, including the initial broadcaster, on a platform-by-platform basis. This extension of the private copy exception to catch-up TV services impinges on the exclusive making available right, and thus likely violates Switzerland's international obligations, including under the WIPO Copyright Treaty (WCT).

Circumvention of Technological Protection Measures (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, particularly given the inappropriately wide scope of the private copy exception. Taken together, these exceptions allow individuals to circumvent access or copy control measures in order to copy from illegal sources and share with friends. As a consequence, circumvention devices and software are widely available in Switzerland. Furthermore, the country's Monitoring Office for Technological Measures (OTM) is currently evaluating country restrictions that affect the cross-border portability of copyright protected content.¹⁰ This appears to be in service of assessing the possibility of legislating the portability of audiovisual content similar to and inspired by the European Union's Portability Regulation.¹¹ This consultation is particularly troubling in light of the broader “Digital Switzerland” Strategy, also currently underway.¹²

Discrimination Against Neighboring Rights: Article 60(2) of the Copyright Act caps the remuneration payable to right holders (collected via collecting societies) at 10% of the licensees' income for authors and 3% for neighboring rights owners. This cap on right holders is wholly unjustified in the present reality of the music markets. The discrimination against the neighboring rights owners leads to revenues that are substandard in comparison to most European countries. In 2010, the Swiss performing artists and record producers collecting society “*Swissperform*” initiated arbitration proceedings against this cap. In 2014, the Swiss Federal Supreme Court dismissed the case in the final instance. In its judgment, the Federal Supreme Court stated that the 3% and 10% caps serve as a rule of thumb for what is an equitable remuneration under collective rights management. It acknowledged that the remuneration for performing rights are in fact higher in other European countries, but was unable to intervene on the merits. Rather, it held that it is up to the Swiss legislature to set these caps based on a political assessment. With this judgment, the Swiss Federal Supreme Court clearly showed the path for reform—yet it did not make its way into the draft Copyright Act amendments. Rather, those amendments create an “extended collective licenses” provision that, when combined with the existing remuneration caps, falls short of the country's international obligations. This unusual and unjustified discrimination against the neighboring rights owners should be ended and replaced with a fair and equitable remuneration for both performing artists and producers.¹³ The IIPA notes that there are no independent broadcasting and public performance rights for sound recording producers under current Swiss law, as producers merely have an entitlement to receive a share of artists' remuneration.

Criminal Sanctions Needed for Distribution that Prejudices the Public Performance Right: Article 12 Section 1*bis* of the Copyright Act states that copies of audiovisual works may not be distributed or rented if this prejudices the right holder's public performance right—e.g., if a motion picture audiovisual work is still in the theaters. An explicit criminal sanction for the violation of this principle is needed, in order to deal effectively with an influx of French-language DVDs imported from Canada and freely distributed while those motion pictures are still playing in Swiss cinemas.

¹⁰See <https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office-otm.html>.

¹¹Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

¹²See <https://www.bakom.admin.ch/bakom/en/homepage/digital-switzerland-and-internet/strategie-digitale-schweiz.html>.

¹³Moreover, the government should not be attempting to create additional collectively managed rights (in the proposed Copyright Act amendments) without addressing first the fundamental unfairness in Switzerland's collective management system—namely, the discrimination against neighboring right holders. This discrimination is fundamentally contrary to the standard U.S. policy of not establishing a hierarchy of rights, and should be resolved prior to entertaining proposals regarding collective management.

Amendments to the Swiss Film Act: Amendments to Switzerland's Federal Act on Film Production and Film Culture (Film Act) have been in effect since 2016.¹⁴ They require that any form of exploitation in the Swiss market, including theatrical, DVD/physical home entertainment, and all forms of VOD/online distribution (with the exception only of linear broadcast television and reportedly some catch-up TV) may be undertaken only by an organization that controls the rights for all available language versions and regions exploited in Switzerland. It is still not yet fully clear whether or not the revised provision shall mean that if a company acquires any rights for Switzerland it needs to acquire all rights (i.e., theatrical, video, VOD) and for all languages spoken in Switzerland, or whether it just means that the entity that acquires certain rights (e.g. video) just needs to acquire for this category of rights the rights for all language versions that are available for exploitation in Switzerland.

This law has interfered with the internationally established practice of cross-border licensing, particularly to multi-territory online platforms for specific language versions or language regions. If construed so as to require exclusive licensing and/or package licensing of various forms of online distribution, the law interferes with practices of non-exclusive licensing and of separate licensing for SVOD, transactional video on demand (TVOD), and advertising video on demand (AVOD). While the markets are adapting to licensing practices, adverse effects of this regulation on the market remain probable. No sanctions have been imposed yet. The amended law also imposes registration and detailed reporting of exploitation data upon entities (including foreign) for films exploited in Switzerland in all sectors, which became effective 2018 (for figures collected in 2017). The provision lacks clarity and has caused several areas of uncertainty: 1) whether or not all types of VOD (including SVOD) must be included in exclusive "package" licenses for the territory; 2) to what extent broadcasters' ancillary on-demand rights (such as catch-up) are excepted; and 3) the extent of "grandfathering" protection for existing contractual fragmentation of film rights. In sum, this amendment's provisions interfere with internationally established licensing practices.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Switzerland is a member of the Berne Convention, TRIPS, WCT, and the WIPO Performances and Phonograms Treaty (WPPT). It is thereby obligated under these international agreements to provide "effective" remedies to prevent and deter infringement. Under Article 41(1) of TRIPS (and similarly the WCT Article 14(2) and WPPT Article 23(2)) it is required to "ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." It is not currently doing so, as explained in this report, and the draft Copyright Act amendments do not do enough to bring Switzerland in line with its existing obligations.

¹⁴See <https://www.admin.ch/opc/en/classified-compilation/20001389/index.html#a19>.

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Thailand remain on the Watch List in 2019.¹

Executive Summary: In the past few years, the IPR situation has improved in Thailand. Thailand was recently lowered to the Watch List partly in recognition of reforms undertaken by the Royal Thai Government intended to help Thailand meet the challenges of the digital age, including amendments to the Computer Crime Act (CCA) to establish an administrative, no-fault remedy to disable access to infringing copyright content. However, Thailand continues to struggle with online piracy. Mostly Thai-language sites continue to dominate the piracy landscape, and the growth of piracy devices and apps continues to harm the legitimate over-the-top (OTT) landscape. Piracy facilitated by social media platforms has also increased. The enactment of the CCA in late 2016 (which went into force in July 2017) led to the first applications to disable access to copyright infringing sites. While the process seems fairly well defined, some orders remain to be properly implemented. Unauthorized camcording of motion pictures (especially through audio feeds) continues to damage the market for audiovisual works. Unfortunately, the government has not taken any action to address the continued operation of rogue collective management organizations (CMOs) that undermine music rights holders and users, and contribute to crime and the erosion of public order. Thailand should introduce a measure addressing the establishment and governance of CMOs to bring order to music collecting societies that are distorting the market.

There is hope that pending amendments to the Copyright Act may pave the way toward greater online platform accountability and a strengthened site blocking remedy under the copyright law, as well as proper implementation of protections against unlawful circumvention of technological protection measures (TPMs). Thailand also appears poised to join the WIPO Copyright Treaty (WCT), which would result in the recognition of the basic standards for online copyright, although it is also critical for Thailand to further update its laws to be compatible with the WIPO Performances and Phonograms Treaty (WPPT), while recognizing that sound recordings are protected as copyright works in Thailand. Several key criminal referrals of major piracy services remain pending, and time will tell if the Royal Thai authorities can successfully curb piracy and pave the way toward deterrent criminal remedies in the future.

PRIORITY ACTIONS REQUESTED IN 2019

Enforcement

- Ensure proper implementation and application of the CCA regarding actions to combat pirate websites, including ensuring expeditious and non-burdensome procedures, and full and fast compliance by the ISPs in Thailand.
- Successfully address large-scale pirate operators in Thailand; ensure that these services stay offline and the defendant/operators are properly dealt with under the law.
- Bring effective enforcement actions against illegal distribution of copyright materials over online social media platforms, including live streaming, against piracy devices and apps which riddle the marketplace and make it impossible for legitimate services to compete, and against illegal camcording activities.

¹For more details on Thailand's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Thailand's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



Legislative

- Address shortfalls to Copyright Act in order to:
 - Ensure that the proposed provisions on intermediary liability provide adequate incentives for neutral online intermediaries to cooperate with rights holders to address online infringement, and implement international best practices to combat infringement, such as requiring ISPs to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to infringing content.
 - Ensure provisions on TPMs include protection against the act of circumvention, prohibit trafficking in circumvention technologies, devices, components, and services, and that both the TPM and RMI provisions do not permit overly broad exceptions.
 - Ensure (through revision of the existing camcording provisions) that measures addressing camcording effectively prohibit possession of an audiovisual recording device in an exhibition facility with the intent to make or transmit an audiovisual work, in whole or in part, and that exhibition facilities are given standing to bring complaints.
 - Ensure that any exception does not run afoul of international standards, including the Berne Convention and TRIPS Agreement “three-step test.”
 - Ensure copyright offenses are non-compoundable.
 - Extend the term of copyright protection consistent with the global trend to 70 years from the death of the author, or for sound recordings (and performances) at least 70 years from publication.
 - Reduce the number of and bring order to the multitude of CMOs currently active in the market to protect rights holders and users from rogue CMOs, including by adding a measure addressing the establishment and governance of CMOs.

Market Access and Related Issues

- Formally remove market access barriers impacting foreign audiovisual content, including:
 - fixing (or withdrawing) the problematic Film Act;
 - relaxing investment/ownership restrictions that impede legitimate distribution channels; and
 - easing television advertising restrictions.

PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Prior IIPA reports on Thailand contain a more detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.² Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2018. Rights holders continued to have good cooperation with Royal Thai authorities, who assisted with rights protection, and conducted many trainings and IP-related events throughout the year.³

Online Piracy: As broadband and mobile 3G and 4G services become more widely available, with faster speeds, growing infrastructure, and lower Internet subscription fees, there are opportunities for growth of a legitimate online and mobile marketplace for copyright works in Thailand.⁴ Access to the Internet, including through both fixed and mobile Internet access, continues to increase, and smartphone use in Thailand remains very high.

Notwithstanding the expanding availability of legitimate services for music and audiovisual materials, the increasing access to broadband Internet, particularly on mobile devices, has led to escalating piracy of recorded music, television content, video games, published materials, and broadcasts. Legitimate services are simply unable to

²See, e.g., IIPA, *Thailand*, 2018 Special 301 Report, February 8, 2018, at <https://iipa.org/files/uploads/2018/02/2018SPEC301THAILAND.pdf>.

³For example, the motion picture industry participated in several events and trainings, most relating to the challenges of combatting digital piracy.

