

February 6, 2020

**Submitted via regulations.gov Docket No. USTR–2019–0023**

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 in Response to USTR's Request for Comments and Notice of a Public Hearing Regarding the 2020 Special 301 Review, 84 Fed. Reg. 70613 (Dec. 23, 2019)**

Dear Mr. Lee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the above-captioned Federal Register Notice as a part of the “Special 301” review. The IIPA filing details three aspects of the copyright markets within U.S. trading-partner countries: (i) the adequacy of copyright laws, and in particular the ability of rights holders to fully exercise their rights; (ii) effective and efficient enforcement of those rights; and (iii) market access barriers that inhibit the licensing and dissemination of works and recordings.<sup>1</sup>

The IIPA members represent thousands of creators, producers and worldwide distributors of copyrighted works and sound recordings, including literary works, music, movies and television programming, and video games. During the last two decades, digital technological advances have allowed rights holders to create 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 benefited global e-commerce and consumers providing convenient access to a great variety of material, now legally available in more diversified ways and with more varied pricing options, than at any other time in history.<sup>2</sup> The copyright sector, more than any other in the U.S. economy, has moved aggressively to electronically deliver its products and services across borders to meet worldwide consumer demands, inextricably linking “digital trade” with trade in copyright-protected material. At this intersection of expanding consumer appetite and the worldwide digital dissemination of all types of copyrighted material, is a reliance on strong rules and practices for digital trade and a legitimate online economy. Open markets and strong copyright laws combined with effective and efficient enforcement of those laws allow creators and producers to invest in the creation and dissemination of new (and existing) materials in secure markets, ultimately meeting worldwide consumer demand for high quality copyrighted works and recordings.

The statutory purpose of the Special 301 review 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.”<sup>3</sup> To address these statutory requirements, the IIPA filing details acts, practices and policies of our key trading partners that present obstacles to rights holders’ abilities to assert their

<sup>1</sup>IIPA will file under separate cover a Notice of Intent to Testify at the February 26, 2020 public hearing on Special 301.

<sup>2</sup>For example, there are now between 50 and 60 million licensed tracks on some of the major music streaming services. See e.g., <https://www.apple.com/au/apple-music/> and <https://www.amazon.com/music/unlimited> and hundreds of digital music services. For more information on the proliferation of services, see, <https://www.motionpictures.org/watch-it-legally/> (movies and television content); <http://www.whymusicmatters.com> and <http://www.pro-music.org/> (music), as well as the IFPI Global Music Report 2019.

<sup>3</sup>19 U.S.C. Section 2242(a)(1).

affirmative rights to make and distribute their copyrighted works and recordings, and to license those works and recordings to whatever businesses, on whatever authorized platforms and at prices they chose. To maximize market potential, rights holders must stay current with (or be ahead of) technological developments in order to expand markets and creative activity, launch new business models, and to facilitate effective enforcement utilizing the best available practices.

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 as Congress intended—to enable rights holders to properly assert their rights. Markets with strong laws and enforcement of those laws help American creators and producers, as well as our trading partners, to develop, nurture, and enjoy the benefits of their own cultural and creative output, ultimately for the benefit of local consumers. Dynamic digital market conditions create enormous opportunities and the potential to further expand economic growth that results in more well-paying jobs and foreign sales. However, that potential can be reached only if copyright protection and enforcement keeps pace with technological demands, and market access barriers are corrected. It is not the goal of this 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 copy formats, by providing a strong copyright protection framework and fair and equitable market access to meet consumer demand.<sup>4</sup>

Additionally, IIPA members very much 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, and that the process has yielded results, including productive legal reforms and enforcement actions. For 2019, we note below some of these positive outcomes in a number of countries.

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

IIPA's submission focuses on the several dozen markets where IIPA members believe active engagement by the U.S. Government can reap further positive results for creators and the industries that support and invest in them. Each of the 19 full Country Reports contains: (i) a summary of developments from 2019 along with key issues to focus on in 2020; (ii) a bullet-point set of priorities; and (iii) fuller explanations of legal, enforcement and market access concerns specific to each market. Some Country Reports also include details of specific trade obligations to the United States in bilateral or multilateral trade agreements or in other fora, identifying unfulfilled obligations that, if addressed, could improve the local market. The shorter Country Reports contained in the Annex only focus on a few issues that impact the copyright industries.

IIPA's 2020 Submission includes this Cover Letter plus two appendices—Appendix A and Appendix B.

**Appendix A:** Appendix A has three parts:

- (1) Nineteen full Country Reports;
- (2) Seven short Country Reports grouped together in an Annex section; and
- (3) A chart of eleven countries where IIPA filed a report in recent years but where there was no new pertinent information or major developments to report in 2019. We include our current IIPA ranking recommendations (unchanged from prior reports) for these eleven countries in the chart.

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<sup>4</sup>The most recently identified market access and other trade barriers around the world, including those pertaining to intellectual property rights, as well as key barriers to digital trade, are detailed in the U.S. Trade Representative's 2019 National Trade Estimate Report on Foreign Trade Barriers (March 29, 2019). That report is available at: [https://ustr.gov/sites/default/files/2019\\_National\\_Trade\\_Estimate\\_Report.pdf](https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf).

The first part of Appendix A contains detailed full Country Reports on 19 countries with recommendations for designation in USTR’s Special 301 Report this year.<sup>5</sup> These 19 Country Reports cover: **Argentina; Brazil; Canada; Chile; China; Colombia; Ecuador; India; Indonesia; Mexico; Peru; Russian Federation; South Africa; Switzerland; Taiwan; Thailand; Ukraine; United Arab Emirates; and Vietnam.**

For these 19 countries, as detailed in the separate Country Reports, the IIPA recommendations are as follows:

<b>IIPA 2020 Special 301 Recommendations–Full Country Reports</b>	
<b>Priority Watch List</b>	<b>Watch List</b>
Argentina	Brazil
Chile	Canada
China	Colombia
India	Ecuador
Indonesia	Peru
Mexico	Switzerland
Russian Federation	Thailand
South Africa	United Arab Emirates
Taiwan	
Ukraine	
Vietnam	
11 Countries Total	8 Countries Total

The second part of Appendix A includes an Annex providing short Country Reports on the following seven countries: **Barbados; Costa Rica; Egypt; Guatemala; Jamaica; Turkey and Venezuela.** The short Country Reports—grouped together in the Annex—are brief summaries of particular issues in the seven countries. In these countries, there was not enough new information, or no new major developments in 2019, to warrant a longer Country Report. The short summaries address one or two key issues, sometimes pertaining to only one or two IIPA members, regarding legal reforms, enforcement or market access barriers in each of these seven countries.

All of these seven countries in the Annex were identified in USTR’s 2019 Special 301 Report, and in previous submissions IIPA provided more detailed analyses of legal and enforcement regimes in these countries.<sup>6</sup> IIPA makes the same recommendations on these seven countries as in our prior reports for USTR’s Special 301 placement in 2020, namely:

<b>IIPA 2020 Special 301 Recommendations–Annex (Short) Country Reports</b>	
<b>Priority Watch List</b>	<b>Watch List</b>
Costa Rica	Barbados
Venezuela	Egypt
	Guatemala
	Jamaica
	Turkey
2 Countries Total	5 Countries Total

<sup>5</sup>Country Reports and Annex entries were prepared by the following counsel to the IIPA: Kevin Rosenbaum, Craig Bradley, Sofia Castillo, Lucy Plovnick, and the undersigned. The reports are based on information furnished by IIPA’s member associations. We thank Pamela Burchette for her contribution in preparing, producing and distributing this submission, as well as Julia Davis for reviewing and editing the report. The Country Reports and Annex contain information that should not be construed as providing legal advice.

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

The third part of Appendix A covers 11 countries for which IIPA members have in the past filed reports but in 2020 note only that there have been no significant improvements in these 11 countries to warrant an updated report. Since conditions in these 11 countries remain unchanged from prior years, for 2020, IIPA recommends placement or retention on the Watch List for these 11 countries—the same recommendation we made on each of them the last time IIPA filed a full report on them as detailed in the chart below.<sup>7</sup> These 11 countries are: **Bolivia; Dominican Republic; Greece; Kuwait; Lebanon; Pakistan; Romania; Saudi Arabia; Tajikistan; Turkmenistan and Uzbekistan.**

IIPA ranking recommendations for these 11 countries and the year we previously filed full Country Reports for each, is as follows:

<b>IIPA 2020 Special 301 Recommendations—No New (2020) Country Reports</b>	
<b>Watch List</b>	<b>Last Year IIPA Filed Full Country Report</b>
Bolivia	2006
Dominican Republic	2008
Greece	2014
Kuwait	2014 (and in 2017 Annex)
Lebanon	2013
Pakistan	2013
Romania	2014
Saudi Arabia	2014
Tajikistan	2014
Turkmenistan	2014
Uzbekistan	2014
<b>11 Countries Total</b>	

**Appendix B:** Appendix B provides an Historical Chart of every IIPA Special 301 filing, and all of IIPA's recommended USTR placement designations since 1989.<sup>8</sup>

## **II. ABOUT IIPA AND IIPA'S INTEREST IN SPECIAL 301**

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of 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 ([www.motionpictures.org](http://www.motionpictures.org)), and Recording Industry Association of America ([www.riaa.com](http://www.riaa.com)).

Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and distributed by IIPA-member companies include: entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services, as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and

<sup>7</sup>For copies of each of these prior reports, see <https://iipa.org/reports/reports-by-country/>.

<sup>8</sup>A number of countries/territories have appeared on a Special 301 list every year since 1989, or for a considerable number of years. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of "priority foreign countries," provides that USTR must 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).

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.<sup>9</sup> The jobs created by these industries are well-paying jobs; for example, copyright industry workers earn on 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 clearly demonstrate 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 distinct, but overlap:

**Legal Reforms:** Inadequate copyright and related laws (e.g., civil, criminal and procedural codes) that fail to meet current global standards and fast-evolving best practices, or in some cases, existing commitments necessary to adequately and effectively address all forms of authorized and unauthorized uses, to allow copyright markets to grow 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.<sup>10</sup> To be effective, enforcement tools must address modern infringement challenges, such as pirate operations based online and/or outside the jurisdiction which are frequently run anonymously, and often across a number of jurisdictions. Moreover, enforcement authorities need the resources and capacity to do their jobs effectively.

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<sup>9</sup>See 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 [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2014.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf), 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 studies provide the economic underpinnings for efforts to reform copyright laws, improve enforcement, and lower market access barriers. The Motion Picture Association has commissioned a series of “Economic Contribution of the Film and Television Industries” studies. Some recent examples of these studies include: South Korea (2019); China (2019); Japan (2019); India (2018); and Brazil (2016). 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](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>.

<sup>10</sup>See WTO TRIPS Articles 41 and 61. There are many obligations for civil, administrative and criminal remedies in Articles 41 through 61, including for provisional relief and judicial procedures (e.g., injunctive relief), which are particularly critical for online enforcement.

**Market Access:** Barriers, investment restrictions, or discriminatory measures that make it difficult for U.S. producers and distributors to participate fully 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:

## 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)—adopted 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 these rights online as well as offline. The WIPO Internet Treaties were the culmination of a 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 and recordings. These controls, particularly access controls, are key enabling technologies for a full range of online digital services, such as subscription streaming services, that deliver creative works to consumers in a time and place convenient to them, and in a manner that protects the affirmative rights of creators and producers. 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 especially when reviewing copyright reforms being undertaken in countries that are parties to an agreement (including a Free Trade Agreement (FTA)) with the U.S. In particular, TPMs protections should be adopted in ways that protect access controls regardless of the method or technology, and 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 that protects and supports digital content services.

In the 24 years since their adoption, 103 countries have acceded to both of these critical treaties. In 2019, **Barbados** (December 13, 2019), **Belize** (February 9, 2019), **Cabo Verde** (May 22, 2019), **Cook Islands** (June 19, 2019), **New Zealand** (March 17, 2019) and **Uzbekistan** (July 17, 2019) acceded to the WCT and WPPT.

There are still several large trading partner countries that have not acceded to the treaties, including: **Brazil**, **Thailand**, **Pakistan**, **Israel**, **Norway**, **Saudi Arabia**, **Vietnam**, **South Africa** and **Egypt**, as well as smaller markets, such as **Bolivia**, **Kuwait**, **Kenya**, **Lebanon**, **Tanzania**, **Uganda** and others. **Saudi Arabia** is currently undertaking a major Copyright Law revision as part of possible future treaty accession (and acceded to the Marrakesh VIP Treaty on February 21, 2019); reports are that the draft law is a positive step forward, but it should be monitored for proper Internet Treaty compliance. **Brazil** has begun a public process updating its 1998 Copyright Law, which could also signal accession to the Internet Treaties in the near future. 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 2020 to encourage all U.S. trading partners to both accede to and fully implement the WIPO Internet Treaties.

### 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, in recent years, some countries have used these copyright reform initiatives to weaken, not strengthen, protection. In a few cases, reform

efforts have become a vehicle for proposals that threaten well-established global norms enshrined in long-standing international instruments, which for example, confine exceptions and limitations to the limits of the “three-step test.”<sup>11</sup>

**South Africa** is an alarming example of this trend. In 2019, the National Assembly of South Africa adopted legislation that includes a broad spectrum of vaguely delineated exceptions to the Copyright Law (as well as in a companion bill for neighboring rights). 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 provision that resembles, but is broader than the U.S. “fair use” statute. This version of “fair use” can be applied to seven broad and unclear “purposes” of use, such as “scholarship, teaching and education,” and for “ensuring proper performance of public administration.” The proposed “fair use” system lacks the decades of legal precedence that have served to define, refine, and qualify that doctrine in the United States, and to do so on a case-by-case basis. If enacted, the combination of fair use, fair dealing and the 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. In particular, it will imperil the legitimate markets for educational publishing, locally distributed works, and online works in general.<sup>12</sup> These exceptions are inconsistent with **South Africa’s** international obligations because they far exceed the degree of exceptions and limitations permitted under Article 13 of the WTO TRIPS Agreement—the “three-step test” (as well as Article 9 of the Berne Convention and the corresponding provisions in the WIPO Internet Treaties). This legislation should be redrafted, not enacted into law; more details on these and many other concerns with the pending Copyright and Performers laws are provided in the **South Africa** Country Report in [Appendix A](#).

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 for educational use of published materials, and has produced instability and slowed investment in educational publishing in **Canada**. It is hoped that, as a part of the ongoing Copyright Law review process, these exceptions will be significantly narrowed or eliminated in keeping with Canada’s international obligations.

In **Ecuador**, legislation was adopted in 2016 that substantially weakened copyright protections. The new law—the Code of the Social Economy of Knowledge, Creativity, and Innovation (COESCI)—contains 30 exceptions and limitations on rights including a five-factor “fair use” clause, which is broader than the fair use provision found in U.S. law and is unpredictable in a civil law jurisdiction. In combination, the changes have made the overall scope of protection very unclear; these and other problems are detailed in the Country Report in [Appendix A](#).

**Switzerland** adopted Copyright Law amendments in 2019 (detailed in the Country Report), but left in place many troubling provisions, including broad exceptions, such as the private copying exception in Article 19 which permits downloading from unauthorized sites, as well as a free reproduction license for scientific research (Article 24d), meant to cover text-and-data mining. The latter provision, if read broadly and in combination with other exceptions (e.g., Article 19(1)(c)), will exceed its intended purpose and the internationally-recognized three-step test. Even after the adoption of these amendments, the Swiss law is significantly weaker than the laws of its European Union neighbors and most OECD countries.

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<sup>11</sup>Article 13 of the WTO TRIPS Agreement obligates WTO members to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” See also Berne Convention Article 9(2) (same, as to reproduction right); WIPO Copyright Treaty (WCT) Article 10 (same, as to all Berne exclusive rights and all exclusive rights granted under the WCT itself); WIPO Performances and Phonograms Treaty (WPPT) Article 16(2) (same, as to all rights provided for under WPPT).

<sup>12</sup>There are many other deficiencies in the 2018 legislative package detailed in the **South Africa** Country Report in Appendix A. For example, the 2019 bills include provisions that will intervene 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. The bills also provide: (i) inadequate protection against the circumvention of Technological Protection Measures (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.

**Nigeria** ratified the WPPT and WCT in 2018, but it has not implemented the treaties, and, as a result, its legal regime has fallen short of international copyright norms in several key respects. A draft copyright bill, first circulated in 2015, had a number of significant deficiencies. IIPA understands that a new bill may be tabled again in 2020 to commence the copyright revision process. **Nigeria** needs a substantially revised bill from the 2015 draft to implement the Internet Treaties properly. For example, the 2015 legislation proposed a making available right subject only to remuneration, not as an exclusive right as set out in the WPPT. In addition, new legislation needs to be compatible with the Berne Convention and international treaties by abolishing the current requirement for a copyright registration (Section 23 of the Copyright Act, provides for fines of up to N100,000 (US\$277) for failing to register works), so that registration for works or recordings is voluntary. Any new law also should provide a three-step test limitation on exceptions. Other fixes needed from the 2015 proposal: amend the provisions from 2015 that would have granted broad immunity to Internet Service Providers (ISPs) from copyright liability and include expeditious timetables for takedowns and provisions to address repeat infringers. Private copying exceptions, and with them, provisions for levies, should apply only to content that is lawfully acquired—the exceptions should not be misused to operate as a licence to legalise piracy. The term for sound recordings should be extended to 70 years.

One additional concern in **Nigeria** is the ongoing dispute between the Nigerian Copyright Commission (NCC) and the collective management organization COSON Limited that is responsible for managing performance rights in musical works and sound recordings. The NCC recently announced the appointment of external auditors to conduct an audit of COSON. The music industry supports this audit, but recommends that its findings be shared with rights holders as a key step towards enabling local and international music rights holders' (authors, producers and performers) to license their works and recordings effectively in Nigeria. Last, because there are a number of unlicensed online entertainment services in Nigeria, which are harming many markets outside of Nigeria, there needs to be more effective online enforcement.

Some countries, including **Thailand**, **South Korea** and **Israel**, have adopted a fair use legal regime, but proper application of this defense to infringement has been problematic. For example, in **Thailand**, broad educational exceptions (detailed in prior IIPA filings) have been applied in cases allowing copying for research or study. Guidelines on fair use were issued by the Thai Government, but is not clear that they are being adhered to in practice. In the **Philippines**, drafts implementing fair use regulations to the Intellectual Property Code were issued in late 2019 for comment. The U.S. Government should engage with the Government of the Philippines to ensure that these regulations, when issued, comply with the “three-step test” and international treaty obligations. In **Ecuador**, the government has commenced a review process of the COESCI and it is hoped that the current extensive catalog of broad exceptions, including the overbroad fair use provision, will be narrowed to be compatible with international treaties and norms.

### 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 fixation or first distribution for works or recordings 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 Organization for Economic Cooperation and Development (OECD) countries already meet or exceed this norm for some or all categories of creative works (and all except **New Zealand** do so for sound recordings). 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. Although the U.S. withdrew from the TPP, the hope is that in particular, **New Zealand**, **Vietnam** and **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. **China** is a major market that still provides life plus 50 terms for works and 50 years from fixation terms for sound recordings. As part of its revision in 2019 (but still not in force), **Switzerland** enacted term extensions for neighboring rights, including sound recordings to 70 years from publication or fixation (if unpublished), and a 20-year extended term for computer programs. In 2019, **Uruguay** also adopted a 70 years from publication term for sound recordings. It is hoped that other countries, particularly in Asia and Africa, will follow these recent examples (many in Latin America) of extending the term for sound recordings.

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

Direct licensing of copyright works and sound recordings by individual rights holders of their exclusive rights should always remain the baseline. However, in certain circumstances where it makes economic sense and where international treaties permit, rights holders may prefer to exercise some of their rights on a collective basis, e.g., through CMOs. Public performance and broadcasting rights are a good example, because there are often a large number of users (potential licensees) involved, for example, from cafes and restaurants, to hundreds of radio stations, and the value of individual transactions may be relatively small compared to the transactional costs. Public performance income has become an increasingly important source of revenue for music rights holders, more so than broadcast income worldwide. This represents an important source of monies for the financing of the production and dissemination of new works. This importance has heightened the need for efficient, transparent, and accountable collective management services. It is therefore essential that rights holders can, on a voluntary basis, set up and govern their own CMOs. Governmental roles should be limited to establishing regulatory frameworks that enable efficient, fair and non-discriminatory operations of CMOs backed by rights holders, and, where appropriate, providing expert fora for the resolution of disputes on certain aspects of collective management, including by ensuring that rights are properly valued.

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 always be voluntary, transparent, allow rights holders the ability to organize efficiently, and should never limit exclusive rights or direct licensing;
- CMOs should only be established and 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 reasonable, demonstrable costs and expenses; and
- CMO 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.

The individual Country Reports in [Appendix A](#) detail serious concerns about these issues in a number of countries, including **Ukraine, Thailand, Malaysia, Indonesia, the UAE, Russia, Taiwan, Switzerland, Vietnam, Uruguay, Peru, India, and Brazil and Argentina** (albeit for different reasons). 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. In **UAE**, the government has prevented rights holders from exercising their performance rights at all, by refusing to grant an operating license to a

music CMO. The motion picture industry remains concerned about proposals for mandatory collective licensing in some Latin American countries. If imposed on rights holders, these schemes would undermine exclusive rights and encumber distribution; they should not be adopted. The recording industry is also concerned about these developments in Latin America because they could undermine legal certainty and freedom of contract and impact the proper licensing of music videos (treated as audiovisual works).

### **5. *Bilateral, Regional and Multilateral Agreement Obligations to the United States***

For decades, there has been bipartisan agreement in the U.S. Government and in Congress that strengthening copyright laws and enforcement worldwide is vital to the 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, regional, 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 is 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. These agreements have been in operation during a period of rapid market transformation in many countries, but the goals of better copyright protection and more efficient enforcement, especially online, remain valid and should spur U.S. trading partners to act.

In 2020, the USMCA will enter into force after ratification in the U.S., **Mexico** and **Canada**. 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), that agreement did not address e-copyright or the enforcement challenges of the digital era. The USMCA is a step in the right direction for the copyright industries, although its overall impact on the copyright industries will depend on how it is implemented and whether global best practices are properly adopted in the process.

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, 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, which should lead to 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. The USMCA 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 and Rights Management Information (RMI), 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 the broad limitations on liability for online service providers, could potentially undermine many of the benefits of this agreement for the copyright industries in these countries.

In January 2020, the U.S. Government completed a Phase One Agreement with **China**, which includes some enforcement obligations pertaining to copyright protection (including obligations for **China** to develop a more effective notice and takedown system). The two governments plan to commence negotiations later in the year on a possible Phase Two Agreement, which should address the many legal regime and enforcement shortcomings in **China** detailed in the Country Report. In addition, in 2020, the Administration intends to commence trade agreement negotiations with the **United Kingdom**, **Japan** and the **European Union**. 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.<sup>13</sup>

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 taking steps to modernize and strengthen their copyright laws and/or enforcement regimes.<sup>14</sup> Some of the agreements were negotiated bilaterally in the context of accession of U.S. trading partners to international entities such as the WTO, or in the settlement of WTO disputes, while others constitute “action plans” or similar pledges resulting from negotiations to resolve bilateral issues. Some of these latter agreements or action plans, such as with **Ukraine** and **Russia**, are specific to digital protections and online enforcement schemes. The benefits of these agreements can only be realized if the obligations taken on by these U.S. trading partners are properly and promptly implemented in the statutes, regulations and policies of these countries, as for example, in **Ukraine**, which has not sufficiently implemented important digital enforcement obligations.