⁴Legitimate services in Thailand for content include iTunes, Google Play Store, Hollywood HDTV, Prime Time, iFlix, HOOQ, Doonung, ZABMOVIE, Deezer, KKBox, Spotify, YouTube, AIS, GTH Movie Store, AIS Movie Store, HTV (from True Visions), and Clickplay TV, among others.

compete with often free-to-end user pirate offers. The use of social media is on the rise, and has become a popular platform for distributing and accessing pirated content. Streaming unauthorized content is the most popular form of piracy, whether through social media and streaming websites, apps, or Piracy Devices. 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 PPV events and concerts. BitTorrent index and tracker sites, cyberlockers, and BBS/forums also remain problematic, although the popularity of peer-to-peer (P2P) networks, including BitTorrent, has declined mainly due to the increase in stream-ripping. Internet Protocol Television (IP TV) has also become a popular platform for digital piracy.⁵ The latest report shows that social networking is very popular, and that Facebook Video is number two for downstream traffic.⁶

Services and programs that allow users to illegally convert streams into unlicensed downloads from platforms such as YouTube (i.e., stream-ripping) are an increasing form of music piracy. These include *YouTube Downloader YYTD*, *Keepvid*, *Flyto.biz*, *Flyv2mp3.org*, and *Convert2mp3.net*, as well as mobile apps such as *Video Downloader Lite Super – Vdownload* on iOS and *TubeMate Youtube Downloader* on Android. 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.

The motion picture industry has reported that many piracy websites are among the top 500 most accessed sites in Thailand, according to Alexa rankings, with the most popular sites being in Thai language. These sites specifically target Thai Internet users, and include Thai as well as foreign motion picture and television content. These include *Movie2Free.com*, *037HD*, *Mastermovie-HD.com*, *MovieHD-Free.com*, *Siambit*, *TT-Torrent*, *Nanamovies*, *onlinemini-hd*, *duckload*, *nungnew-hd*, and *Kod-HD*. Industry has informed the government of the severity of piracy on all of these sites, and the government is supportive of addressing industry's concerns. For the music industry, the main infringing site by audience size is *Joox*, but sites such as *2sh4sh.com*, *4shworld.com*, *kakzmuzik.com* and *olozmp3.net* are also problematic. Illegal apps on smartphones, readily available from Apple iTunes and the Google Play Store, are increasingly popular among Thai users to access vast amount of pirated content either for free or at a very low cost. This rampant piracy continues to take its toll on the market for legitimate creative content. Increasingly, piracy websites are using content delivery networks and cloud services such as Google Drive, making identification of website operators and server locations very difficult. From the music industry's perspective, cooperation with ISPs has been lacking, with a takedown rate of only around 50% from January to September 2017, and, again, once content is taken down, links to the same infringing content reappear immediately.

The local motion picture industry succeeded in March 2018 with the first-ever site blocking order under the CCA, blocking a piracy site called *nungmovies*. Subsequently, sports rights holders and the music industry have obtained additional orders, but compliance has been spotty. For example, in the case of several sports sites, ISPs are not blocking encrypted requests to the site despite the fact they know the court orders will be ineffective if they fail to do so. While CCA Section 27, provides for penalties for non-compliance, it has not been enforced. In all, stronger action is needed against piracy sites in and outside of Thailand.

IIPA is encouraged by actions the government has taken in an effort to improve the copyright ecosystem in the online and mobile environments such that it is able to support legitimate business models. In particular, the amended CCA, which entered into force in July 2017, permits disabling of access to infringing websites. As noted, the first test case was successful in March 2018 against *nungmovies*, although some rights holders report some difficulties with the bureaucratic nature of the process.⁷ In April 2018, music rights holders then obtained a blocking order from the criminal court under the CCA provisions related to pirate site *4shworld.com*. As of January 2019, TECA had reported some difficulties in enforcing the order, particularly in relation to a secure version of the site which is using

⁵IP TV allows streaming of television content over the Internet, and the illegal content is typically distributed using BitTorrent while collecting a monthly fee from subscribers. The television content may be streamed through a stand-alone server streaming the content to subscribers through a proprietary website that is typically difficult for enforcement authorities to trace, or through caching in a cloud service, such as Google Drive or openload.co, which are very difficult for enforcement authorities to trace.

⁶Sandvine, *The Global Internet Phenomena Report* (October 2018).

⁷Since August 2017, TECA has filed 25 cases and so far obtained only 6 blocking orders. The rest are either pending at the Digital Economy and Society Ministry or only partially handled by the new government unit Coptics which removed the specific infringing URLs but not the domain.

https protocol. Similarly, court orders to block pirate sites *kakzmuzik.com*, *hdprime.tv*, and *hd2liveplus.com* (all using https protocol) were obtained, but the blocks are not implemented. As of January 2019, more than 12 other cases reported by the music industry are pending consideration at the Digital Economy and Society Ministry, most of which have been pending for more than 6 months, and one for more than 16 months. Proper training to the government authorities as well as government follow up with ISPs, or court proceedings, are needed to ensure that blocking orders can be properly implemented.

In late 2018, a major set of raids and criminal referrals resulted in the disruption of several key Thai piracy sites, including *Doo4K* which provided subscription piracy VOD to Thai users. The case was handled by the Department of Special Investigation (DSI). The site unfortunately remains up and the case is ongoing. Other referrals include the most popular infringing websites in Thailand, such as *Movie2free* and *037hd*. These criminal cases remain pending.

Another positive development in 2018 was the creation of Thailand's new anti-piracy agency, *Coptics*, which is a partnership between the Royal Thai Police and DIP with the aim to accelerate the process for blocking illegal websites and to target online piracy.

DIP has been instructed to take the lead on inter-agency coordination of IPR enforcement efforts, and to date, has held meetings to further cooperation between rights holders and intermediaries to address infringement on their services, which would include ISPs, payment processors, domain registers, advertising services (e.g., DAAT), and search engines. We hope these efforts at inter-agency coordination can encourage improved standards in investigations for computer forensics and electronic evidence gathering so that investigations are not delayed. IIPA encourages further training and education for law enforcement authorities in handling online piracy cases, particularly to improve understanding of the CCA, the process for seeking to disable access to infringing websites, and the need to address newer technologies such as stream-ripping apps and services.

Retail and Hard Goods Piracy Still Prevalent: Physical piracy is decreasing mainly due to the shift to online and mobile platforms. Nonetheless, physical piracy remains a significant concern for some industries, harming local and foreign creators alike. Such piracy still finds its place in the malls and on the streets in Thailand, particularly in tourist areas. Areas notorious for piracy include, in Bangkok: Panthip Plaza; Klong Thom; Saphan Lek; Baan Mor Shopping Area; Patpong; Kao-Sarn Road (where reports showed Bruno Mars finding his pirated records on sale blatantly and openly while on tour in March 2014); Silom; Mah Boon Krong (MBK) Center; Sukhumvit Road; and Bobae Market (a wholesale market that sells to street vendors). Also noted for piracy are Rong Klua Market, Sakaew, Samui Island, Hua Hin, Phuket, Pattaya, and Chiangmai. The Royal Thai Government has itself designated many of these markets "Red Zones" and "Yellow Zones" to indicate that it views these markets as vulnerable to piracy activities. Pirated music, video games, and published materials remain available. The "IT" malls conduct hard disk loading of content onto any device. Further, there are indications that infringers have moved to newly emerged Sunday and night markets.

To address hard goods piracy, industry reports that Royal Thai Government authorities have conducted raids. Unfortunately, those raids have generally not been followed by upstream investigations to target the criminal organizations at the root of this piracy. To the extent mall owners are uncooperative, the government has on prior occasions indicated that, even in the absence of landlord liability in the law (which was not included in the amendments to the Copyright Act), criminal action can be brought against mall owners; however, we are unaware of any actions to date. Unfortunately, hard goods piracy takes place at certain government-supported activities or events, such as Silom Walking Street on Sunday. The Royal Thai Government should review the effectiveness of its anti-piracy efforts (including the designations of "Red Zones" and "Yellow Zones"), and seek improvements.

Piracy Devices and Apps Represent a Growing Problem: Piracy Devices include media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed, and they have become an increasing problem in Thailand. China is

a hub for the manufacture of these devices and the deployment of middleware and apps used to access infringing materials. Piracy Devices are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The devices are either pre-installed with apps that facilitate infringement or include instructions for users to easily obtain apps to access unauthorized motion picture and television content. These apps allow users to connect to a supporting online infrastructure, including foreign piracy sites that provide users with instant access to infringing audiovisual content. Piracy Devices are sold on e-commerce websites such as *Lazada.co.th*, but are also made available through traditional retailers found in popular malls across Bangkok, and are often promoted and/or advertised to enable infringement of copyright or other illegal activities. Consequently, Royal Thai authorities should increase enforcement efforts, including cracking down on Piracy Device vendors or those that market piracy apps, or preload the devices with apps that facilitate infringement or offer them as an aftersales service, and take action against key distribution points for devices and apps that are being used illegally. Thailand should also amend its legal framework to specifically address this problem.

Camcorder Piracy Traced to Thailand Continues to Harm Motion Picture Market: The problem of unauthorized camcording of motion pictures in movie theaters in Thailand remains a concern of the industry. Pirate syndicates continue to minimize risk by focusing almost exclusively on Thai audio captures, which are then added to video camcords found on the Internet. In 2018, 15 illicit recordings of MPAA member films were traced to Thai theaters, up from eight in 2017. Local Thai films are camcordered within days of their release in the movie theater. Increasing broadband Internet higher-speed mobile connections in Thailand mean faster uploads to the Internet of motion pictures illegally camcordered. In addition, the rise of live streaming content over the Internet has contributed to the growing camcording problem. If strongly implemented, the Copyright Act provision that deems camcording an infringement of copyright could help.

Book Piracy Problems Remain: The growth of the book and journal publishing industry is hampered by unauthorized commercial photocopying in and around university campuses and book piracy. Pirated materials include academic journals, chapters of reference books, language dictionaries, travel guides, and history books, and typically occur on a print or copy "to order" basis. Pursuing litigation against producers of counterfeit/pirated books remains problematic, as the process is typically plagued by delays.

Court Reforms: The establishment of the Thai IP & IT Court in 1998 encouraged great hope for a sustained workable judicial system to protect copyright, and in 2018, those efforts bore fruit with the IP & IT Court issuing the first-ever site blocking order under the CCA. In addition, the criminal courts issued orders for blocking additional sites of concern to the music industry and sports broadcast rights holders.

Notwithstanding such progress, civil damage awards are far lower than the cost and attorney's fees associated with bringing cases. Independent rights holders are particularly hard pressed to afford civil litigation as a means of enforcement and deterrence to pirates. Further, it remains to be seen whether the latest criminal raids against major piracy sites in late 2018 will yield deterrent sentences in the criminal courts. Some improvements could be offered, such as providing for additional damages, punitive damages, or pre-established (statutory) damages in the law. Sentencing guidelines should be issued, adopting minimum sentences that provide a real deterrent to infringement.

An endemic problem within the Royal Thai Government as a whole is the relocation of staff. Expertise, including among the judiciary, is often wasted when judges are rotated out. The relocation to other departments of officers who become familiar with techniques to track and enforce against online piracy leaves a gap in online investigation knowledge among the remaining officers. We recommend the courts (including the IP & IT Court) and the officers of the various enforcement arms be retained so as to build upon the expertise they have obtained by experience.

The Money Laundering Prevention and Suppression Act (2013) now includes IP crimes as a predicate act for money laundering investigations, potentially leading to significant criminal fines, imprisonments, and asset seizure. It could be a useful tool, but due to the high evidentiary burden, this law has not been used to effectively combat copyright

infringement. IIPA hopes that prosecutors and judges are able to find ways to more effectively use this tool in the future to build key cases involving copyright infringement.