Some signatories to existing FTAs have not met their agreement obligations, yet these countries continue to enjoy unfettered access to our valuable national markets for goods and services. These concerns are detailed in the Country Reports in Appendix A, notably in **Chile** and **Colombia**, where the legal frameworks for online enforcement are deficient, and in **Peru**, which has taken some positive enforcement actions, but where much more needs to be done. In some instances, the details of online enforcement remedies, including in trade agreements, are outdated and new more efficient enforcement solutions exist. In these instances, the U.S. Government should seek remedies that are relevant for current copyrighted works and delivery systems.

**Costa Rica** has not implemented key provisions in the Dominican Republic–Central America FTA (DR-CAFTA), more than eight years after the obligations came into force. The copyright industries’ concerns in **Costa Rica**, detailed in the Annex in Appendix A, include the need to improve basic protections for copyrighted works and sound recordings, as well as online enforcement mechanisms.<sup>15</sup> In **Panama**, the Copyright Law is generally sufficient in comparison with neighboring countries, but more needs to be done to improve its legal and enforcement regime to meet international standards and best practices.

This year, it is critical that the U.S. Government ensure 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 some of the provisions in a few of these agreements have become 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 and interactive uses that have so dramatically changed the landscape of the marketplace for goods and services protected by copyright. In such instances, the U.S. Government should seek high standard remedies that support today’s business models of the creative industries, including remedies that effectively respond to current challenges and reflect international best practices—to ensure the proper delivery of digital works and services.

## B. ENFORCEMENT TRENDS AND CHALLENGES

The evolution and development of new technologies offers greatly expanded opportunities for rights holders to create and disseminate their works via new consumer services and business-to-business applications. Unfortunately, just as digital technologies have expanded consumer accessibility for licensed materials, they have also been exploited by rogue services to facilitate new forms of piracy that undermine rights holders’ investments in the

<sup>13</sup>See [https://iipa.org/files/uploads/2019/01/2019\\_Jan15\\_IIPA\\_Comments\\_US\\_UK\\_Trade\\_Agreement\\_Negotiating\\_Objectives.pdf](https://iipa.org/files/uploads/2019/01/2019_Jan15_IIPA_Comments_US_UK_Trade_Agreement_Negotiating_Objectives.pdf); [https://iipa.org/files/uploads/2019/01/2018\\_Nov26\\_IIPA\\_Comments\\_US\\_Japan\\_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/2019/01/2018\\_Dec10\\_IIPA\\_Comments\\_US\\_EU\\_Trade\\_Agreement\\_Negotiating\\_Objectives.pdf](https://iipa.org/files/uploads/2019/01/2018_Dec10_IIPA_Comments_US_EU_Trade_Agreement_Negotiating_Objectives.pdf).

<sup>14</sup> See, for example, the intellectual property rights agreements compiled by the Commerce Department’s Trade Compliance Center, available at: [http://tcc.export.gov/Trade\\_Agreements/Intellectual\\_Property\\_Rights/index.asp](http://tcc.export.gov/Trade_Agreements/Intellectual_Property_Rights/index.asp).

<sup>15</sup>Costa 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.

production and distribution of new and existing materials and services. For example, cloud computing and streaming technologies are now used by cyberlockers and various platforms that do not have licenses for the content they make available. In addition, there are various stream-ripping applications that circumvent TPMs and convert licensed streams into unlicensed downloadable content. Stream-ripping is the illegal practice of making a downloadable file from content that is only authorized to stream online. It is now the most prevalent form of online music copyright infringement. Thus, enforcement systems (and trade commitments to address enforcement) must be adaptable, agile, efficient and effective to deter the myriad forms of unauthorized activities.

### 1. *Online and Mobile Network Piracy*

Online and mobile network use is now the dominant authorized delivery system for copyrighted works, including music, films and television programs, journal publications, and video games. It is also the most prevalent form of unauthorized and unlicensed use, threatening the viability of licensed platforms and eroding the capacity of creative artists, authors and producers to earn a living, as well as to invest in creating new materials. The entrenchment of infringing services (including those misconstruing laws to avoid licenses) is a leading barrier to U.S. creators and rights holders in markets worldwide.

A September 2019 study for the International Federation of the Phonographic Industry (IFPI) surveyed 34,000 people across 21 major music markets worldwide to understand global consumption of music online. It found increasing rates of licensed music consumption online, but piracy and unlicensed downloads of music are still common. The IFPI study found that 89% of consumers had engaged in licensed on-demand music streaming across a range of audio and video streaming services. This shows an exponential growth in the popularity of new services that offer huge libraries—now including over 50 million tracks—of licensed music content to consumers on hundreds of music services worldwide.<sup>16</sup> Many of these services offer a free tier as well as a paid, premium service. The use of mobile devices to listen to music was typical in many, and dominant, in some countries. In **Mexico**, 95% of consumers used their smartphones to access music in a one month survey period; in **China** the figure was 96%; in **South Korea** it was 90%; and in **India** it was 97%. However, 27% of consumers in the surveyed countries said they continue to download unlicensed music at least once a month, with stream-ripping being the most common form of music copyright infringement.

Massive online infringement of entertainment software continues to be an international problem that undermines legitimate markets worldwide, as reflected in industry monitoring of peer-to-peer (P2P) and direct download activity. For 2019, **Russia, Ukraine, Brazil, India** and **Kazakhstan** 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.

The motion picture industry reports that (in 2018) there were an estimated 9.8 billion downloads of pirated wide-release films and primetime television and Video-on-Demand (VOD) shows using P2P protocols. Worldwide, this number was 5.4 billion downloads. Additionally, in 2018, there were an estimated 32.5 billion visits to streaming piracy sites worldwide on desktop and mobile devices. In the second half of 2018, the 10 most popular streaming sites globally each month saw an average of 4.5 million monthly desktop visitors worldwide. Effective enforcement can have a meaningful impact on the legitimate marketplace. For example, the shutdown of Megaupload and its associated sites caused a 7 to 10% increase in online movie units sold and a 4 to 7% increase in movie rentals. If piracy could be eliminated from the theatrical window in the United States, box office revenues would increase 14 to 15% (\$1.5 billion annually).<sup>17</sup>

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<sup>16</sup>IFPI, *Music Listening 2019*, available at: <https://www.ifpi.org/downloads/Music-Listening-2019.pdf>.

<sup>17</sup>The data included in this paragraph is based on: an analysis of MarkMonitor and GDPi data; SimilarWeb data, based on streaming sites (with at least 10,000 removal requests) according to Google Transparency Reports; Danaher, et.al. "The Impact of the Megaupload Shutdown of Movie Sales"; and Carnegie Mellon University, 2016.

There are many countries with adequate legal regimes that can address Internet and mobile network piracy, but which fail to provide effective enforcement, usually due to a lack of coordinated efforts or a lack of resources (or both). Two examples include: **Bulgaria** and **Romania**.

IIPA continues to recommend four steps to address the problem of Internet and mobile network piracy: (1) identifying and closing down markets and actors engaged in these activities, especially criminal syndicates through the use of criminal enforcement remedies; (2) creating legal frameworks that (i) prevent the operation of services that promote or otherwise induce infringement; (ii) criminalize online infringement; and (iii) 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 and applying injunctive relief and administrative measures, especially to address notorious online marketplaces hosted in one country that 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.”<sup>18</sup> 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. IIPA’s long-standing recommendation is that USTR should urge trading partners to either convert sites and services to licensed dissemination of works and recordings, or notorious markets should be taken down, and followed where appropriate, by criminal enforcement actions.

The second step, creating legal frameworks to prevent the operation or emergence of illegal services is itself, multi-staged, including: (i) 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 for the digital environment; (ii) recognizing online piracy as a form of cybercrime; and (iii) fostering cooperation among all industry stakeholders (including ISPs) in the online supply chain, including the removal of impediments to collaboration.

While arrangements for notice and takedown of infringing materials are in place in many markets, they are often mistakenly viewed as the only means of online enforcement. Moreover, some services, including some clearly pirate services, attempt to rely on notice and takedown procedures to avoid standard copyright licensing. Clear primary and secondary liability rules are necessary to discourage abuses and to avoid inaction or license evasion. Where infringing activity rises to the level of criminal liability, imposing responsibility for aiding and abetting infringement can be an effective remedy against commercial platforms.

IIPA members are concerned about proposals granting complete immunity to ISPs and other platforms from any civil or criminal liability, and urge foreign governments to include clear language in these proposals ensuring such immunities do not apply to violations of intellectual property rights. The U.S. Government should ensure that implementation of any such immunity does not hinder IP enforcement. Additionally, there are concerns with provisions that immunize parties who induce or facilitate infringement of copyright. There have been troubling proposals in **Brazil**, **Argentina**, and in **Nigeria**, and concerning provisions already exist in the law of **Chile**. Legal incentives that foster cooperation of ISPs and other online intermediaries with rights holders are important for online enforcement.

The third effective step, especially for illegal marketplaces hosted in one country that target consumers in another, is injunctive relief. This is necessary where a country hosting illegal services refuses to take effective action against its own “homegrown” (or otherwise) 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 to restrict or disable access to foreign pirate sites from within their borders. Government agencies and courts in over 40 countries—including **South Korea**, **Australia**, **Singapore**, **United Kingdom**, **France**, **Denmark**, **Germany**, **Portugal**, **Spain**, **Italy** and **Ireland**—employ injunctive relief or

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<sup>18</sup> The most recent report is USTR’s 2018 Out-of-Cycle Review of Notorious Markets (April 2019), available at: [https://ustr.gov/sites/default/files/2018 Notorious Markets List.pdf](https://ustr.gov/sites/default/files/2018%20Notorious%20Markets%20List.pdf) (“USTR NM 2018 Report”). The 2019 Notorious Markets report has not yet been issued.

administrative orders to ensure that ISPs 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. After over 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 online marketplace.

## 2. Piracy Devices (PDs)

Piracy Devices (PDs) and apps (also referred to as “illicit streaming devices” (ISDs)) allow users to stream, download, or otherwise access unauthorized content from the Internet and are a major problem for the motion picture and television industry. This issue was the focus of USTR’s 2017 Notorious Markets Report.<sup>19</sup> PDs and apps provide illegal access to movie and television content through a variety of means, including downloading and streaming content as well as unauthorized streaming of live television and sporting events, thus undermining the licensing fees paid by distributors on which content creators depend. Motion Picture Association (MPA) members continue to suffer enormously from a growing threat of these PDs. It is estimated (Sandvine Study, December 2018) that approximately 5.5% of North American households access pirated live television services, especially via Internet protocol television (IPTV) uses (e.g., Kodi boxes), and this figure does not include web-browser video piracy.

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.

PDs 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; alternatively, the app developer can be prosecuted (if identified). Governments can also take action against key distribution points for devices that are being used illegally, including marketplaces (both online and physical) where such devices are sold; many of the physical marketplaces of greatest concern to the copyright industries now increasingly feature goods and services enabling PDs, and/or stalls or kiosks, or “repair”

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<sup>19</sup>In its 2017 Notorious Markets Report, USTR spotlighted the growing problem of Piracy Devices (i.e., PDs), concluding that they “pose a direct threat to content creators, sports leagues, and live performance, as well as legitimate streaming, on-demand, and over-the-top (OTT) media service providers.” USTR 2017 NM Report at 8-9.

shops, offering to load unauthorized copyright material or piracy-enabling apps onto any device. Vigorous action is needed to lessen the growing harm to the legitimate digital delivery of copyright materials by these devices.