Protection Needed for Legitimate Licensees: 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. These “rogue” entities, often accompanied by threatening individuals, or sometimes even police officers, harass and threaten to sue the legitimate licensees for copyright infringement, or even imprison them, if they do not pay additional fees to obtain additional purported licenses. Often, the legitimate licensees have felt that their personal safety was in jeopardy. We urge the Royal Thai Government to take appropriate actions to protect these legitimate business operators from such unlawful threats and intimidation, which also harms music rights holders and users in Thailand. Such actions should include promulgating and implementing regulations to increase the transparency of CMOs, such as requiring an entry check and verification of the rights that the CMOs claim to manage, and publishing a list of repertoire and members that the CMOs represent.

COPYRIGHT LAW AND RELATED ISSUE UPDATES

CCA Amendment: In a significant development, the 2016 Amendment to the Computer Crime Act B.E. 2550 (2007) added IP infringement as a predicate crime in Section 20, permitting injunctive relief against ISPs to disable access to infringing websites hosted outside of Thailand. The Amendment entered into force in July 2017, and as indicated above, test cases for this provision have already been successfully concluded. As of November 2018, DIP had received 62 requests for blocking or disabling access to IPR infringing contents or activities, and 48 of those requests were forwarded to the Digital Economy Ministry (MDES) for further action. The Central Intellectual Property and International Trade Court and the Criminal Court have issued 26 court orders to block or disable access to copyright infringing contents, totaling 634 URLs (however, in most of these cases, the orders were to disable access to specific content identified in the URLs, not entire websites). IIPA encourages the Court to finally adjudicate the remaining cases, so that it can be determined whether the CCA is having the desired effect of reducing online infringement in Thailand.

Copyright Act Revisions Approved by Cabinet, Now With State Council: Broad amendments to the Copyright Act have been approved by the Royal Thai Cabinet, and now sit with the State Council. The bill introduces new safe harbor provisions, provides for site blocking as a copyright remedy, and proposes amendments to other provisions in the Copyright Act, including those related to TPMs.⁸ One result of the bill’s assent will be that Thailand will join the WCT, although joining the WPPT should be confirmed as well.

The following are critical issues with the Copyright Act and the draft amendments that should be addressed as part of Thailand’s ongoing Copyright Act amendment process to ensure that Thailand achieves its stated goal of a modernized copyright law that brings Thailand closer into compliance with its international obligations and implements the WCT and WPPT:

- **Service Provider Liability Amendments:** The amendments to the Copyright Act would repeal Section 32/3 of the Copyright Act, and add Sections 43/1 to 43/14 for notice and takedown which would be an improvement on the existing law in several respects, including: (i) not requiring rights holders to obtain a court order before ISPs take down content (although they do have to file a court action within 15 days of notification); (ii) requiring ISPs to have a repeat infringer policy; and (iii) requiring that ISPs must not interfere with TPMs. The proposed safe harbor provisions are largely based on Section 512 of the Digital Millennium Copyright Act (DMCA). Notwithstanding these relative improvements, the amendments are problematic in several respects and in need of further improvement. Specifically, IIPA recommends the following: (i) implementing reasonable measures to prevent infringement in addition to taking down the infringing material; (ii) stipulating that only ISPs of a technical, automatic and passive nature may be covered by safe harbors; (iii) stipulating that ISPs that do not meet all the conditions

⁸The bill would also expand protection of photographic works to the lifetime of the author plus 50 years.

will not be protected by the safe harbor provisions, which is not clear in the current text; (iv) amendments to the notification requirements to make them less burdensome on rights holders; and (v) extending the period rights holders have to file an action to at least 30 days.

- **Technological Protection Measures:** TPMs are key enablers of new legitimate business models for content distribution in the digital and online environments. Accordingly, their proper protection is necessary to shape a healthy digital marketplace for Thailand. The amendments will improve the law to cover access controls and prohibit trafficking. IIPA understands that Thailand intends to join the WCT once the bill has received Royal Assent, which would be a positive step.
 - **Trafficking:** Section 53/6 explicitly outlaws provision of services to circumvent technological protection measures and trafficking in circumvention devices, technologies, and components.
 - **Exceptions:** Some of the enumerated exceptions in Section 53/5 may be acceptably narrow, but others must be eliminated or reworked to preserve the adequacy and effectiveness of protection. For example, Section 53/5(1), allowing circumvention for any exception to copyright under the law, is overly broad and undermines needed protections, especially for access controls. The exception in Section 53/5(7) also risks undermining necessary protections because it appears to allow circumvention by educational, archival, library, or public broadcasting entities in fairly broad circumstances.
- **The Exception for Rights Management Information (“RMI”) Should Be Narrowed:** The exceptions to the protections for RMI appear to be extremely overbroad, which risks undermining important protections for rights holders and raises serious questions regarding consistency with the three-step test governing exceptions and limitations under the WCT and WPPT treaties. IIPA urges the Royal Thai Government to narrow or, if necessary, eliminate these exceptions to bring them in line with international standards.
- **Camcording Provision Should Be Revised:** The provisions intended to outlaw unauthorized camcording of motion pictures in Thailand unfortunately falls well short of model approaches provided to the Royal Thai Government on numerous occasions because they restate what is already true: namely, that the reproduction of an audiovisual work in a movie theater is a copyright infringement. Notwithstanding this shortcoming, IIPA is still hopeful the law can be strongly implemented to provide an avenue to eradicate all acts of reproduction or transmission (or attempts at the same) of all or part of a movie, whether audio or video, or both. Preferably, these provisions will be revised to ensure that the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both) is prohibited, and that exhibition facilities are given standing to bring complaints. Those engaging in the act proscribed should be subject to interdiction by cinema employees and the police, immediate seizure and forfeiture of the equipment used in violating the law 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. Clarification in the law and implementing regulations for clear, fair, market-based, and transparent collection rules are overdue. We strongly suggest that the Copyright Act be revised in this regard. In particular, legislation should address the establishment and governance of CMOs to provide at least that (i) only entities whose ownership or membership comprises rights holders or bodies representing them may operate as CMOs, (ii) rights holders or bodies representing them must be represented in the governing bodies of the CMOs, and must have fair and balanced representation in the supervisory bodies of the CMOs, and (iii) the management, including collection and distribution practices, of the CMO must be transparent and accountable. The Royal Thai Government should implement international best practices in this area, such as those embodied in the EU Collective Rights Management Directive, reflected also in the WIPO Collective Management Organizations Toolkit, not least to address the problem of rogue entities masquerading as legitimate CMOs, which is damaging to users and music rights holders alike. In addition, DIP should take measures to ensure the accuracy of its copyright registration system, such as by developing a

Copyright Registration Database System allowing examination of the accuracy of copyright owners and registered content to ensure accuracy and protect consumers from rogue CMOs.

- **Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** In November 2018, Copyright Act Number 4 B.E.2561 (2018) was published and will go into effect in March 2019. The act permits persons with disabilities who do not have access to copyrighted work due to impairment in vision, hearing, movement, intellect or learning or other deficiencies to have equal opportunities to other persons to access, make copies, modify, or distribute the copyrighted work. DIP will issue 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, which will be mandatory for individual WIPO members that ratify the Treaty. From the music industry's perspective, sound recordings should not be covered by the exception at all, and in the alternative, the exception should be properly defined and restricted in scope to apply solely to specific acts in respect to specific works, for the benefit of specific individuals, with adequate safeguards, and with equitable remuneration payable to rights holders. Industry understands that the Royal Thai Government intends to exclude film and television productions from the export provisions in the Marrakesh Treaty. This exception needs further scrutiny, and in any event, should not be implemented in such a way that it would conflict with the Berne Convention and TRIPS "three-step test."
- **Absence of Landlord Liability Provision:** In the recent amendment process, it is unfortunate that the Royal Thai Government did not take the opportunity to enact a landlord liability provision to provide adequate civil, administrative, and criminal remedies against property owners who lend their premises to those who engage in commercial infringement of copyright. While a previous draft of the recent copyright law amendments included a landlord liability provision imposing criminal liability on one who "provides physical or digital spaces for infringing activities," in 2011, DIP was apparently informed by the Thai Trade Representative that the provision was "redundant with the existing contributory offense of the Criminal Code." DIP then commissioned a research team to conduct an in-depth study on this issue. The authorities indicated they may opt for existing provisions under the Penal Code to prosecute landlords who facilitate infringement activities if there is enough evidence of the landlords supporting the wrongdoing. A test case under the existing law would be extremely helpful but should not ultimately substitute for a strong landlord liability provision, which is necessary to crack down on piracy in the malls and should be considered in the current revision process.
- **Inadequate Term of Protection:** Thailand should extend its term of copyright protection to be in line with the international trend of 70 years after the death of the author, or, in cases in which term is calculated based on publication, to at least 70 years.

Evidence Law: IIPA recommends that the Royal Thai Government amend the Evidence Law to allow the hearing and testimony of digital evidence. Conforming changes should be made to any procedural rules of evidence in the various enforcement authorities so that they too will have clarity with respect to digital evidence.

Section 32 and Fair Use Guidelines: IIPA also continues to call for a narrowing or clarification of Article 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 affected publishers and stakeholders are afforded the opportunity to provide input into the guidelines.

MARKET ACCESS ISSUE UPDATES IN THAILAND

Film Act Remains Problematic: The Motion Pictures and Video Act B.E. 2550 (2008) (not yet implemented) potentially imposes quotas and onerous censorship and ratings provisions. Section 9(5) allows the Film Board to establish a ratio between the number of local and foreign films, and film/screen time quotas. The number of screens in

Thailand (nearing 1,000 as of the end of 2018) is more than enough to have a free market for theatrical releases. At a time when most other countries are removing quotas, these restrictions could, if imposed, have a significant negative effect on the growing infrastructure, local Thai productions, and foreign film distribution in Thailand, limiting the variety of entertainment available to Thai consumers, and exacerbating piracy.

The Act would also impose onerous ratings requirements on films, music videos and live performances, and censorship requirements on films, audiovisual products, music used for karaoke, and video games. The concerns over this ratings and censorship regime include: 1) the long time frame (15 days) for obtaining ratings or censorship approval, allowing pirates (who do not adhere to the law's requirements) to gain a head start; 2) the high costs associated with rating or censorship approval, giving pirates an additional time and cost advantage in the market; 3) the severe consequences (including criminal liability) for failure to comply with the ratings and censorship system; and 4) the onerous requirement that the relevant rating or censorship code must be "fixed" onto the container of films or audiovisual products and on the packages, and that rights holders "embed" the code into the content of films and audiovisual products to appear on the screen or any media when broadcasted or displayed. In December 2018, the Film Ratings Office (FRO) proposed changes to rating submissions procedures that would require submissions of Digital Cinema Packages (DCPs) with open encryption keys (KDMs). Such a request is against international norms and poses significant security risks. Although the FRO has agreed to accept a low-resolution screener version with watermarks for archive purposes, and allow DCPs to be returned on the same day, the Royal Thai Government should reevaluate this ill-conceived and outmoded legislation which causes confusion in the local Thai marketplace as distributors try to comply with changing requirements.

One positive aspect of the Film Act is it would place responsibility on Internet cafés, distributors (shops or stalls) of films and audiovisual products, theaters, and karaoke operators to acquire a "license to operate the business" in advance, with violators subject to criminal liability of up to BHT1 million (US\$28,536) or up to two years in jail. Industry has noted optimistically that the new law could be used in parallel with the Copyright Law to curb piracy in street stalls, shopping malls, complexes, and Internet cafés.

Ban on Investment/Ownership in Terrestrial Broadcast Networks: Foreign ownership/investment in terrestrial broadcast networks is severely limited to not more than 25% of the voting stock. This includes free-to-air, pay-TV and channel content provider operators. Such restrictions impede the development of legitimate content in Thailand, and should be relaxed.

Television Advertising Restrictions: Advertising is now permitted under the Act on Broadcasting and Television Operation Business enacted in 2008, but is limited to a daily average of five minutes per hour for each channel, or a quota of six minutes in any single hour. This restriction undermines the economic viability of licensing of content for broadcast, and should be lifted.

OTT Taxation: NBTC is in the process of considering policies on OTT services. Thailand is also proposing amendments to its Revenue Code that will require overseas e-commerce services to register for VAT payment. A tax rate of ten percent is being proposed on non-resident business operators who employ electronic payment for e-commerce services including digital online services. Under the existing VAT guidelines implemented since 1992, any person or entity supplying goods or providing services in Thailand and that has an annual turnover exceeding 1.8 million baht (US\$55,000) is subject to VAT. IIPA encourages NBTC to adopt a robust content protection regime to protect digital delivery of content as well as a non-discriminatory tax system.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Many of the deficiencies in Thailand's enforcement framework described above—including inadequate efforts to combat piracy, burdensome and inefficient civil and criminal procedures, and inadequate and non-deterrent civil and criminal remedies—run afoul of Thailand's obligations under the TRIPS enforcement provisions, particularly Articles 41, 42, 45, and 61.

UNITED ARAB EMIRATES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2019 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 2019.¹

Executive Summary: Despite being one of the top ten countries with the highest GDP per capita, the UAE struggles with critical market access barriers, below-par copyright protection, and diverse methods of piracy. The UAE has seen some positive movements in IPR enforcement and awareness, but has not fully implemented the standards of protection required by the WIPO Internet Treaties and does not protect copyrighted content for a term in line with the modern standards of protection. In addition to legal protection shortfalls, rights holders in the UAE face major difficulties with the exercise of their existing rights. It has been 16 years since the UAE passed federal legislation providing for the possibility of collective management of certain rights—a facility that rights holders in the music sector would like to make use of, given that their attempts to directly exercise broadcasting and public performance rights were blocked by the government. However, the Federal Council of the UAE has failed to issue an operating license to any such collective management entity, or to rights holders themselves, leaving music rights holders without the legal means to exercise their existing rights under local copyright law and collect compensation for the commercial use of their music. The UAE is a major hub for tourism and retail and is a repeat host for legitimate music services, sold-out concerts, and the upcoming EXPO 2020 in Dubai. This puts the UAE in position to not only follow through with payments that are critical to U.S. rights holders and the rule of law in the country, but also to invest in the development of a robust local industry that can advance local talent and increase jobs in the media sector. The government needs to urgently stop ignoring the problem and immediately issue an operating license to a collecting society that will enable music rights holders to start licensing and collecting royalties. Otherwise, it must confirm in writing that rights holders are free to exercise their broadcasting and public performance rights directly. The government's inaction constitutes a direct market access barrier for international music rights holders. Two other potential market access barriers are the Dubai Department of Economic Development's (DED) new requirement for a UAE copyright registration certificate as a prerequisite to initiate a copyright infringement case; and the DED's and Custom Authorities' failures to take action against infringement and inspect markets without first receiving a complaint from a rights holder.

On a positive note, the UAE Cyber Crime Law has been used effectively against virtual private networks (VPNs), DNS "masks" (that hide domain names), and Tor (anonymous) networks—all used to otherwise disguise piratical sites and activities from enforcement officials. Moreover, the enforcement of the Cyber Crime Law has resulted in some severe and deterrent penalties. Enforcement officials have also taken action against social media accounts selling counterfeit and pirated materials. Over the past year, the UAE has implemented many non-legislative reforms dealing with Customs practices and held focused workshops to increase awareness of, and respect for, IPRs, which is also helping improve the status of piracy in the country.

PRIORITY ACTIONS REQUESTED IN 2019

- Take immediate action to approve a collecting society application so that rights holders can finally begin collecting royalties under the UAE copyright law.
- Modernize the copyright law to implement the WIPO Internet Treaties; to ensure adequate protection against circumvention of technological protection measures (TPMs) and trafficking in circumvention technologies, devices, components, or services; and to harmonize the copyright term with the emergent international norm.

¹For more details on UAE's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of UAE's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



- Proactively enforce against Internet piracy by encouraging the Telecommunication Regulatory Authority (TRA) to engage domain name registrars and other intermediaries to cooperate with rights holders to block: illegal TV services websites; advertisement to pirated TV services throughout online classifieds, auctions, blogs, forums and social networks; illegal credit cards payment gateways and alternative online payment methods; websites that offer gift-cards or redeemable vouchers to buy or refill personal accounts to these services in question; help desk support numbers for these illegal services; and illegal VPN IP addresses dedicated to streaming content to hybrid set-top boxes. It also should work to better monitor app-based dissemination of illegal content.
- Ensure enforcement in malls outside of the cities and Free Zones, which are currently rife with pirated and counterfeit products.
- Encourage Customs authorities to ban the importation of illegal set-top boxes (STBs) such as servers for Dish TV of India.
- Expedite the content review procedure for clearing book titles for sale into the market, including by providing adequate resources and personnel to the National Media Council and by creating a central database of cleared titles to avoid repetition among the title monitors assigned to various book stores/retailers.
- Put more restrictions over the services which facilitate the subscription of unauthorized paid TV channels such as Dish TV, Airtel TV, and TataSky.
- Support rights holders in enforcing their rights under UAE copyright law.
- Introduce laws providing for more transparency among enforcement authorities.

COPYRIGHT PIRACY IN UAE

As of 2018, roughly 9.38 million people in the UAE use the Internet, which is about 98.4% of the UAE population.² The UAE leads the world in mobile penetration, with well over 200 mobile subscriptions per 100 inhabitants.³ These numbers, and the affluence of the population, mean enormous opportunities for growth in legitimate copyright distribution services. Unfortunately, online and mobile device piracy in the UAE remains a problem, including accessing websites that provide illegal access to music, movies, television content, video games, reference books, online journals, and trade books of top publishers. Similarweb reports that in December 2017, 1 million visits to *Torrentz2* and 1.8 million visits to *Thepiratebay.org* were from the UAE.

Public Performance and Broadcasting Piracy for Music: At present, because of the impossibility of licensing public performance and broadcasting by rights holders directly or collectively, all music that is used in such a way is *de jure* pirated in the UAE. This is due to the government's 15-year-plus delay in issuing an operating license to a music collective management organization (CMO). Despite attempts by industry, in cooperation with the Abu Dhabi media authority, to obtain an operating license, there has been no information as to whether the Ministry of Economy (MOE) even considered the application at the federal level. The last application was submitted in 2016, but no formal reply was issued. The lack of government engagement with the industry, and the bar to the exercise of existing rights resulting from the government's inaction, raises questions about the UAE's compliance with the WTO TRIPS Agreement and the state of the rule of law in the country. Simply put, the UAE's regulatory inaction means that the existing law has no effect and there is no remedy for the ongoing, country-wide infringement of music public performance and broadcast rights. As such, music rights holders have no means to license their works and recordings.

Online and Mobile Piracy: Several notorious online piracy sites are heavily accessed in the UAE, including *123movies.is*, a streaming website that embeds popular movie and series content from third-party cyberlockers. The TRA reports that it has blocked approximately 83,900 websites in 2017, which includes 473 websites for IP violations, and the Dubai DED blocked more than 15,050 accounts on social media in 2017. Popular pirate music sites in the UAE include *Torrentz2.eu*, which indexes links to torrent music files that are hosted on BitTorrent indexing sites such as *The Pirate Bay*. According to Alexa, both these websites currently feature in the top 50 websites accessed in the

²See <http://www.internetworldstats.com/stats5.htm>.

³See <http://www.arabianbusiness.com/uae-s-mobile-phone-penetration-rises-228--676115.html>.

UAE. Recently, there has been an increase in mobile applications that enable illegal showings of copyrighted TV programs or exclusive TV channels and are extremely difficult to monitor. One example is the *Bear TV app*.

Hybrid Set-Top Boxes: With fast Internet bandwidth becoming more prevalent in the UAE, media content is increasingly delivered through digital means rather than by satellite or terrestrial broadcast. Legitimate UAE platforms—Etisalat, Du, and OSN Play—offer satellite and streaming pay-TV to the UAE market, although they do not pay music rights royalties (see above). However, using the Internet as a low-cost form of delivery, pirates rip content feeds, upload the feeds on servers, and stream them through STBs that can decrypt the data feeds to be viewed on TV sets. Hybrid STBs are used for this. There are STBs that can be used either to receive the Free-To-Air channels—which is a legal act—or to receive the pirated TV channels by way of installing certain Internet Protocol TV (IPTV) applications. This type of piracy increased in the UAE this past year and is hurting the market. These STBs and the channels or content they carry are illegally marketed, promoted, and sold to consumers in high volumes through several sales channels such as door-to-door, small retailers, Internet sales, or over social media accounts. While the equipment and hardware used for these types of services seem legitimate, it is the loaded operating software that allows access to the pirated content. Unless these Hybrid STBs are preloaded with the required piracy software, it is difficult to identify their illegal nature. Examples of these Hybrid STBs are the ones known and used for UKTV Abroad, UKTV Arabia, ip888tv.com and Expat TV. Expat TV is gaining popularity amongst western expats in the UAE, operating under the brands Tiger Z280, MXQ, Mag250, iStar and IP888. Numerous Internet-based TV and Video-On-Demand services legitimately operate throughout the world within defined territorial limits. The UAE has many foreign expats from territories where these services are licensed, and it is easy for them (with the use of their foreign credit cards or with the use of VPNs or other circumventing services that are widely available on the digital market) to subscribe to these services and access the content in the UAE. This poses a direct threat to legitimate UAE platforms offering the same content in the UAE.

Circumvention of Territorial Restrictions: A number of pay-TV operators in Asia take advantage of the overspill of the satellites used to actively broadcast in their territories to promote, market, distribute, and sell their services outside their licensed territories. These services are not authorized by their suppliers to sell in the UAE market, nor are they licensed by local regulators to operate and offer regulated services to the UAE public. The most blatant illustration of such illicit overspill services is India's Dish TV operations in the UAE. More must be done to protect companies licensed to operate in the UAE from unauthorized companies that are operating in the UAE as a result of overspill, such as Dish TV, Airtel TV, and TataSky. Additionally, circumvention services, such as VPNs, DNS masks or Tor networks, which are widely available in the UAE, are used to access and stream content from Internet-based TV and Video-On-Demand services that legitimately operate in different territories, but have not been licensed for the UAE. This poses a direct threat to legitimate platforms which are currently offering the same content in the UAE. By increasing fines and threatening expats with deportation in 2017, the government raised extensive public awareness to issues surrounding the use of VPNs, DNS masks, and Tor networks for illegal activities. Officials also arranged with the TRA this past year to block websites illegally streaming paid TV channels.