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

One reason why so much legitimate material is now available to consumers, in many formats and on many 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 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. One example is stream-ripping (which was highlighted as a problem by USTR in its 2016 Notorious Markets report).<sup>20</sup> Stream-ripping services infringe the making available right and circumvent the TPMs used to prevent download of music streams. These services have proliferated in the last few years, making stream-ripping, as noted above, the dominant method of music piracy globally. Stream-ripping sites, services and apps enable users to make a permanent, free download of music that was licensed only for streaming on a video website such as YouTube, and then allow that consumer to listen to it whenever and wherever they wish, without paying for a licensed download or a premium streaming subscription. This harms both legitimate streaming services and 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, closing the site in September 2017.<sup>21</sup> 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. 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** is the locus for the manufacturing of a host of circumvention devices. There are many countries identified in the Country Reports in Appendix A, with weak or no TPM protections, including **Mexico**, now committed by the USMCA to properly address this problem, as well as **Israel**, a developed country that has failed to adopt any protection whatsoever in this field, and **New Zealand**, which adopted weak TPM provisions.

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

The book and journal publishing industry continues to face large-scale unauthorized photocopying of academic, scientific, technical and medical books, in many markets; 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 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

<sup>20</sup>See <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

<sup>21</sup>See <http://www.ifpi.org/news/Worlds-largest-music-stream-ripping-site-shuts-down-after-successful-international-legal-action>.

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**, **Malaysia**, and the **Philippines**, for example, where the growth of the publishing market is undercut by widespread unauthorized photocopying of educational materials.

### **5. *Illegal Camcording of Theatrical Motion Pictures and Pay-TV Piracy and Signal Theft***

A priority for the motion picture industry involves stopping the 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 the 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 2019, the MPA identified 524 total illegal recordings of its member company titles from cinemas around the world, including both video and audio captures—this was a slight increase from the 510 titles recorded in 2018, and there were increases in some key markets. These figures do not include numerous independent or foreign films that were illegally camcordered, and only include audio and video captures that can be traced to a particular theater.

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 requires **Mexico**, which has been a major source of camcordered movies uploaded to the Internet, to add proper criminal remedies into its national law. The Country Reports in this submission highlight many other markets where an effective strategy against camcording has not yet been implemented, and where new criminal laws are clearly needed. Enactment of criminal sanctions is not by itself enough; effective enforcement of these laws remains critical to addressing the problem.

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 another 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 **India**. In most of these cases, the signals are encrypted, and infringers circumvent to access the content so enforcement actions (and regulations) need to focus on: (i) prohibiting the trafficking in pay-TV or signal theft devices or technologies; (ii) the unlawful decryption of encrypted cable or satellite signals; and (iii) the forwarding of decrypted signals (whether lawfully or not) without the authorization of the rights holders of the content or of the signal. These actions can help foster the licensing of broadcasters and cablecasters, and weed out unlicensed television distributors.

A related problem to cable and signal theft are the illegal IPTV services that provide stolen telecommunication signals and channels via dedicated web portals, third-party applications, or via 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 resellers 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 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 crucial foreign markets. The issues of copyright protection of authorized materials, and enforcement against infringing goods, are moot if legitimate American works and recordings cannot be disseminated in a particular market in a fair and equitable manner to meet consumer demand. Market access barriers take many forms, including:

- restrictions on the ability to fully engage in the business of development, creation, production, distribution, promotion, and publication of copyright materials;
- high tariffs (such as through inclusion of royalties in the calculation of duties), taxes, or fees on core copyright businesses and their products and services;
- arbitrary restrictions on the ability of rights holders to decide how to manage their rights, in particular by mandatory collective licensing combined with government interference in the operation of CMOs and rate setting;
- quotas on audiovisual programming or complete bans on foreign programming, which overall curb the ability of film and television producers to compete fairly, and which limit consumer access to legitimate content;
- restrictions on advertising, including local content requirements;
- restrictions on ownership and investment in copyright-related businesses;
- discriminatory, onerous, and/or dilatory content review/censorship systems;
- periods during which foreign governments prevent U.S. producers from opening their films, or impose onerous restrictions on the window for theatrical distribution (including unfairly shortening the run of a theatrical motion picture);
- mandatory local replication requirements for films (that may also compromise the security of digital materials); and
- other forms of government interference with the exercise of rights or contractual freedoms by rights holders.

One recent trend has seen governments seeking to regulate the online marketplace in the same manner as the traditional television market, threatening the vitality of fast-growing and dynamic business segments such as VOD and other OTT television and film services. Today there are more than 480 legitimate online audiovisual services, responding to all manners of consumer viewing preferences and offering diverse options and price points.

These formal market access barriers are discussed in detail, in markets where they occur, in the Country Reports in [Appendix A](#). Whatever form they take, all market access restrictions that impede the entry of legitimate products increase the appeal of unauthorized production and distribution operations. Often these illegal operations cement strong loyalties with consumers, making them even harder to dislodge. U.S. officials should continue to strive to open markets for American creators and producers, and to eliminate or phase out market access barriers, as identified in this year's IIPA submission. In the recently concluded USMCA, Canada secured a "cultural carveout." This means that American cultural industries potentially will not benefit in Canada from the market opening opportunities of the USMCA. This carveout is inconsistent with the principles of free and fair trade, since cultural promotion and open

markets are compatible and complementary. IIPA members are committed to the promotion and protection of cultural diversity and believe that governments can, in lieu, effectively rely on the flexibilities built into Free Trade Agreements, including permissible support programs, to promote their cultural interests.

#### IV. POSITIVE DEVELOPMENTS

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

**Brazil:** There were several successful enforcement actions in 2019, following on the success of the Federal Police in “Operation Copyright” in January 2019, which shut down seven major torrent sites. This included a campaign by Sao Paulo’s Public Prosecutors Cybercrime Unit (CyberGaeco) which shut down 106 infringing music domains—accessed over 23.3 million times monthly (an estimated 367 million visits yearly). In November 2019, the Ministry of Justice’s National Council to Fight Piracy (Conselho Nacional Contra a Pirataria, CNCP) and the Secretariat of Integrated Operations (Secretaria de Operações Integradas, SEOPI) participated in a coordinated criminal enforcement campaign (“Operation 404”) which resulted in 30 search warrants aimed at online piracy in 12 different Brazilian states. The results: 210 websites and 100 apps were taken down, and sites and participants delisted, and profiles removed, from social media platforms. Separately, the CNCP facilitated several promising agreements. For example, there was an agreement between ANCINE, the Brazilian Cinema Agency on behalf of rights holders, and Mercado Livre, one of the largest online markets, to limit the availability of non-certified devices and set-top boxes, including rogue IPTV and key sharing devices. In another 2019 agreement, CNCP signed an MOU with key advertisers in Brazil, to develop compliance mechanisms to prevent advertising money from supporting infringing websites.

**Chile:** On October 24, 2019, the Santiago Court of Appeals dismissed a constitutional challenge filed by a group of business owners in Providencia against phonogram producers. The producers were seeking payments for the reproduction of phonograms in computers and digital jukeboxes. The ruling ratified the rights of the Chilean recording industry association to collect royalties (for so-called “dubbing rights”) for the copying of recordings into databases to be used by businesses as background music at their places of business.

**India:** There were several 2019 court decisions favorable to the copyright industries. First, in April 2019, the Bombay High Court (*Tips Industries v. Wynk Ltd. & Anr*) held that the statutory license in Indian Copyright Law (Section 31D) does not apply to Internet music—neither for streaming nor download services. The court rejected a 2016 interpretation from the Department for Promotion of Industry and Internal Trade and correctly held that, the statute is intended only for terrestrial radio and television broadcasting, not Internet broadcasts. The case is on appeal. In another April 2019 case, the Delhi High Court permitted a permanent site block to curtail a clearly infringing site in India. In *UTV Software Communication Ltd. V. 1337x.TO*, the court issued “dynamic” orders allowing additional domains that were used to access the infringing site to be blocked. In July 2019, the same court also permitted dynamic domain blocking of another infringing site (*Warner Bros. Entertainment Inc. v. Https:Hindilinks4u.To*). The motion picture industry reports that, as a result of these and other decisions, a total of 106 websites were blocked (comprising 584 domains) in India, resulting in both a significant decline in traffic to these sites and a resultant lowering of overall piracy in India.

**UAE:** 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 deterrent penalties. 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 treatment of unauthorized uses in the country.

**Ukraine:** The long-awaited CMO accreditation process, implemented by the 2018 legislative reforms (Bill #7466), commenced in 2019. The reforms are intended to correct the long-standing chaotic situation of multiple, overlapping CMOs in Ukraine, which also have had systemic governance and accountability problems. Three CMOs

were accredited before a court challenge suspended the process. Procedural changes were adopted by the Government of Ukraine in late 2019 and it is expected that the remaining (pending) accreditations will be completed in 2020. In addition, there are significant reforms and improvements of the CMO system pending, as well as copyright law reforms.

**Taiwan:** In April 2019, Taiwan adopted amendments to Article 87 and 93 of the Copyright Act that provide a clear legal basis for enforcement against the dissemination of software or apps that facilitate infringement, and also the manufacture and trafficking of Piracy Devices.

**Greece:** The Government of Greece has taken significant steps to combat online piracy in recent years. One positive step was the implementation of an administrative website blocking system that has achieved success in addressing Internet piracy in the country. Since July 2018, 64 domain names that were making infringing content widely available were blocked as the result of these administrative actions.

**Canada:** In November 2019, the Federal Court (*Bell Media Inc. v. GoldTV.Biz*, 2019 FC 1432) granted an injunction to order a group of ISPs to block access to an illegal IPTV service. The Court rejected arguments that the injunction was improper due to the absence of an express site blocking provision in the Copyright Act. One ISP (TekSavvy) has filed an appeal to the ruling. This ruling was the first site blocking order to be issued by a Canadian court.

The above are some examples of 2019 positive developments in particular countries. Despite these positive developments, serious additional legal reform and/or enforcement issues remain in several of these countries. The details of these and other issues in each of these countries can be found in the respective Country Reports in Appendix A.

## V. CONCLUSION

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, and has been a witness to the many positive results yielded by the process over those years. It is hoped that further market expansion and progress will result from this year's review proceeding. As detailed in the 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 depend on promoting and respecting intellectual property rights and opening markets to products and services that depend on copyright. Open markets foster jobs in the creative industries, 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 and enforcement, 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) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Argentina be maintained on the Priority Watch List in 2020.<sup>1</sup>

**Executive Summary:** Despite some positive developments in 2019, the Government of Argentina continued to demonstrate an overall lack of commitment to effective copyright enforcement.

In November 2019, the Macri Administration presented a National Plan Against Cybercrimes (NPAC) to establish suitable personnel, technology and regulations to combat cybercrime by 2023 through collaboration between security forces; public-private initiatives, particularly with Internet service providers' (ISPs) and information and communication technology's (ICTs); and joint efforts with international organizations. A draft reform to the penal code was presented to the Argentine Congress in March 2019 with some provisions that, if properly implemented, would improve the enforcement landscape for copyrighted works. It is unclear whether President Fernandez will follow through on these initiatives.

The absence of a strategic enforcement policy and interagency cooperation, especially between prosecutors and law enforcement cybercrime experts, continues to allow pirate sites to thrive in Argentina and expand to other Spanish-speaking countries. Hard goods piracy, linked to organized crime groups, also remains rampant. Notorious market *La Salada* remained open in 2019 and its owner was released on bail in a significant set-back for the case. To address these significant piracy problems, IIPA recommends the new Government of Argentina: (1) apply existing Civil and Commercial Code provisions on ISP liability for storing infringing content; (2) host private sector discussions on cross-industry cooperation; (3) create a specialized IP Prosecution Office to promote cross-agency law enforcement cooperation and ensure the diligent investigation and prosecution of copyright infringement cases; (4) undertake routine, *ex-officio* inspections and raids of physical markets; and (5) actively involve the Argentinean Customs Office (AFIP). It would also be helpful for Argentina to bring copyright under federal jurisdiction, as it has done with trademark law.