Pirate Free-To-Air Channels: Pirate Free-To-Air (FTA) channels constitute one of the major problems in the media industry. The FTA channels are clear, unencrypted channels that can be received and viewed without requiring a subscription. They are uploaded from many different locations across the region to satellites that have region-wide reach. This remains a prevalent problem because it is difficult to apply consistent regulatory control when entities are not located in a specific territory. There is a high number of FTAs focused on broadcasting content without acquiring the necessary rights. The multiple locations and lack of regulatory control in the UAE make it very difficult to regulate FTAs, enforce copyrights, and apply remedial measures. An added problem is that even when the legitimate rights holders are successful in closing down pirate channels (e.g. through filing legal applications with the courts or through voluntary cooperation of satellite operators), the lack of regulatory control allows for them to simply change the channel or name and restart operations again under the same model. Examples of pirate FTA channels are *Majestic Cinema* and *Top Movies*, which historically have been two of the worst offenders for this form of piracy.

Impact on Legitimate Markets and Other Countries: Piracy of pay-TV and other media streaming channels not only affects rights holders, but also harms cinemas, publishers, and legitimate content providers that invest significant sums to license content and develop business models in the region. These legitimate efforts contribute to the economic development of the country, fund production of local content, create jobs, and generate revenue for advertising and auxiliary industries. Dubai is a commercial hub for the region and may affect legitimate markets in surrounding countries—such as India, Iraq, Iran, and the Gulf Cooperation Countries—by exporting copycat products and digital piracy equipment, like hybrid STBs.

COPYRIGHT ENFORCEMENT ISSUES IN UAE

Raids and Piracy Prevention: Industry sectors report that enforcement has improved in the past year. The DEDs in Dubai, Sharjah, and Ajman have been conducting intensive inspection raids of local retailers to ensure that their markets are free from counterfeit copyright products. The Dubai DED is active in fighting counterfeit products and has conducted several raids against entities using software without authorization from the copyright holder and shut down social media accounts selling counterfeit products. The Criminal Investigation Department (CID) has been working closely with rights holders and licensees to stop sales of hybrid STBs. This has somewhat reduced the use of unauthorized direct-to-home TV broadcasting services. Unfortunately, such operations require arrangements between different departments, which slows down investigations. For example, the electronic crime unit is not allowed to correspond with organizations outside of the UAE, such as social media service providers, without a court order. Correspondence between the TRA and CID is also relatively slow, which impedes the collection of information and evidence in piracy investigations. These are areas the UAE can focus on to strengthen its enforcement regime.

Judicial and Case Law Developments: The judicial system has also shown some signs of improvement. Prosecutors have been analyzing facts of IPR cases and referring cases to the courts on the grounds of violations of IP or cybercrime-related laws. Also, the punishment under UAE Cyber Crime Law has become more severe. As a result, use of VPNs, DNS masks, and Tor networks for piracy is decreasing. Also, the Abu Dhabi Criminal Court issued a judgment in a case against an administrator of the torrent website called *arabscene.org*. The court decided to block the website, as it showed exclusively licensed TV channels without permission. In addition, the administrator was fined and deported out of the country. The judgment was enforced in 2017. The case is significant as it involved a website that was hosted outside the UAE, setting a strong precedent for other similar offenders. Evidencing this, the criminal courts of Dubai and Sharjah have found defendants guilty in cases relating to piracy through IPTV apps.

However, on the downside, administrative authorities such as the DED are requesting UAE copyright registrations in order to proceed with a complaint against copyright infringers, even where the infringed work is copyrighted outside the UAE. The administrative authorities should proceed with complaints based on foreign copyright registrations if such registrations are recorded in a member country of the Berne Convention, since the UAE is a member of this Convention. Though UAE copyright law recognizes this, administrative authorities are not implementing the law correctly.

Enforcement in Free Zones and Areas Outside City Limits: Enforcement challenges remain in malls outside the main cities and in Free Zone areas. Authorities continue to detect high levels of counterfeit products in Dragon Mart 1, Dragon Mart 2, the Global Village, Karama in Dubai and the China Mall. There is a high volume of goods imported to the UAE, and the territory is used as a regional hub for goods in transit. The UAE should ramp up efforts to enforce against pirate and counterfeit traffickers with deterrent enforcement actions and enhanced customs controls.

Customs Piracy Prevention: The Ajman Customs authorities activated their IP department in 2017, and they can now take actions against copyright and trademark infringers. Dubai Customs recently announced that it will allow recycling of counterfeit products instead of re-exporting such products. Recycling means that the products are sent to a local recycling company that destroys the products and raw material thereafter used in various industries. Dubai Customs used to re-export the counterfeit products to the country of origin instead of destroying or recycling

such counterfeit products. Abu Dhabi Customs also extended the protection for recorded trademarks from one year to ten years, in line with other local customs authorities in the UAE. A continuing challenge, however, is that Customs authorities are not taking action against counterfeit copies of copyrighted works unless they first receive a complaint from a rights holder. The law needs to be amended so that Customs authorities may take actions even in the absence of complaints by the rights holder.

Training Programs: The IPR Department at Dubai Customs is the first of its kind in the Middle East. It is a federal law enforcement agency that works towards securing the twenty-one air and sea entry/exit points of the mainland. Apart from operating in a reactive capacity and intercepting the supply of infringing content/goods, the department has also been working in a preventive capacity by employing educational means to limit the demand for infringing content in the first place. The objective is to raise awareness to avoid the direct, and often physical, harm that counterfeit goods cause, as well as to create an anti-infringement culture and eliminate other issues stemming from IPR infringements. Additionally, Dubai Customs offers customs inspectors training courses to increase their knowledge and understanding of IPR. The IPR department has, in cooperation with the communication department at Dubai Customs, held theoretical and practical courses on IPR protection in schools. Moreover, seminars have been held in universities, summer camps, and shopping malls, targeting large segments of society. They are also open to representatives from other government ministries and other member states of the Gulf Countries Council. In 2017, Emirates IP Association and INTERPOL co-hosted an IP awareness session with Dubai Customs, Brand Protection Group, Dubai Police, and Ministry of Economy. The session hosted a number of speakers from the private and public sectors that shed light on various IP violations. These organizations continue to conduct events aimed to combat IP crime and illicit trade. In addition, the Emirates IP Association is designing paid courses to promote the education of IP in the state, and the Dubai DED has started an IP awareness program for starter companies and IP violators to educate them about IP and the benefits of respecting IP rights. The audience for this program has been reacting positively, i.e., owners of companies are registering their IP and some IP violators are sharing information about the source of specific counterfeit products.

Ensuring Consistent Enforcement: For a period of time, enforcement authorities were reluctant to take action when the Prime Minister called on officials to cooperate as much as possible with companies to encourage the investment. This call was misunderstood, and the effect was that enforcement authorities waived or reduced fines against IP violators, including the Dubai DED, which reduced fines up to 50%. Additionally, the Dubai DED's failure to inspect markets absent a complaint from copyright holders encouraged infringers to trade in illicit products including STBs containing IPTV apps for pirating paid TV channels.

OTHER COPYRIGHT LAW AND RELATED ISSUES

Prevention of Music Rights Holders' Exercise of Legal Rights: Broadcasting and public performance (such as in hotels, restaurants, shops, discos, bars, dance schools, airlines, etc.) of music are important uses of recorded music and musical works. Revenue collected from such uses, estimated to be in the tens of millions of U.S. dollars if collection were allowed, is an essential element in supporting the development of local artists and in the UAE becoming a hub for the production of music in the region. Yet, due to government inaction and refusal to issue an operating license for collections, nothing is being collected today, substantially undermining the capacity of companies in the UAE to invest in promoting local artists and building artists' careers. It also means that the U.S. music being exported to the UAE cannot be monetized, and that various UAE businesses are not required to pay for music despite the protection recognized in the UAE law.

The UAE copyright law provides the relevant rights in Article 18 of the Federal Law No. 7 of the 2002 law concerning Copyrights and Neighboring Rights, which states that producers of phonograms enjoy rights to any exploitation (including copying, renting, broadcasting, re-broadcasting, disseminating by wire, wireless, computer or other means, or making available to the public via computer or other media) of their phonograms. Article 37 provides that anyone who engages in such exploitation without permission from the rights holder infringes copyright and is subject to criminal penalties and civil remedies. The law also enables the creation of collecting societies and provides

for the undertaking of collective rights administration. Additionally, the Ministerial Decision No. 133 of 2004 concerning the Collective Management of Copyrights and Neighboring Rights established the basis on which licenses permitting collective management activities would be granted.

Sixteen years later, no license for a collective licensing organization has been granted, and rights holders still find themselves unable to exercise their rights, whether individually or on a collective basis. In 2015, it began to look as if a resolution were in sight. Twofour54—an Abu Dhabi Media Zone entity supported by a rights holder coalition—submitted an application to the MOE for an operating license as a music rights CMO. However, the MOE issued no response. The most recent application was submitted in 2016, but, again, the authorities neither replied nor engaged with the international music sector. The UAE should move swiftly to approve the application, which is supported by the music industry across the board.

Content Review of Book Titles: The book publishing industry faces a protracted content review process, particularly in Dubai. There appears to be no standard review process; instead, title monitors make determinations as to whether particular titles should or should not be sold in the country after what is often a lengthy process. A monitor is assigned to each retail establishment, and is required to inspect each title and write a summary of it before making a determination. This review does not apply to other retailers that may have ordered the very same title. Thus, it may be the case that while one retailer has been cleared to sell a title, the very same title may yet be unavailable at other retail shops (if review of the same title by another monitor at a different shop is still pending). The lack of a central database listing all titles reviewed and cleared for sale in the country contributes to the significant delay in bringing new titles to market. While there is reportedly an effort to create a database of books authorized for sale in the market, it is unclear whether this has progressed at all. In addition to creating such a database (which would also alleviate duplicative reviews by different monitors), additional monitors should be trained and deployed to address the existing backlog.

Challenges with Internet Service Providers (ISPs): ISPs in the UAE, namely Etisalat and Du, cooperate with rights holders to a limited degree and are open to listening to their challenges. Some ISPs have special platforms on their websites for reporting IP violations. They normally ask the rights holders to contact the TRA for enforcement actions, which is the governmental body that monitors the operations of the ISPs in the UAE. The government needs to encourage the ISPs to restrict access to the following: illegal TV services websites; advertisement to pirated TV services throughout online classifieds, auctions, blogs, forums and social networks; illegal credit card payment gateways and alternative online methods of payment; websites that offer gift-cards or redeemable vouchers to buy or refill personal accounts to these services in question; helpdesk support numbers for these illegal services; and illegal VPN IP addresses dedicated to streaming content to hybrid set-top boxes. Additionally, ISPs need to be encouraged to act more expeditiously. While some provide platforms for reporting IP violations, they act slowly on complaints.

Amendments to the UAE Copyright Law: The current copyright law falls short of the commitments in the WIPO Internet Treaties and the modern standards of protection. It contains only rudimentary protections against the unauthorized act of circumvention of TPMs and against the trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs. The following should be prohibited: 1) the act of circumvention of a TPM that effectively controls access to copyright-protected materials⁴ or the exercise of exclusive rights; and 2) the trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs (independent of the existence of any infringement). It should be made clear that violations involving TPMs are subject to both civil and criminal remedies. Other changes that should be made in any amendments going forward include: 1) removal of unreasonable restrictions on the ability to freely contract;⁵ 2) ensuring compulsory license provisions are in

⁴It should be confirmed that access control TPMs are covered (at present, Article 38(1) covers a TPM “for preservation of specific standard of quality of the copies,” which does not seem to cover all access control TPMs).

⁵For example, Articles 11 (right of transferor to return to court for reconsideration) and 15 (making invalid “any action” with respect to “more than five” of an author’s works) are unreasonable restrictions, and should be left in general to marketplace solutions rather than be restricted by statute as they are here.

conformity with the Berne Convention Appendix;⁶ 3) ensuring WTO TRIPS-compatible enforcement procedures are included, such as *ex parte* civil searches; 4) providing for statutory (pre-established) damages; 5) adding a presumption of subsistence of copyright; 6) extending terms of protection to life plus 70 years for natural authors and 95 years for works of corporate authors and for producers/performers of sound recordings (or at least 70 years from publication); 7) confirming that costs and attorney fees are available to the prevailing party in infringement actions; 8) providing protection against unauthorized decryption of program-carrying signals, manufacture of decryption devices, and provision of decryption services; 9) raising minimum and maximum fines for copyright infringement (Article 37); and 10) adding provisions specifically related to Internet infringements, including notice and takedown, as well as effective measures to deal with repeat infringers and non-hosted infringements on services with business models based on providing access to copyright infringing material.

Cyber Crime Law Should Include IP: The Cyber Crime Law was recently updated to include, among other things, a specific provision on ISP liability. However, it does not expressly classify unauthorized or pirated content as illegal. Moreover, it does not include ISP liability for IP infringement carried out through the ISP. Implementing regulations should be issued clarifying that the Cyber Crime Law applies in cases of IP infringement.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Many of the shortcomings in the UAE copyright law identified above may constitute violations of UAE's obligations under the WTO TRIPS Agreement. UAE has also acceded to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Some of the shortfalls in its copyright law (e.g., with respect to the circumvention of technological protection measures) and the state-sanctioned, non-application of existing legal rights of music rights holders raise issues of compliance with the UAE's obligations under those treaties, as well.

MARKET ACCESS

Music Licensing: Because of UAE's failure to implement a music licensing regime in the country, music producers (and others in the music sector) are effectively prevented from licensing in the market. This selective non-enforcement of legislation acts as a disguised market access barrier for the music sector. This inaction is also protectionist and discriminatory, given that various UAE families, as well as the state, have stakes in most shopping malls, hotels, restaurants, and other such establishments that require licenses to play music. This framework has been the very essence of the problem for years. This situation is untenable, especially in view of the upcoming EXPO 2020 in Dubai, which has worldwide attention. It is imperative that the music licensing problem be solved without any further delays.

UAE Copyright Registration Requirement: Dubai DED has started to request UAE copyright registration certificates in order to proceed with any action for copyright infringement. This is a detrimental change from its old policy, in which it allowed a copyright infringement case to be heard if the plaintiff had a copyright registration certificate in any country that is a member of the Berne Convention. Such restrictions limit the power of rights holders to protect themselves from infringement and hinder their ability to thrive in the UAE market.

⁶Article 21 of the Law provides for the possibility of reproduction of translation compulsory licenses consistent with the Berne Convention Appendix. In 2004, when the UAE joined the Berne Convention, the government availed itself of the Berne Appendix. See "Berne Convention Members," World Intellectual Property Organization, available at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>. In implementing any such licenses, the Government of the UAE must ensure that the rules of the Appendix are strictly followed.

ANNEX

ANNEX: SHORT COUNTRY SUMMARIES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

This Annex Report provides Short Country Summaries for the following seven countries: **Barbados**; **Costa Rica**; **Egypt**; **Guatemala**; **Jamaica**; **Turkey** and **Venezuela**.

The short summaries were prepared for these seven countries in lieu of full Country Reports because IIPA members were aware of no new major developments in 2018 that would lead IIPA to revisit our current recommendations for USTR designations under Special 301. Instead, these Short Country Summaries treat one or two key issues pertaining to legal reforms, enforcement issues, and/or market access barriers in each of these countries. Although IIPA does not have sufficient information to prepare a comprehensive report for each country, IIPA recommends that in 2019, the U.S. Government prioritize the issues identified in these Annex summaries. Each of these seven countries was identified in USTR's 2018 Special 301 Report, and previous IIPA submissions have provided detailed analyses of legal and enforcement regimes in these countries. IIPA makes the same recommendations as last year on these seven countries for USTR's Special 301 placement in 2019, namely:

- Priority Watch List: **Costa Rica** (currently on USTR's Watch List); **Venezuela**
- Watch List: **Barbados**; **Egypt**; **Guatemala**; **Jamaica**; **Turkey**

There are an additional 11 countries for which IIPA members have prepared neither a full Country Report, nor a Short Country Summary, in 2019. They are: **Bolivia**; **Dominican Republic**; **Greece**; **Kuwait**; **Lebanon**; **Pakistan**; **Romania**; **Saudi Arabia**; **Tajikistan**; **Turkmenistan**; and **Uzbekistan**. Each of these countries was identified in USTR's 2018 Special 301 Report. IIPA has, in prior years, filed Country Reports and recommended USTR's Special 301 placement on the Watch List for all of them.¹ In 2019, IIPA makes no recommendation.

The following chart indicates the last time IIPA filed Country Reports on these 11 countries,² and IIPA's recommendations for each:

<u>Country Name</u>	<u>Last Year IIPA Filed Full Country Report</u>	<u>Last IIPA Full Country Report Recommendation</u>	<u>2018 USTR Placement</u>
Bolivia	2006	WL	WL
Dominican Republic	2008	WL	WL
Greece	2014	WL	WL
Kuwait	2014 (and, in 2017 Annex)	WL	PWL
Lebanon	2013	WL	WL
Pakistan	2013	WL	WL
Romania	2014	WL	WL
Saudi Arabia	2014	WL	WL
Tajikistan	2014	WL	WL
Turkmenistan	2014	WL	WL
Uzbekistan	2014	WL	WL

¹Algeria is also listed on USTR's 2018 Special 301 Priority Watch List. However, IIPA has neither filed a Country Report nor made a recommendation on this country in prior years, and we make no recommendation for 2019.

²The prior IIPA reports for these countries can be found at: www.iipa.org.



ANNEX: BARBADOS

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Barbados needs to incorporate basic improvements into its copyright legal regime to encourage investment, deter piracy, and develop a market for the creative industries. It needs to both modernize its law and undertake fundamental steps to require and enforce the licensing of rights and payment of royalties. One legal reform step forward would be for Barbados to finally ratify, and then properly implement, the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Incorporating these treaty obligations would provide fundamental digital copyright and neighboring rights protections, to create a favorable environment for the digital marketplace in Barbados.

Legal and enforcement shortcomings for the copyright industries in Barbados are not limited to the online environment, but also include the failure of traditional broadcasters (including state-owned broadcasters) to license their uses of copyrighted materials. According to the recording industry, Barbados is one of many Caribbean countries that continues to permit the unlicensed and uncompensated broadcasting, cablecasting, and simulcasting of copyrighted music. Some services currently refuse to pay royalties, alleging that their use of recorded music is not clearly protected by law.

In some instances, such as traditional broadcasting and cable transmissions, the current Copyright Act of Barbados (last amended in 2006) unequivocally provides protection for rights holders. Yet, some broadcasters, including the state-owned Barbados Broadcasting Corporation, refuse to pay broadcast fees (or fees as well for simulcasts). In addition, concert promoters take advantage of an exception for “charities” to the public performance right and do not pay license fees to sound recording producers or performers for the use of recorded music at concerts and other live performances. This is an exception only available by law to registered charities. The Government of Barbados needs to review the operation of the Charities Act to ensure that it is not abused to avoid licenses. And, if this cannot be corrected by applying current law, then the law must be amended to prohibit the abusive application of what was intended to be a very narrow public performance exception.

In its April 2018 Special 301 Report, the U.S. Government noted that while the legal framework in Barbados provides “a basic framework...the country's failure to adopt modern copyright legislation that protects works in both physical and online environments is a major concern.” The U.S. Government then pointed to three major concerns highlighting the failure to apply existing law: (i) the retransmission of U.S. broadcast and cable programming by local cable operators without authorization or payment; (ii) the refusal of TV and radio broadcasters and cable and satellite operators to pay for public performances of music; and (iii) unenforced civil litigation judgments by rights holders. The copyright industries concur—these problems have gone unaddressed for years by the Government of Barbados. For example: in 2007, a Barbados Supreme Court case granted a local performance rights organization (PRO) the right to receive remuneration, which, over ten years later, remains unpaid. This was a case against a state-owned broadcaster (Barbados Broadcasting Corporation), but unfortunately, the ruling has never been enforced.

The motion picture industry reported in 2018 that there is ongoing widespread broadcast piracy of both free-to-air and premium services in Barbados. This includes the use of unauthorized decoding equipment and the unauthorized retransmission of signals. These activities are violations of both Barbados Copyright Law and of international norms. In addition, illegal IPTV services and unauthorized streaming services are providing unlicensed access to U.S. broadcast programming services.

Barbados is currently on the [Watch List](#).



ANNEX: COSTA RICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The Government of Costa Rica has not properly enacted legal reforms or undertaken enforcement actions to respond to the extremely high levels of online piracy in Costa Rica, and has instead moved to weaken the protections available to rights holders. In addition, Costa Rica has fallen far short of meeting its obligations under the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA); the DR-CAFTA has been in force for Costa Rica since January 1, 2009. Seven years after the expiry of the transition period, Costa Rica still has not achieved the aims of the DR-CAFTA to improve copyright protection and enforcement.

One of the key DR-CAFTA obligations that has not been implemented is introducing clear rules on copyright liability, as well as providing meaningful legal incentives for inter-industry cooperation to deal with online infringements. Instead, Costa Rica's law offers largely unconditional liability exceptions to Internet Service Providers (ISPs) and others, even allowing identified infringing activity to remain on their systems for as long as 45 days (which is the timetable for forwarding infringement notices to ISP subscribers). There were reports in January 2019 that the Government of Costa Rica is considering legislative proposals to amend the 45-day period and replace it with a requirement to respond to takedown notices and remove infringing content "expeditiously." IIPA recommends that the term "expeditiously" be clarified with a defined time-period as a best practice, or for example, in an accompanying regulation of the Government of Costa Rica, so that there is a clearer indication of the expected time for removal upon notice.

There are still many instances where the Costa Rican Top Level Domain (ccTLD) registry has provided a safe haven to notorious online enterprises dedicated to copyright infringement. For example, *thepiratebay.cr* domain is still online despite actions against it from ICANN and the U.S. Embassy in Costa Rica. Costa Rica's failure to deal effectively with its obligations regarding online infringement, more than six years after these came into force under DR-CAFTA, is a serious concern.

In 2009, Costa Rica filed a reservation to the WIPO Performances and Phonograms Treaty (WPPT) (and to the Rome Convention). Reservations to Article 15(1) of the WPPT are permissible, subject to the limitations set out in the WPPT (e.g., pertaining to the scope of the reservation). However, in doing so, Costa Rica violated its bilateral obligation to the United States (and in the DR-CAFTA) to consult before taking this action and actually lowered its levels of copyright protection. This decision was thus contrary to the treaty text and to the objectives of the DR-CAFTA, which was intended to improve copyright protection and enforcement. In May 2018, at the end of the Solis Administration, two executive orders were issued to withdraw Costa Rica's reservations to Article 12 of the Rome Convention and Article 15 of the WPPT. Official letters were prepared for the respective administrative bodies for the treaties—to the United Nations (Rome Convention) and the WIPO (WPPT Convention)—and although the Rome Convention UN letter was delivered, the WPPT letter was never delivered to the WIPO.