Market access obstacles persist in Argentina, including film and television quotas, and high taxes on copyrighted content. IIPA urges the removal of these barriers to ensure a level playing field for U.S. creative industries.

### **PRIORITY ACTIONS REQUESTED IN 2020**

- Increase resources and develop a coordinated, long-term antipiracy agenda at the federal and local level to address online piracy.
- Continue to apply the Civil and Commercial Code to ISP liability cases.
- Host private sector discussions on potential cross-industry cooperation to tackle online piracy more effectively and support the development of the local digital economy.
- Create a specialized IP Prosecution Office and establish federal jurisdiction over copyright crimes.
- Undertake routine, *ex officio* actions such as inspections and raids of physical markets to stop hard goods piracy.
- Remove quotas for motion pictures and television content, 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.
- Monitor proposed ISP liability legislation.

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<sup>1</sup>For more details on Argentina's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Argentina's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



## 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, stream-ripping and linking sites. The prevalence of piracy fundamentally undermines the emerging digital economy in the country. In a recent 19 country study of Internet users, a recording industry survey found higher rates of music piracy in Argentina than in any other country but one, with 47% of Internet users (and 66% of 16-24 years old users) pirating music on a regular basis.

The U.S. Government has said that Internet piracy rates have reached extremely high levels in several content areas. One positive development, relates to the notorious Argentine-run market *Cuevana*. *Cuevana* offered pirated movies and TV shows and had expanded to include a mobile streaming application. A key figure responsible for the site indicted in December 2017, which took six years to accomplish, and in 2019 the court issued a blocking order that mandates ISPs to block the website in Argentina. Other cases however have continued to languish. For instance, a case against the operators of a prominent infringing TV and movie release group has been stalled for two years with little movement expected anytime soon. The lack of a level playing field in the digital content market stymies the growth of legitimate services that struggle to compete with vast quantities of copyrighted material available from a multitude of unauthorized 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 home to heavy users of BitTorrent (e.g. *1337x.to* and *rarbg.to*), cyberlockers (e.g. *1fichier.com*, *zippyshare.com*), stream-ripping sites (e.g. *y2mate.com*, *flvto.biz* and *savefrom.net*) 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 2019, there was also an increase in consumption of films and television through piracy mobile apps and add-ons.

The illegal distribution of physical and online video game content continues to grow. Online marketplaces, such as *Mercado Libre*, remain increasingly popular with providers of unauthorized copies of video games and counterfeit consoles. Social media platforms enable online pirates to attract wider audiences. Infringing linking sites in Spanish—monetized by advertisements—are the most popular piracy channels for video games in Argentina and other Spanish-speaking countries such as 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 digital public performance rights market, demonstrating the country's appetite for music consumption, digital sales are currently well below potential. 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 mobile apps. Despite promising growth in streaming revenue in recent years (up by 59% in 2018), it is clear that the digital market cannot flourish while widespread piracy continues to be an issue.

**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. It is estimated that hard copy piracy accounts for 60% of the illegal market for some industries such as video games.

Despite a reported 17% reduction in open-air markets in recent years, 2019 did not bring marked improvement. For example, 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.<sup>2</sup> 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 Government of

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<sup>2</sup>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>.

Argentina should renew these efforts and conduct such actions regularly. The high profile arrests of two alleged leaders and many associates of notorious market *La Salada* in June and October 2017, followed by large-scale enforcement operations in December 2017, showed a renewed governmental interest in cracking down on marketplaces known for counterfeit and pirated goods. Unfortunately, *La Salada*'s owner was released on bail and the market remained operational in 2019. There was also a significant growth in the number of locations and vendors across the entire city of Buenos Aires.

**Camcording.** Three illicit recordings of MPA member films were sourced from Argentine cinemas in 2019, consistent with the figures in 2018. Moreover, Argentina is home to a number of release groups, which source camcorded material from all over the region and resell it online. Despite the fact that the industry works with law enforcement to bring criminal cases against owners of camcording groups, the pace of development of such cases is so slow that years go by before any concrete measures are taken.

## **COPYRIGHT ENFORCEMENT IN ARGENTINA**

The creative industries report that, as in previous years, there were no significant enforcement actions in 2019. Only a few basic actions (such as small street raids) took place, despite the government being in a position to do more. Greater protections are especially needed online.

In its 2018 and 2019 Special 301 Reports, the U.S. Government noted long-standing deficiencies in Argentina's IPR protection, especially the lack of effective enforcement at the national level. In addition, the U.S. Government said that "criminal enforcement for online piracy is nearly nonexistent."<sup>3</sup> In all cases, the copyright owner has to invest a lot of resources and time to actively urge and promote actions. These problems persist.

Some of the weakness in Argentina's copyright enforcement regime is attributable to a lack of resources during an ongoing economic crisis; but much rests on failings in procedures that do not make 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 online and offline piracy allows for multiple markets and sites to adapt and grow. *Ex officio* action by enforcement agencies remains nonexistent and the police fail to comply with search warrants in a timely manner. 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 piracy crimes are not a priority for the investigative authorities. All of this makes enforcement very difficult.

The general perception is that while enforcement actions in 2019 remained at the same low level as previous years, during the Macri Administration there was improved government initiative to: (1) tackle organized crime; and (2) promote a legitimate digital market in Argentina. However, law enforcement agencies were not assigned adequate human and technical resources, without which agencies have a difficult time investigating and enforcing against IPR crimes.

**Online Piracy.** With regard to online piracy, there is a noticeable lack of action by either federal or local law enforcement. Thus, online infringement remains a major problem. Despite the laudable progress in getting the *Cuevana* website blocked in Argentina, difficulties still generally persist in the investigations of copyright violations, evidence gathering procedures, and the assessment of monetization structures based on advertisements by infringing sites. Further, a general perception of tolerance, including from the judiciary, for online copyright infringements presents obstacles to law enforcement efforts and to rights holders' own civil litigation. There is also a recurring jurisdictional issue between local and federal police forces when it comes to online piracy cases, as Argentina has not federalized copyright law as it has done with trademark law. The effects of this uncertainty can be seen in the enormous amount of time cases presented to the judiciary system in Argentina take to progress. Moreover, both local and federal authorities suffer from a lack of technical support and human resources able to tackle the problem on a large-scale. The lack of units that specialize in intellectual property enforcement also makes IP crime in the context of other crimes prosecuted by the enforcement units in Argentina.

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<sup>3</sup>See, e.g., USTR 2018 Special 301 Report, at p. 58 (April 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>, and USTR 2019 Special 301 Report, at p. 63 (April 2019), available at [https://ustr.gov/sites/default/files/2019\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf).

While there are agreements involving U.S.–based companies that include DMCA-style requirements for content removal, ISPs typically ignore takedown notices submitted by rights holders. The agreements need to be improved 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 combat copyright piracy over Internet services and to increase enforcement measures; (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;<sup>4</sup> 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 new Government of Argentina can take. 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, 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 Federal Administration of Public Income (AFIP) is needed to reduce hard goods piracy, including the importation of illegal video game devices, consoles, and video cards, many of which come into Argentina from Paraguay. The lack of enforcement against physical piracy has gained more relevance as the penetration of Piracy Devices (PDs), also called ISDs (Illegal Streaming Devices), has soared. The inability to control the widespread sales of DVDs has the same root cause as the government's inability to control the burgeoning importation, distribution and sales of devices dedicated to illegal online piracy: lack of focus on the IP problem due to the absence of specialized units, and conflicting jurisdictional spaces.

**Civil and Criminal Prosecution.** Notwithstanding some positive developments, criminal and civil prosecution of pirates continues to present significant procedural hurdles, and criminal prosecution of cases remains non-deterrent due to a very slow criminal prosecution process. For example, criminal cases can take up to nine years to reach a final verdict. Thus, improvement 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. A targeted amendment of the Criminal Code should also clearly criminalize camcording activities

Importantly, 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.

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

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<sup>4</sup>In 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>.

National Entity for Communications (ENACOM) to take action. Authorities should take *ex officio* initiative and also implement international best practices on disabling access to infringing websites.

**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 consultation 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, it 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.

In a positive development, the Administration's draft Penal Code Reform bill, sent to Congress in March 2019, addresses a number of copyright issues, including: 1) reproduction of copyrighted material and programs from the Internet without proper authorization, 2) manufacturing, storing or selling copyrighted programs without authorization, and 3) circumvention of technological protection measures (TPMs). In addition, the proposal would make theft of IP equivalent to theft of physical objects and would make the incorrect reporting of pay-TV subscriber numbers a penalty under the law. The general provisions of the bill are being debated at the Senate's Judicial Affairs Committee, and the balance of the bill is set to be debated in 2020. Moreover, the Justice Ministry has signaled a commitment to amend the penal code to outlaw sale of PDs, which enable piracy of creative works. These provisions, if implemented, would improve the enforcement landscape for copyrighted works in Argentina. Unfortunately, the Bill is still awaiting debate in the Senate and near-term progress is dubious.

Regarding the protection and enforcement of copyright online, IIPA urges the U.S. Government to be vigilant to ensure that any draft legislation regarding ISP liability that might be proposed in 2020 does not jeopardize the development of the legitimate digital market for copyright materials and turn Argentina into a safe haven for even greater numbers of infringing sites and platforms. While rights holders appreciate the willingness of Argentine lawmakers to start a fresh discussion, Argentina should follow global best practices with respect to the breadth of safe harbors for online intermediaries, and should take note of developments in Europe on enforcement actions available in online copyright enforcement cases.

Within the former Ministry of Communications, a Commission (ENACOM) was set up 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 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 risks interfering with anti-piracy actions carried out by copyright rights holders and, therefore, copyright should be expressly excluded from its scope (similar to the approach in Marco Civil in Brazil), and the bill should state expressly that the principles in the bill do not have impact on other actions against unlawful content (i.e., the net neutrality principle and other rights apply to lawful content only).

## **MARKET ACCESS IN ARGENTINA**

**Local Content Quotas.** Resolution 4773 E/2017 mandating certification of compliance with the screen quota provisions set forth in Section 67 of the 2009 Media Law and accompanying regulation (Decree 1225/10) went into effect on January 1, 2018. The quota regime requires free television licensees to show eight Argentine feature films per calendar year, or, for certain licensees, to pay 0.5% 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 0.5% of the previous year's annual turnover to acquire the broadcast rights to independent Argentine film and TV movies.

Regulatory Decree 1225/2010, published in April 2019, established a registry of national films at the National Film and Audiovisual Arts Institute (INCAA) from which pay-TV programmers select productions to comply with the quotas imposed by Article 67 of Media Law 26.522. The list of works includes both existing and yet-to-be-filmed productions. ENACOM has not established compliance procedures for pay-TV programmers. The decree presents several problems, such as whether channels with highly specific content will be able to find suitable content in the registry and whether programmers are subject to fines if they do not broadcast productions that ultimately fail to be completed.

Pressure for content quotas increased last year. In May 2019, the Chair of the Senate Communications Committee proposed Bill S-709/208, which would have imposed an additional three hours of weekly local content quotas on pay-TV services and introduced 10% quotas on streaming services. Although the bill stalled, IIPA remains wary of proposals for additional quotas because they negatively impact non-Brazilian content industries.

In July 2018, INCAA published a resolution (Resolution 1050/2018) regulating content quotas for movie theatres, which came into force on July 10, 2018. Domestically produced films must represent 30% of the volume of content shown, for the entirety of one week per quarter where there is a dedicated screen. While that 30% content quota was in effect previously, under the prior regulatory regime, the screen could be shared with another film. Under the new regulation, should the exhibitor share the screen with another movie, it will be considered a partial fulfillment, and the local production must be shown for two weeks (a minimum of one screening per day for at least one additional week) or until the full quota is fulfilled. Also in July 2018, ENACOM announced Resolution 4513 establishing that a 30% local content quota would be enforced on free-to-air TV in urban areas (10-15% for lesser populated markets). IIPA recommends that this quota provision be eliminated, as quotas distort the market, discriminate against U.S. audiovisual content, and are likely to result in increased piracy because Argentine consumers are unable to get sought after U.S. content.

**Temporary Export and Import Tax.** Enforced as of January 1, 2019, and originally set to expire on December 31, 2020, the Temporary Export Tax was set at 12% with a cap of \$4 per dollar and has had a direct impact on the audio visual industry, increasing local budgets by 12% to 15%. The 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.

Less than a month after taking office, and with a struggling economy, the new Administration extended the Temporary Export Tax beyond the end of this year, to December 31, 2021, a year longer than that originally set by the prior Administration, via Decree 99/2019, which regulates the Social Solidarity and Productive Reactivation (“País”) Law. While the Decree reduced the tax rate to 5%, it also eliminated the four-peso-per-dollar cap that had benefited exporters due to the steep depreciation of the peso over the past year.

Additionally, Argentina assesses customs duties on audiovisual works based on the potential royalty value of the work rather than on the value of the carrier medium. This runs counter to international best practice and is a form of double taxation, as royalties are subject to withholding, income, value-added, and remittance taxes.

In December 2017, the government passed a tax reform law that imposes a 35% customs duty on imported video game consoles, which negatively impacts the video game industry as well as consumers who resort to “unofficial importation” to avoid paying the extra charges. Moreover, the law also imposed a 21% Value Added Tax (VAT) on over-the-top (OTT) services as well as on a range of services provided by companies in the “collaborative economy.” Then, in December 2019, the new administration passed a law (which has now gone into effect) imposing a 30% VAT taxation over OTT services, including digital games, music and movies services. These laws are against international norms and should be amended or repealed.

## **COLLECTIVE RIGHTS AND COLLECTIVE MANAGEMENT ORGANIZATIONS IN ARGENTINA**

In May 2018, an amended Defense of Competition Law (LDC) became fully effective. The purpose of the amended LDC is to make significant changes to Argentina's anti-competition regulations and enforcement procedures. The law seeks to foster competition, fairer market practices and prevent cartelization. It created the National Competition Authority and a Competition Defense Authority, which includes a tribunal that will investigate and penalize practices that threaten market competition. This responsibility no longer depends 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 by the government to be in the dominant position.

In connection with the amendment to the LDC, the Secretary of Commerce issued a fine on SADAIC (the Collective Management Organization representing Authors and Composers in Argentina)—later annulled by the courts—for charging allegedly abusive prices in the collection of performance rights to hotels; however, the litigation confirmed the government's recommendation to revise royalty rates applicable to these types of users. Therefore, there is concern that the law is being used to limit the amount of revenue that the music sector might be able to achieve in public performance licensing.

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.

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2020.<sup>1</sup>

**Executive Summary:** Chile needs to revamp its legal framework to enable effective copyright enforcement online and, in turn, to foster the development of a healthy digital marketplace. Chile's copyright law contains major gaps, including: absence of clear and comprehensive secondary copyright liability standards; counterproductive court order pre-requisite to online content removal; failure to protect against circumvention of technological protection measures; a lack of deterrent remedies; and overly broad exceptions to copyright. These issues remain unresolved or even made worse by Chile's last copyright law amendment in 2010 (Ley No. 20.425).

Chile continues to have a serious online piracy consumption problem without any effective legal remedies to address it. Chile features significant levels of stream-ripping, file sharing of infringing content over peer-to-peer (P2P) networks, illegal use of cyberlockers and IPTV. While illicit camcording of films has significantly declined in Chile in recent years, given recent shifts in camcording activity in the region, Chile should nevertheless pursue a law criminalizing this activity. 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 when those devices are bundled with games and services or unfair competition. Making matters more challenging, when cases are successfully brought before a 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. 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 online. 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.

In the aftermath of widespread social and political turmoil in late 2019, the Chilean Government has signaled its intention to pursue major legal reforms, including the announcement of a referendum to rewrite the constitution in April 2020. IIPA urges the Chilean Government to ensure that any reform adequately applies the country's existing international, multilateral and bilateral commitments to strong copyright protection and enforcement, and equitable market access, and to significantly improve its legal regime beyond the treaties' minimum levels of protection, consistent with international norms for the digital marketplace. IIPA respectfully requests USTR to monitor the impact that any legal reform—including any constitutional changes—may have on Chile's IPR landscape.

### **PRIORITY ACTIONS REQUESTED IN 2020**

- Amend the copyright law (Ley No. 17.336) and repeal Ley No. 20.425 of 2010 to: (i) distinguish clearly between neutral and passive intermediary service providers and active services that cannot benefit from limitations on

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<sup>1</sup>For more details on Chile's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Chile's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



liability; (ii) enable and meaningfully incentivize intermediary service providers to enter into voluntary cooperation with rights holders against online copyright infringement; (iii) eliminate the court order requirement prior to content removal or take down; (iv) introduce deterrent civil and criminal sanctions for copyright infringement, the establishment of statutory (e.g., pre-established) damages, improved injunctions, including against foreign-based websites, and an effective civil *ex parte* search remedy; (v) provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent; and (vi) adopt technological protection measures (TPMs) legislation with civil and criminal penalties and including sanctions for acts of circumvention and the trafficking in devices or services, and once enacted, to effectively enforce the anti-circumvention prohibitions.

- Refrain from reducing copyright infringement penalties currently provided in the Intellectual Property Law.
- 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 value added tax (VAT) on “digital services” does not result in unwarranted discrimination in favor of “free to end consumer” business models over services that offer paid access to copyrighted content.
- Ensure that the eventual overhaul of the country’s constitution and other laws adequately ratifies the country’s international, multilateral and bilateral commitments to strong copyright protection and enforcement, and equitable market access.

## **THE COPYRIGHT MARKETPLACE IN CHILE**

Piracy in Chile remains prevalent and involves various modes of infringement such as Piracy Devices (PDs), also called Internet Service Devices (ISDs), which allow unauthorized access to online streaming content of films and television programs, stream-ripping, file sharing of infringing content over P2P networks, illegal use of cyberlockers, hyperlinks to infringing materials, online sales of circumvention devices for use with illegal video game files, illegal mobile downloads, and, increasingly, IPTV services. The most popular piracy sources in Chile are foreign based, e.g. *Y2mate.com*, *ThePirateBay.org* and *1fichier.com*, which highlights the need to strengthen Chile’s national law to protect against foreign infringers. According to SimilarWeb, during the third quarter of 2019, *Y2mate* received over three million visits, while *The Pirate Bay* and *1fichier* received over two million visits.

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 or unlocked consoles with free games for pre-street-date titles made available through online auction sites, such as *Mercado Libre*. Businesses sometimes offer console modifying services for sale through their *Mercado Libre* listings and modified consoles include the Nintendo Switch, Nintendo 3DS, Sony PSP and PS3, and Xbox 360. An increasingly popular new online marketplace, *www.linio.cl*, has been unresponsive to requests from the video game industry to take down counterfeit products. 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*, who, in turn refers to hacking groups as “our partners.” 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 *Neotronics.cl*, it still offers “unlocked” consoles and services and is based in Santiago. Traffic to *Neotronics.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 2019, Chile placed 21<sup>st</sup> (an improvement since last year when it ranked 15<sup>th</sup>) in the world in

terms of the number of peers participating in the unauthorized file-sharing of select video game titles through personal computers on public P2P networks. Chile ranked 9<sup>th</sup> in the world in P2P infringement of console-based video games (an improvement since last year when it ranked 5<sup>th</sup>).

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. 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, and incentivize local ISP's to engage in voluntary cooperation with rights holders, as outlined below.

The unauthorized camcording of films in theaters has a significant negative impact on both U.S. and Chilean filmmakers. 90% of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. Chile has improved in this arena. In 2019 there were no illicit camcorded copies of MPA member films traced to Chilean theaters. 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 IN CHILE**

Chile made bilateral commitments to the U.S. to significantly improve its levels of copyright protection and enforcement.<sup>2</sup> Yet, Chile's copyright law regime remains inadequate and lags far behind international best practices and the baseline for member countries of the Organization for Economic Co-operation and Development (OECD). 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. However, Ley No. 20.435 was counterproductive for copyright holders', and even some neutral intermediaries', efforts to enforce copyright online:

**Content Removal:** Article 85Q requires ISPs to remove or disable access to copyright infringing content only following a court order that rights holders obtain after a lengthy and complicated court process that can take over a year. 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 expeditiously. There is no incentive for ISPs to act—expeditiously—to remove infringing material, and there are no sanctions for non-compliance with takedown notices. Instead, the law provides time consuming and disproportionately burdensome obligations on rights holders such as requiring rights holders to have a legal representative in Chile to send notices of infringement. The law does not provide any fines or other sanctions for an ISP that fails to act after gaining

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

knowledge of infringement through a notification from a rights holder. Instead, Chile has an ineffective notice-and-notice system (Article 85U) where rights holders do not know if an infringer has actually been notified to take down material and no provisions to deter repeat infringers. The cost and ineffectiveness of Chile's 'notice-and-notice' system has prompted the music industry to discontinue using it altogether. Rights holders' only other option is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users. We urge the Chilean Government to amend its 2010 law to develop a meaningful legal framework for addressing copyright infringement online. As part of this, to avoid abuse of the "safe harbor" provisions, the law should also clarify that these liability privileges are available only to ISPs that are passive and neutral. Finally, so as to be effective, the system should require measures that have been demonstrated to be effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.

**Website Blocking:** Chile lacks a legal mechanism for website blocking. Article 85R provides that a court can order an ISP to block access to clearly identified infringing content only if the blocking does not involve other non-infringing content. This limitation renders the provision worthless as the posting of a single non-infringing work can be relied on to oppose blocking measures, and significantly limits the power of Chilean judges to order effective remedies to limit and prevent online infringement. This contrasts with the situation in the EU and a number of Latin American countries where courts have ordered ISPs to block access to websites while considering the totality of the circumstances. The music, sports and TV industries have pursued successful test cases in Argentina, Peru, Mexico, Uruguay, Brazil and, most recently, Ecuador.

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

**Protection of TPMs and Criminalization of Circumvention Devices:** Even in light of its 2018 legislation criminalizing satellite signal decoders, Chile still falls short of its FTA obligation to provide adequate legal protection for TPMs used to control access or restrict unauthorized acts to a protected work. The sale of video game copier devices and modification services on online marketplaces and through social media is prevalent. Also, music rights holders are left without support to tackle the problem of stream-ripping sites that allow users to download content, without authorization, through circumvention of TPMs. Chile should amend its law to provide adequate legal protection for all forms of TPMs.

**Exceptions to Protection:** The law contains certain exceptions that appear to be incompatible with international norms (as well as the FTA). These include: a reverse engineering exception that is not restricted to achieving interoperability; exceptions that could allow libraries to reproduce entire works in digital form without restriction; and the lack of overarching language consistent with the three-step test set forth in international treaties (and the FTA) to ensure that all exceptions and limitations are properly calibrated.

**Concerning Proposals for a Reform of the Criminal Code:** In early 2019, the Minister of Justice announced a proposal for comprehensive amendment to the Penal Code, aiming to unify and consolidate all criminal provisions scattered in special laws, such as the Intellectual Property Law. The proposal would downgrade copyright infringement to a misdemeanor, dramatically reduce all penalties for copyright infringement and eliminate specific sanctions for the unauthorized reproduction and other illegal uses of phonograms. Such changes would be incompatible with the FTA and the requirements of the TRIPS Agreement. Due to the significant amount of opposing comments received from the private sector, the Minister of Justice delayed the project's submission to Congress pending further analysis. At present, the draft is still under consideration at the Ministry of Justice waiting to be submitted to Congress during the first half of 2020.