While proper treaty implementation and laws remain at a standstill, broadcasters in Costa Rica have stopped making payments for their use of copyrighted material, and online piracy continues to harm the legitimate digital media market, with very high piracy rates.

USTR's April 2018 Special 301 Report urged Costa Rica to "take effective action against all notorious online markets within its jurisdiction that specialize in unlicensed works, and to address the concern that Costa Rican law still allows online service providers up to 45 days to forward infringement notices to subscribers."

IIPA last filed a country report on Costa Rica in 2014. At that time, IIPA recommended that Costa Rica be placed on the [Priority Watch List](#). Costa Rica is currently on the [Watch List](#).



ANNEX: EGYPT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Egypt needs to modernize its copyright regime, including ratifying and properly implementing the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The entire copyright legal regime in Egypt is in need of significant reform and modernization for the digital era, including the Intellectual Property (Copyright) Law of 2003, the Civil and Commercial Procedural Code (No. 13) of 1968, and the Evidentiary Code (No. 25) of 1968.

There were no copyright-specific legal reforms enacted in 2018. There were, however, two positive developments. First, a new Anti-Cybercrime Law (No. 175) was enacted in August 2018, including a provision criminalizing unauthorized Internet access to broadcast, cable, and streaming channels of audiovisual material. This law now needs to be broadened to cover all copyrighted works. Second, on October 18, 2018, the Egyptian Public Prosecutor reportedly issued a circular letter (it is not a public document) instructing prosecutors to enforce the Intellectual Property Law of 2003—for all IPR infringements, including copyrights and related rights.

IIPA members report that there were no changes in the levels of piracy, or enforcement against piracy, in 2018. An ongoing problem in Egypt are the number of unlicensed satellite channels, including unlicensed broadcasts of U.S. audiovisual works. In addition, unlawful decryption of encrypted signals remains an endemic problem. Camcording is also a prevalent form of piracy in Egypt.

Copyright piracy in Egypt is widespread, including unauthorized websites, BitTorrent files and websites, and indexing websites. Piracy has spread in recent years, in part, because of the growth of more sophisticated piracy organizations and increases in the number of mobile devices and other technological advances. Most Internet Service Providers (ISPs) do not respond to takedown notices.

Enforcement generally remains a problem. Cases drag on for years without resolution (two to three years on average for civil cases), and court procedures require experts to identify infringing material even though there are few qualified experts. The industries report continued cooperation with enforcement officials, including the Public Prosecutors Office and with Customs authorities. One positive step, taken many years ago, was the establishment of an Economic Court to allow IPR cases to be heard by experienced judges (more expert than the general commercial courts). But the noted procedural hurdles and delays have hindered the effectiveness of this court. Another bright spot has been the management of the Copyrights and Artistic Works Investigation Unit of the Ministry of Interior, which undertakes *ex officio* actions against piracy. In 2018, the Ministry of Interior conducted a series of raids seizing four unlicensed satellite channels, and raided unauthorized production companies, stores selling illegal devices used in decoding satellite channels, and shops making hard copies of audiovisual works.

IIPA concurs with the U.S. Government's recommendation (in the April 2018 Special 301 Report) on the need to provide "*ex officio* authority for customs officials to seize counterfeit and pirated goods at the border" and to "provide deterrent-level penalties for IP violations."

IIPA members recommend four priorities in 2018: (i) to facilitate the establishment and operation of collecting societies in Egypt; (ii) to create an expeditious content review procedure for clearing book titles for sale in the market, including properly resourcing the Copyright Office in the Ministry of Culture to create a central database of cleared titles to avoid repetition; (iii) to augment enforcement against signal theft; and (iv) to urge the Economic Court, where appropriate, to make use of the full range of penalties available under the IPR laws in order to deter infringements (recent practices have assessed only minimal fines and no imprisonments for commercial-scale infringements).

IIPA last filed a country report on Egypt in 2013. At that time, IIPA recommended that Egypt be placed on the [Watch List](#). Egypt is currently on the [Watch List](#).



ANNEX: GUATEMALA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The music industry has, in recent years, introduced licensed music services in Guatemala, due to clear consumer demand for such services. At the start of 2019, there were eight digital services competing in the market, including all of the leading international streaming services. However, because of piracy and the lack of effective enforcement locally, the digital music market in Guatemala has had a difficult time developing beyond its initial phase. In the face of strong opposition from broadcasters, the local collective management organization of record producers and artists (AGINPRO) continued its efforts in 2017 to collect monies, and filed several legal actions (mostly criminal actions) to try to obtain compensation for public performances from businesses performing sound recordings and from cable and satellite operators.

In August 2017, AGINPRO won a case against a group of television and radio broadcasters requiring that the broadcasters obtain licenses and make payments for broadcasting recorded music. In ruling in AGINPRO's favor, the Constitutional Court required payments consistent with tariffs published by AGINPRO in November 2010. But, even after the 2017 ruling, the broadcasters have continued to use recordings without a license and without making any payments. Some of the broadcast stations are owned by local politicians. This highlights the need for the Government of Guatemala and the U.S. Government to assist music rights holders in exercising their rights in Guatemala to license their recordings and to be paid for such licenses. Rights holders cannot do this without government assistance, when even court rulings are ignored.

In its April 2018 Special 301 Report, the U.S. Government noted that "after an increase in enforcement activity in 2016, the number of enforcement raids and convictions declined significantly in 2017." There were no reports by the copyright industries of significant increases in activity in 2018. The enforcement raids that do take place are undertaken by the National Police and Attorney General's Office.

The motion picture industry remains concerned about cable signal piracy and recommends that the Intellectual Property Office and Guatemala's telecommunications regulator UNCOSU should have administrative authority to act without requiring a complaint from rights holders. The music industry remains concerned that broadcasters do not secure licenses for the music they broadcast. In general, there is a need for substantially more criminal enforcement efforts against all forms of piracy and unlicensed uses of copyrighted materials.

IIPA last filed a country report on Guatemala in 2003. At that time, IIPA recommended that Guatemala be placed on the Watch List. Guatemala is currently on the Watch List.



ANNEX: JAMAICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The problem of illegally transmitted (and cable retransmitted) broadcast channels in Jamaica is longstanding. In recent years, there had been some progress, but the last two years, those efforts stalled. This is unfortunate because there have been positive recent legal reforms, including copyright amendments in 2015, as well as Jamaica's accession to the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

In 2015, the Broadcasting Commission of Jamaica publicly identified nearly 100 illegally transmitted channels, and issued a directive to cable licensees to cease the illegal transmission of 19 of these channels by August 2015. The 2015 enforcement directive was widely complied with, and there were some steps taken in 2016 to continue the enforcement of broadcast rights among the country's top providers of audiovisual content. But, there has not been significant progress since then. One positive step in 2018 was that the Broadcasting Commission of Jamaica initiated another audit of cable operators regarding their use of licensed copyrighted materials; but, the results of the audit have not yet been made public, nor yielded any significant enforcement actions.

Thus, even with these positive steps, there has not been a resulting widespread removal of illegal broadcast or cable channels. As a result, dozens of additional channels continue to broadcast illegally, most by local operators. Additionally, while Jamaica maintains a statutory licensing regime for the retransmission of copyrighted television programming, it has not consistently enforced the payment of statutory royalties to rights holders.

It has been almost four years since Jamaica enacted amendments to the Copyright Act to fulfill Jamaica's obligations under the WIPO Internet Treaties. The Copyright Act was also amended that same year (2015) to extend the term of copyright protection.

In June 2017, the U.S. Government led the "Joint CARICOM-United States Public-Private Sector Stakeholder Seminar and Dialogue on Broadcast Licensing and Enforcement in a Converging World" in Jamaica. This long-awaited dialogue was a positive step allowing content licensors, cable operators, regulators, and copyright officers to discuss the direction the region should take regarding pirated content on various cable platforms. It was hoped that this initiative would accelerate the pace of reform in Jamaica and in neighboring markets, but progress has slowed.

In its April 2018 Special 301 Report, the U.S. Government noted the progress and was "encouraged by Jamaica's continued effort to ensure that its regulatory broadcasting agency is monitoring compliance." Also, the Report highlighted enforcement operations and arrests "targeting transnational criminal organizations operating in Jamaica and engaging in IP violations." These are also encouraging steps for the copyright industries, but the persistent problem of unlicensed broadcasts and cable systems, and the non-payment of royalties to the audiovisual producers, or for the use of music, is very problematic. Although the Government of Jamaica has agreed to legalize its broadcast television ecosystem, rampant signal theft continues. The government needs to enforce the current law and fully implement its promised reforms.

Jamaica is currently on the [Watch List](#).



ANNEX: TURKEY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

For over a decade, the Government of Turkey has promised to enact copyright legislation aimed at addressing long-standing problems, but no legislation has been enacted. In the meantime, piracy issues continue to plague the Turkish marketplace, undermining economic opportunities for Turkish and American creators alike. Digital piracy—via the Internet, mobile phones, peer-to-peer (P2P), BitTorrent and linking and “topsites” (i.e., high speed servers used covertly to share content)—is widespread and has stifled the legitimate market. The copyright industries report that the nature and levels of piracy remained the same in 2018. However, satellite TV channel infringement has continued to worsen in the past two years, and the Turkish laws need to be amended to explicitly address satellite piracy. There is a need for numerous improvements in the law, including full and proper implementation of the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), as well as improvements in enforcement to help Turkish markets grow for copyrighted content.

The Government of Turkey published a draft Copyright Amendments Bill in May 2017, and reintroduced the bill in May 2018; it is expected to be considered by the Parliament in 2019. Separately, there is an Act on Evaluation, Classification and Promotion of Cinema Films that is expected to be considered by the Parliament in 2019 (it is still being finalized by the Ministry of Culture and Tourism). This legislation, if enacted, would create investment incentives for foreign film producers to shoot their films in Turkey.

The Copyright Bill (the 2018 draft) includes provisions for the formation and operation of collective management organizations (CMOs), referred to as “Collective Licensing Societies.” There would be four such CMOs—one each for literary works; music; film; and works of the visual arts. It is not clear whether the long-standing discrimination against foreign members of CMOs would be eliminated if this legislation is enacted. A Copyright Arbitration Committee would resolve tariff price negotiation disputes (with fees initially proposed by the CMOs); but, those Arbitration Committee decisions could be appealed to the courts for final resolution.

The 2018 draft Copyright Bill would also provide the Turkish National Police (TNP) with *ex officio* authority to commence IPR cases. The draft Copyright Bill also includes provisions regarding enforcement against the making, selling or trafficking in anti-circumvention devices or software.

IIPA members have also encouraged the Government of Turkey to establish specialized digital piracy task forces with dedicated and specially-trained prosecutors; provisions to do this were in the 2017 draft, but not the 2018 draft.

A third bill will take provisions that were in the 2017 Copyright Law and amend the Civil Code instead. Those provisions would address online infringement and Internet Service Provider (ISP) liability, including with a “graduated response” mechanism against repeat infringers to slow their Internet connections.