## **CASE LAW DEVELOPMENTS IN CHILE**

In 2019, there were two positive rulings in cases involving phonogram producers' rights. On July 24, the Competition Court ("*Tribunal de Defensa de la Libre Competencia*") ruled against the petition filed by the Chilean Broadcasters Association (ANATEL), asking the Court to issue an order to the Executive to seek an amendment to repeal and substitute the collective management organizations' (CMOs) tariffs setting procedure, included in the Intellectual Property Law. According to ANATEL, the procedure was plagued by technical errors that made unfair and unconstitutional the implementation of tariffs by all CMOs. During the procedure, the CMOs and rights holders organizations demonstrated that none of ANATEL members are paying full tariffs and, instead, they enjoy discount programs freely negotiated with CMOs and therefore, there was no necessity for users and CMOs to follow the legal tariffs setting procedure. The Court dismissed the petition and ANATEL appealed.

On October 24, the Appeal Court of Santiago (8th Chamber) dismissed the constitutional protection action filed by a group of business owners against the recording industry, seeking to prevent phonogram producers from collecting dubbing rights from businesses located in the municipality of Providencia. The Court found no constitutional violation committed by the recording industry representatives in Chile by implementing a licensing campaign to defend its members' rights and to collect rights based on the reproduction of phonograms in computers and digital jukeboxes. The ruling ratified the right of members of the Chilean recording industry association to collect dubbing rights from businesses creating music databases as background music.

## **COPYRIGHT ENFORCEMENT IN CHILE**

IIPA members report that copyright enforcement in 2019 was little changed from 2018 and as explained above, the legal system itself is a barrier to more extensive law enforcement, especially online. 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 several different entities, operating under different ministries, and remain poorly coordinated. They are: the *Departamento de Derechos Intelectuales del Ministerio de las Culturas, las Artes y el Patrimonio*; the *DIRECON – Dirección de Economía, Departamento de la Propiedad Industrial*, Ministry of Foreign Affairs; and, the general IP prosecutor. 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, and (4) judges continue to impose the minimum available penalties, which are non-deterrent, even with higher penalties available under the 2010 amendments.

On a positive note, the recording industry highlights the good level of cooperation achieved with public prosecutors around the country, in support of the actions against the unauthorized reproduction of sound recordings by companies offering background music services for businesses. 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) leading to customs seizures of counterfeit consoles with pre-loaded games in 2019. As piracy shifts to the online environment and given the procedural delays in civil actions, IIPA urges Chilean authorities to redirect most enforcement energy to pursue criminal enforcement actions against Internet sites distributing infringing products and content.

## **MARKET ACCESS IN CHILE**

**Screen Quota Bill:** In October 2019, Chile's Chamber of Deputies approved bills 8620-24 and 11967-24. The first bill modifies Law No. 19.981 on Audiovisual Promotion with a mandatory 20% theatrical quota for Chilean films and obligates theaters to show Chilean films with ticket sales of at least 10% of overall cinema hall capacity in

peak season and 6% in off-peak season. The second bill modifies Law 18.838 on the Creation of the National Television Council by imposing a 40% Chilean content quota in free-to-air television that includes at least 15% of Chilean cinematographic works, such as feature films, series and miniseries, among others, in prime time. The U.S.-Chile FTA does not permit screen quotas on television or 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.

**Proposal for VAT Expansion:** In August 2019, in a shift from the 2018 Digital Services Tax Bill 1871/5000 that would impose a 10% tax rate on digital services, Chile's Chamber of Deputies approved tax reform bill 12043-05, which would establish a 19% VAT on digital entertainment content delivery services, including videos, games, etc. via download, streaming or other means. The recording industry is deeply concerned by this bill, which still needs to pass the Senate, because 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 a 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)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2020 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** China holds enormous potential for the creative industries. China's online marketplace continues to expand, and China now leads the world in cinemas with almost 70,000 movie screens at the end of 2019, most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen. China is now the seventh largest music market, and the fourth largest music streaming market, in the world by revenue. Yet China's market for legitimate content continues to be hampered by piracy, discriminatory and restrictive market access policies, and long-standing unfulfilled international obligations.

The long delayed Copyright Law amendment process 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 should ensure the legislation will bring its standard of copyright protection and enforcement into compliance with global norms and best practices in order to meet the challenges of the digital age. China should fully implement the *Guidelines on Strengthening the Protection of Intellectual Property Rights*, the introduction of which has provided hope that enforcement will be enhanced and prioritized, and that the Copyright Law revision process will be accelerated. China also made commitments in the recently-concluded Phase One agreement with the U.S. that raise hopes for improved enforcement and, if implemented in a timely and robust manner, could help address a number of the concerns raised in this report.

Serious problems in China include piracy applications (apps) and devices, piracy websites, unauthorized camcording, piracy on cloud storage services (e.g., *Baidu Pan*) and social media platforms (e.g., *Baidu Tieba*, *Wechat*, and *Weibo*), unlicensed content available on user-uploaded content (UUC) platforms (e.g., *Bilibili*, *YouKu*), journal piracy, and the proliferation of thousands of "mini Video-On-Demand (VOD)" locations that show unauthorized audiovisual content. Criminal enforcement efforts remain stunted by evidentiary requirements (including thresholds) that are ill-suited to effectively pursuing online piracy cases and do not reflect the nature of "commercial scale" piracy. Civil litigation, even when successfully brought against blatant piracy services, is generally ineffective due to a lack of meaningful injunctive relief, high costs, and low damage awards. The National Copyright Administration of China (NCAC), in cooperation with rights holders, has taken administrative action against certain online services that facilitate audiovisual piracy, but these actions are not sustained or effective to meaningfully deter widespread online piracy. Overall, much more is needed to ensure China's online marketplace reaches its full potential for rights holders and licensed businesses, in the face of evolving piracy challenges.

China should abandon recent proposals that would erect additional barriers to its audiovisual marketplace, and should eliminate current impediments, which exacerbate its piracy problem by impeding access to sought-after U.S. content. IIPA seeks further reforms and enforcement of China's existing obligations under the 2012 U.S.–China Film Agreement, which mandated review and additional compensation in 2017, to improve access for U.S. film producers to China's well-established theatrical film market, including increasing theatrical revenue share and ensuring private Chinese distributors may distribute films to cinemas without interference from state owned enterprises, or imposition of unofficial quotas. Unfortunately, as detailed below, the ability of U.S. producers to compete in the Chinese marketplace for all audiovisual content was even more drastically curtailed during 2019, with licensing opportunities on

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<sup>1</sup>For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of China's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



all distribution platforms significantly hampered, through opaque regulations, obscure content review processes, and a “soft ban” on new or never released U.S. imports. This has effectively prevented access by U.S. producers to one of the largest consumer markets in the world. Finally, the revised “negative list” maintains the foreign investment and ownership restrictions in the cultural and entertainment sectors, and these restrictions need to be eliminated.

## **PRIORITY ACTIONS REQUESTED IN 2020**

### **Enforcement:**

- Improve effectiveness of administrative enforcement, including by:
  - taking measures demonstrated effective in preventing or restraining infringement;
  - 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;
  - NCAC establishing a mechanism with Ministry of Industry and Information Technology (MIIT) and internet service providers (ISPs) to shut down infringing sites operating without a business license;
  - 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.
- Take further effective action, with increased transparency, against the online piracy ecosystem, including against:
  - piracy websites, such as *zimuzu.tv*, *btbtdy.net*, *trix360.com*, *92flac.com*, *sq688.com*, *51ape.com*, *dygod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.com*, *btbtt.co*, *piahua.com*, *vodxc.com*, *lbdly.com*, *yym3.com*, *musicool.cn*, *xh127.com*, *b9good.com*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bt99.com*, *80s.tw*, *meijutt.com*, *ygdy8.com*, *dysfz.vip*, and *panduoduo.net*;
  - piracy facilitated through the cloud storage service Baidu Pan and through the Xunlei thunder service;
  - unauthorized content available on UUC platforms (e.g. *Bilibili*, *YouKu*, and *Miaopai*)
  - plugin player xigua and its related piracy ecosystem; and
  - apps such as *Renren Shipin*, *Tian Kian Kan*, *Kuaishou*, and *Tian Lai K Ge*.
- Bring more targeted and deterrent enforcement actions, with transparency, against:
  - Piracy Devices (including against dedicated piracy apps);
  - the manufacture, distribution, and exportation of circumvention devices and software components;
  - unauthorized movie broadcasts in mini VOD locations;
  - unauthorized camcording;
  - unauthorized broadcasting of movies and music;
  - services trafficking in, or providing access to, unauthorized copies of journal articles; and
  - hard goods piracy (including against production and supply of high quality counterfeit books and optical discs, and USB flash drives containing high volumes of infringing sound recordings).

### **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.
- Implement the *Guidelines on Strengthening the Protection of Intellectual Property Rights*, which include important measures to improve copyright protection and enforcement, including lowering criminal thresholds, adding punitive damages, streamlining evidence processes, establishing a blacklist of repeat infringers, and regulating websites to ensure infringing content is not made available.
  - Improve enforcement framework by, *inter alia*:
    - revising the 2011 Criminal IPR Opinions to enable more effective and more frequent criminal investigations and prosecutions;
    - revising the criminal threshold to ensure deterrent-level 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 products, including devices and software components; 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:**

- Take action on the following issues to improve the marketplace for U.S. films and programs: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement and liberalize the distribution market for private third party Chinese distributors; 2) substantially increase U.S. producers’ share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of the Chinese locking out U.S. films from the prime release dates, and end the practice of “double booking” theatrical releases; 4) eliminate informal restrictions on the number of imported “flat fee” films so that more independent producers have unimpeded access to the Chinese market; 5) further relax 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; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) do not delay or restrict film and TV imports for theatrical and online distribution through layers of a non-transparent content review system; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and ensure that no Chinese regulation or rule impedes the payment of U.S. producers for their intellectual property rights.
- Open key elements of the audiovisual market to foreign investment, particularly regarding film and TV production and distribution companies, and online video services platforms; reconsider the Online Publishing Rules as well as other measures prohibiting foreign involvement in online publishing activities, and allow distribution of audiovisual content on online video platforms where the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP); revoke all other measures—including the 2014 Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas, 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 content review procedures, restrictions on foreign content on broadcast, pay-TV, and online video, and strict quotas on foreign films and television programming; adopt a voluntary, age-based classification system to help eliminate

disparate treatment of U.S. content and ensure that China's content review process is transparent, predictable, and expeditious; and 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 further regulating the production and distribution of foreign audiovisual content.

## **CHINA'S ONLINE MARKETPLACE AND COPYRIGHT PIRACY UPDATES**

Supported by the largest Internet user base in the world, the potential of China's online marketplace is immense. Chinese companies are investing heavily in content and media, with greater numbers of co-productions and financing from China. This expanding marketplace provides 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. The seventh largest music market in the world, the music industry estimates that in 2019 Chinese consumers spent almost 18 hours listening to music each week, with nearly three-quarters of that engagement through social media sites or apps.<sup>2</sup> Yet piracy and market access concerns prevent rights holders from seeing their investments in China reach their full potential. 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.<sup>3</sup>

**Evolving Online Piracy Remains Serious:** Online piracy in China—including illegal downloading and streaming of IIPA members' copyright content through piracy websites, apps, and devices—has evolved extensively in recent years, and remains a serious concern. Contributing to the problem, many online services benefit from overbroad ISP safe harbor rules to avoid seeking licenses to the copyrighted material available on their platforms. Notwithstanding annual Special Enforcement Campaigns, which have yielded some positive results and helped pave the way for a growing legitimate digital economy in China, the NCAC's generally non-deterrent and piecemeal administrative sanctions have done little to hinder the growth of major piracy websites, apps, and related services.<sup>4</sup> As discussed below, a more holistic enforcement response is needed to effectively combat the entire online piracy ecosystem, which poses the greatest threat to the continued growth of legitimate businesses in China.