The goal of changes to the liability and responsibility of ISPs should be to ensure that the law is properly tailored to incentivize all online intermediaries, including technical, automatic and passive intermediaries, whose services are used for infringing activities, to cooperate with copyright owners to stop copyright infringements on their services. For services inducing or encouraging infringement, there should be no safe harbors. The May 2017 draft bill fails to meet this objective. It would instead require “content or hosting providers” to remove infringing content within 24 hours of a takedown notice. First, the bill should be clarified to limit the takedown scheme only to technical, automatic, and passive online intermediaries (and the definition of a “content or hosting (service) provider should be narrowed). Additionally, IIPA recommends that the obligation be revised to require that content be removed “expeditiously” (and to clarify a time period in regulations or best practices). Infringing content under the draft bill can also be removed subject to a court order, but the legislation does not clarify the timeframe for removal; the bill should



clarify this provision. The proposed penalties for noncompliance with takedown notices or court orders include administrative fines and civil law damages.

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 draft legislation does not address the fundamental problem of banning non-Turkish producers from participation in or management of the CMOs. The draft legislation would govern extended collective licensing. Additionally, the draft legislation grants rights holders with an ability to opt out of this licensing. However, the draft bill does not clearly prevent the discrimination that is now prevalent in CMOs. The draft bill would also mandate formal registration and a “stickering” (banderole) procedure for CMO representation, both of which should be eliminated since these are relics of physical copy distributions, not digital ones, which now predominate. Where mandated, these requirements have proven onerous and burdensome, especially for foreign rights holders.

One loophole in the draft law would allow Turkish collecting societies to screen motion pictures in theaters without an authorized license and subject them only to a collecting society-determined remuneration. This exception to the public performance right, if enacted, would be a violation of international treaties and norms, and should be corrected before the adoption of the Copyright Amendments Bill.

Another related concern in Turkey is that judicial decisions have incorrectly interpreted the right of communication to the public, specifically, the right of public performance, in violation of the Berne Convention, the WCT, and the WPPT. These interpretations have meant that so-called “indirect” performances—such as the playing of a sound recording on a radio, a television, or other indirect manner in a bar, hotel, or other public place—do not require a public performance license and are exempted from collections, if the bar or hotel owner “authorizes” the performances. The “logic” of this interpretation, contrary to international law, is that these recordings have already been licensed. This fails to distinguish between the use and licensing of a sound recording to broadcasters, and the use and licensing in public performance venues, which are separate and distinct uses and markets for licensing music. IIPA urges the Government of Turkey to correct the misinterpretation of public performances to capture “indirect” performances, as is required by Turkey’s obligations under the international treaties and the Copyright Law of Turkey.

There are other concerns with the draft bill 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.

Some courts and prosecutors are reluctant to treat IPR offenses as a priority and will not order the confiscation of pirated materials or grant injunctive relief. The reorganization of the courts, that began in 2016, has further exacerbated the workload of specialized courts dealing with IP cases. There have, in the past, also been prosecutorial delays (or indifference) especially to takedown notices with ISPs or actions to remove links to pirate sites. One additional improvement has been the Access Providers’ Association that has worked as a clearinghouse, in lieu of individual ISPs, to receive notices. This has helped to funnel and streamline notices and responses (including takedowns). Additionally, the training of judges have yielded results. By one estimate, approximately 70% of takedown notices now are responded to with a removal of material.

Current law provides a legal basis for direct infringer injunctions to block infringing websites (and many such sites, including *Grooveshark*, have been blocked in Turkey). Current law (Article 4(3)) also provides a legal basis for civil-law injunctions against third parties, such as intermediaries (e.g., access providers), whose services are used by direct infringers or those assisting them.



In its April 2018 Special 301 Report, the U.S. Government noted that Turkey needed to make significant improvements to the copyright law, including full and proper WIPO Internet Treaty implementation. The problems relating to collective management were also identified by the U.S. Government.

IIPA last filed a country report on Turkey in 2014. At that time, IIPA recommended that Turkey be placed on the Watch List. Turkey is currently on the Watch List.



ANNEX: VENEZUELA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The motion picture industry reports that for several years, Venezuela has remained a source of many infringing camcords. These copies then migrate online fueling international piracy. In its April 2018 Special 301 Report retaining Venezuela on the [Priority Watch List](#), the U.S. Government highlighted the persistent problems of online piracy, and in particular unauthorized camcording, noting also that Venezuela ranked last for the fifth straight year out of 137 countries in IP protection, according to the World Economic Forum's 2017-2018 Global Competitiveness Report.

For several years, the Venezuelan music market has been struggling because rampant piracy has overwhelmed the legal marketplace. However, the more recent political and economic upheaval has meant that the recording industry has no accurate way to measure the market. Even still, AVINPRO, a local producers' and artists' collecting society has remained in operation and collected performance rights monies. However, the rate of inflation has significantly reduced any collection monies as real earnings, making the market there illusory.

IIPA last filed a country report on Venezuela in 2007. At that time, IIPA recommended that Venezuela be placed on the [Priority Watch List](#). Venezuela is currently on the [Priority Watch List](#).



APPENDIX B

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2018) & IIPA'S 2019 SPECIAL 301 RECOMMENDATIONS

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2018)
AND IIPA 2019 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																															
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
ALGERIA		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL																			
ARGENTINA	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL
ARMENIA																		WL	WL	WL											
AUSTRALIA																					WL	WL	WL	WL			WL	PWL	PWL	PWL	
AUSTRIA																						OO	OO								
AZERBAIJAN															WL	WL	WL	WL	WL	WL											
BAHAMAS														WL	WL	PWL	PWL	WL + OCR	OCR	OCR											
BAHRAIN																							WL	WL	WL	WL					
BARBADOS		WL	WL	WL	WL	WL	WL																								
BELARUS					WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO								
BELIZ													WL	PWL	WL	WL															
BOLIVIA		WL	WL	WL		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO							
BRAZIL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
BRUNEI								WL	WL	WL	WL																				
BULGARIA			WL	WL	WL	WL	WL							WL	WL	WL							PWL	WL	OO	OO					
CANADA	WL	PWL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
CHILE	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
CHINA (PRC)	PWL	PWL	PWL	PWL	PWL	PWL+306	PWL	PWL+306	PWL	PWL	PWL	PWL	PWL	PWL + 306	PWL	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL
COLOMBIA	WL	PWL	WL+OCR	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
COSTA RICA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
CROATIA														WL	WL	WL	WL														
CYPRUS																								OO	OO	OO	WL	WL	WL	WL	
CZECH REPUBLIC										WL	WL	WL	OCR									WL	WL	WL	OO						
DENMARK																						WL	WL	WL	WL						
DOMINICAN REPUBLIC		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
ECUADOR	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL			WL	WL	PWL	PWL	WL				WL	WL		
EGYPT		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL	WL
EL SALVADOR								OCR																	WL	WL	WL	WL	WL		
ESTONIA																							OO								
EUROPEAN UNION														WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
FIJI														OCR																	
FINLAND						WL	WL	WL	WL	WL	WL																				
GEORGIA																															
GERMANY																															
GREECE		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL						WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
GUATEMALA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL		
HONDURAS					OCR																		WL	WL	OO	OO	OO				
HONG KONG																						OCR	WL	WL	OO						

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2018)
AND IIPA 2019 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																																
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	
HUNGARY											WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL			
INDIA	PWL	PWL	PWL	PWL	PWL	PWL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL	
INDONESIA	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL+GSP	PWL	PWL	PWL	WL	WL	PWL + OCR	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	
IRELAND																					WL	WL	WL	WL	OO							
ISRAEL							WL	PWL (9/12 to WL)	PWL	Pending	PWL + OCR	PWL + OCR	PWL	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO						
ITALY							WL	WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
JAMAICA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL									
JAPAN																			OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL	
JORDAN																					WL	WL	WL	OO	OO							
KAZAKHSTAN																WL	WL	WL	WL	WL	WL		OO									
KUWAIT		PWL	PWL+OCR	PWL	PWL	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO							
KYRGYZ REPUBLIC																			OCR													
LATVIA														WL + OCR	WL	WL	WL	WL	WL	WL												
LEBANON		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	OO										
LITHUANIA													WL	WL	WL	WL	WL	WL	WL	WL												
LUXEMBOURG																							WL									
MACAU																			WL	WL	PWL	PWL										
MALAYSIA									WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL	
MEXICO	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL	
MOLDOVA																					WL											
NETHERLANDS																							OO									
NEW ZEALAND																		WL	WL		WL							WL	WL			
NICARAGUA																							OO	OO								
NORWAY								WL	WL	WL	WL	WL																				
OMAN																					WL	WL	WL	WL	WL	OO						
PAKISTAN		WL	WL	WL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
PALESTINIAN AUTHORITY																					OCR											
PANAMA																							OO	WL	OO		OO					
PARAGUAY					WL+OCR	WL+306 +OCR	WL	306	306	306	306	306	306	306	306	306	306	306	306	306	306	306	PFC	PWL	WL	OO	OO		WL			
PERU	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
PHILIPPINES							WL	WL	WL	WL + OCR	WL + OCR	WL + OCR	WL	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	
POLAND											WL + OCR	WL	WL	WL	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL				
PORTUGAL																									OO							WL
QATAR																			WL		WL	WL	WL	OO	OO	OO						

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2018)
AND IIPA 2019 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																																
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	
ROMANIA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL							
RUSSIAN FEDERATION	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	OO						
SAN MARINO																							WL									
SAUDI ARABIA		WL									WL + OCR	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	PWL		
SERBIA AND MONTENEGRO																												WL	WL	WL		
SINGAPORE																					WL	WL	WL	WL	WL	WL	OO					
SLOVAK REPUBLIC															WL	WL	WL	WL	WL													
SLOVENIA																					OCR											
SOUTH AFRICA	PWL																				WL	WL		OO	WL							
SOUTH KOREA												WL	WL	WL	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL	
SPAIN				OCR	OCR	OCR	OCR		WL	WL	WL	WL									WL	WL	OO				WL	WL	WL	WL	WL	
SWEDEN																					WL	WL	WL									
SWITZERLAND	WL	WL	WL	WL																												
TAIWAN	PWL											WL (then OFF due to OCR)	WL	WL	WL	PWL + OCR	PWL	PWL	PWL	WL	WL				OO	WL	WL	PWL	PFC	WL	WL	PWL
TAJKISTAN		WL	OCR	OCR	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
THAILAND	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL	PWL
TRINIDAD & TOBAGO					WL	WL	WL																									
TUNISIA																						OO										
TURKEY		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL
TURKMENISTAN		WL	WL	WL	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL												
UNITED ARAB EMIRATES	WL	WL																	WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL			
UKRAINE	PWL	PWL	PWL	PWL	PWL	301	PFC	PWL+GSP	WL	WL	WL	WL	PWL	PWL	PFC + OCR	PFC	PFC	PFC	PFC	PFC	PWL	PWL	WL									
URUGUAY															WL	WL	WL	PWL	PWL	WL	WL	OO	OO									
UZBEKISTAN		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
VENEZUELA		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
VIETNAM	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
YEMEN																						OO										

301: 301 Investigation
PFC: Priority Foreign Country
PWL: Priority Watch List
WL: Watch List
OO: Other Observations (an informal listing formerly used by USTR)
SM: Special Mention
OCR: Out-of-Cycle Review to be conducted by USTR
GSP: GSP IPR review ongoing, except in Ukraine and Indonesia where GSP IPR review initiated June 2012.
DS: Dispute Settlement