Piracy websites remain a serious concern, including 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, trackers, or clients (e.g. *Xunlei Thunder*<sup>5</sup>); forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods, Piracy Devices, high quality counterfeits, and USB flash drives containing a high volume of infringing sound recordings. Notorious piracy sites that disrupt the music and audiovisual marketplaces include *zimuzu.tv*,<sup>6</sup> *btbtdy.net* *trix360.com*, *92flac.com*, *sq688.com*, *51ape.com* *dygod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.com*, *btbtt.co*, *piahua.com*, *vodxc.com*, *lbdly.com*, *yymp3.com*, *musicool.cn*, *xh127.com*, *b9good.com*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bttt99.com*, *80s.tw*, *meijutt.com*, *ygdy8.com*, *dysfz.vip*, and *panduoduo.net*. An increasing number of pirate sites use CK Player, an online media player that facilitates infringement

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<sup>2</sup>See IFPI Music Listening in 2019, P23, available at <https://www.ifpi.org/downloads/Music-Listening-2019.pdf>.

<sup>3</sup>See, e.g., IIPA's 2019 Special 301 submission on China ("IIPA 2019"), available at <https://www.iipa.org/files/uploads/2019/02/2019SPEC301CHINA.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 Concerning China's Compliance with its WTO Commitments (84 Fed. Reg. 40471, August 14, 2019), September 18, 2019*, available at [https://www.iipa.org/files/uploads/2019/10/2019-09-18\\_IIPA\\_China\\_WTO\\_Compliance\\_Comments.pdf](https://www.iipa.org/files/uploads/2019/10/2019-09-18_IIPA_China_WTO_Compliance_Comments.pdf).

<sup>4</sup>The music industry experience is illustrative. China's crack down on many unlicensed music services has helped contribute to growth of the music industry, but the legitimate music market in China is still nowhere near its potential. Unlicensed music is still available on a large number of sites and services, and through mobile apps. Despite boasting the largest number of Internet users in the world, China's music market ranks just 7th globally, behind much smaller markets such as South Korea and France. Revenues remain a small fraction of what they should be, even when compared to revenues seen in comparably developed markets, and 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.

<sup>5</sup>*Xunlei Thunder* is a BitTorrent service that makes available unauthorized motion picture and television content to users.

<sup>6</sup>According to Alexa, *zimuzu.tv*, a linking site, is currently ranked as the 117<sup>th</sup> most popular website in China, and SimilarWeb recorded 22.1 million visits to the site in December 2018.

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*.<sup>7</sup>

Piracy over cloud storage services is also causing significant problems in China. Large quantities of infringing content are stored on cloud storage service services, such as Baidu Pan, with links to the content disseminated through popular Chinese social media platforms and piracy linking sites.<sup>8</sup> Given its market dominance, it is critical that Baidu cooperate fairly and transparently with rights holders and put in place rigorous content protection standards and practices to set the right example for other Internet businesses in China. Instead, rights holders in China have been forced to bring legal actions against Baidu Pan for facilitating infringement.<sup>9</sup> Unfortunately, Baidu's services continue to be used for piracy, and their notice and takedown system has been ineffective.<sup>10</sup> China's government should encourage Baidu to do more, including improving implementation of its takedown tools, applying rigorous filtering technology to identify infringing content, and taking more effective action to suspend or terminate repeat infringers to ensure infringing content and links are removed expeditiously.

The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile and handheld devices and televisions) remains a serious concern. Apps that aggregate infringing content hosted on remote servers are proliferating and there remains legal uncertainty regarding the "server principle."<sup>11</sup> China is a leading manufacturer of media hardware and accessories that can be modified to support the installation of third-party, pre-loaded, or post-purchase infringing apps, allowing users to access pirated content (i.e., Piracy Devices).<sup>12</sup> Android devices allow third-party app distribution and installation, enabling users to download free apps onto their devices to access infringing content by bypassing the major app stores altogether.<sup>13</sup> Many third-party app stores carry a multitude of piracy apps, which are generally not subject to enforcement action because new ones are constantly emerging, making it very difficult for rights holders to effectively monitor the vast landscape of third party stores.<sup>14</sup> Examples of such apps include *Renren Shipin*, *Daqian Vision*, and *Tian Kian Kan*, which facilitate infringement of audiovisual content; and *Kuaishou*, which facilitates infringement of music. *RenRen ShiPin* is a good example of a piracy app that has been the subject of legal action by legitimate services in China, but continues to blatantly infringe foreign content. The app, which makes available hundreds of unauthorized foreign television episodes, has approximately 35.6 million downloads from major China-specific Android App Stores, and can also be downloaded from a popular website (*rr.tv*).<sup>15</sup> Another app, which is extremely popular in China and Hong Kong, is *Tian Lai K Ge*, an infringing Karaoke app.<sup>16</sup> China must do more to combat the growing threat of the app piracy ecosystem.

Online streaming of pirated content is a growing concern for the music, film and television, and video game industries. For the film industry, a significant problem is the proliferation of "clone pyramid" piracy websites, a network of thousands of sites, each embedded with a proprietary video player (e.g., the *xigua* video player), which entice users

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<sup>7</sup>These 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.

<sup>8</sup>Baidu is the most popular search engine in China with over 75% of the market, and the second largest search engine in the world by user base.

<sup>9</sup>In 2018, a local stakeholder, Sohu, won a first-instance lawsuit against Baidu Pan for indirectly facilitating copyright infringement of third parties, but that decision was overturned on appeal in January 2020. Sohu has filed two additional cases against Baidu for copyright infringement of additional licensed content. In 2017, Youku sued Baidu Pan over the unauthorized availability on the service of a popular local television drama series. That case is pending.

<sup>10</sup>Takedown rates on Baidu's services are inconsistent and removal of infringing links can take too long (from one day for one of its services to as long as 15 days for another). Moreover, rights holders must send up to thousands of infringement notices for a single piece of infringing content proliferating on Baidu Pan because of its enormous size.

<sup>11</sup>Certain 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.

<sup>12</sup>IIPA has provided extensive information on Piracy Devices in prior reports. See, e.g., IIPA 2019 at 19.

<sup>13</sup>The Google Play Store is not officially available in China.

<sup>14</sup>Piracy apps are sometimes 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.

<sup>15</sup>*rr.tv* ranks 317 on Alexa and 391 on SimilarWeb in China; more than 85% of its traffic comes from China (with 10% from Japan and 1% from the U.S.). Because *RenRen ShiPin* is also available on both Apple and Android platforms, its use is more prevalent than those traffic numbers would suggest.

<sup>16</sup>In 2019, the operators of *Tian Lai K Ge* were ordered to pay compensation to record labels of 1000RMB per song. The local recording industry in Hong Kong is appealing the low damage award, and the case is still ongoing.

of the sites to create their own derivative piracy websites to generate revenue for themselves and for the mother site.<sup>17</sup> Some music streaming services, including *yym3.com*, were hosted in China but now use a U.S.–based reverse proxy service to obscure their locations and have stopped responding to takedown request notices. Other sites, such as *666c.com*, *cdbao.net*, and *mu6.me*, have begun to adopt the same strategy. Infringement of music videos is also a problem for the music industry.<sup>18</sup>

Licensed streaming and digital piracy compete side by side in China, with nine in ten Internet users consuming licensed audio streaming and nine in ten users engaging in piracy. In recent years, music piracy has shifted primarily to streaming of pirated content, including short videos, from UUC sites (such as *weibo.com*, *miaopai.com*, and *bilibili.com*); but more traditional music piracy, including illegal downloads through cyberlockers (such as *Baidu Pan*),<sup>19</sup> domestic and international P2P sites (such as *ThePirateBay* and *Nyaa*), forums, and streaming sites remains a problem. 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 UUC 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 UUC sites and other hosting providers to ensure this content stays down permanently.<sup>20</sup> There is hope that new regulations issued by the Cyberspace Administration of China (CAC), the Ministry of Culture and Tourism, and the National Radio and Television Administration<sup>21</sup> to strengthen the responsibility of ISPs to review and manage UUC will be helpful in combatting online piracy, but it is unclear exactly what the regulations will require. In addition, if fully implemented, the *Guidelines on Strengthening the Protection of Intellectual Property Rights* (discussed below) will also be helpful.

**Book and Journal Piracy:** The problem of online journal piracy remains a significant challenge. The unfortunate lack of deterrence in the marketplace allows entities engaged in providing unauthorized access to journals to continue to operate.<sup>22</sup> Several online platforms that facilitate access to unauthorized copies of journal articles and academic textbooks, including *syyj.com*, *Keyandi*,<sup>23</sup> *UReader*, and *Baidu Paperhelp* continue unhindered. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. They also facilitate access to infringing content online in 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. As with other forms of piracy, it is an unfortunate reality that administrative enforcement measures seem to have no lasting impact. For example, in 2017, the Beijing Copyright Enforcement Department issued an administrative penalty against the *UReader* entity, but the platform has re-emerged and is now infringing publishing titles that were not the subject of the prior action.<sup>24</sup> It appears that China's enforcement authorities will not take action against the platform as a repeat infringer acting in direct contravention of the previous finding of illegal conduct; rights holders must instead refer a new, but essentially identical, infringement case to China's enforcement authorities. This case illustrates the lack of deterrence in the market due to inadequate enforcement.

It remains the case that pirated print publications and compromised log-in credentials continue to be widely available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit

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<sup>17</sup>Previous reports have provided more details on clone pyramid piracy websites. See IIPA 2019 at 19. Chinese enforcement authorities should investigate and take action against the producers of the proprietary video players (e.g., *xigua* plugin player) and the Content Management System (CMS) and Video Collection Resource (VCR) websites that facilitate the expansion of this network.

<sup>18</sup>The music industry reports that based on their monitoring, 68% of the 342,246 infringing links they discovered in 2019 were to infringing audiovisual content.

<sup>19</sup>Three cyberlockers continue to provide for file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *115.com*.

<sup>20</sup>In 2019, 278 notices with 2944 links were sent to Baidu, and all were removed.

<sup>21</sup>Regulations on the Administration of Online Audio and Video Information Services, which came into effect on January 1, 2020.

<sup>22</sup>Although the *KJ Med* entity has been defunct for some years, a number of similar entities engaged in providing access to unauthorized copies of journal articles and other reading materials have emerged in China over the last few years. None of these unauthorized services have been effectively shut down, despite referrals to enforcement authorities.

<sup>23</sup>*Keyandi* is an online entity that makes illegal profits by providing English e-books for download without publisher authorization and charging a membership subscription fee or a fee for each download by a user.

<sup>24</sup>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 (US\$58,000).

textbooks advertise and sell the illegal products to overseas buyers. In part due to China's inadequate online enforcement framework, sending notifications of infringement to remove these products remains unduly complicated.<sup>25</sup>

**Circumvention Devices:** As the world's leading manufacturer, producer, supplier, and exporter of video game circumvention devices and software components, China drives significant amounts of online video game piracy around the world. Game copiers or modification chips are devices commonly used to bypass TPMs in a video game console 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, including those developed and published by third parties, can be illegally downloaded from the Internet. These devices are sold by thousands of vendors in webshops and 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 and software components are necessary to meaningfully stem the downloading of infringing games.

**Unauthorized Camcording Remains a Problem:** China is a significant source of illicit camcording in the region, and the quality of camcorded films from China has improved, threatening the legitimate theatrical and home entertainment markets.<sup>26</sup> 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. In April 2019, the Ministry of Public Security (MPS) announced the results of a criminal taskforce investigation into film piracy, including camcording.<sup>27</sup> 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 a Concern:** 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 remains a concern. Production of pirated and counterfeit copies of children's books and academic textbooks remains an issue, with these unauthorized physical copies marketed and sold through e-commerce sites, including into foreign markets. 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 popular Chinese and international e-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical discs.<sup>28</sup> Online sales of USB flash drives containing high volumes of infringing sound recordings have become a growing concern, particularly since these flash drives are exported to other Asian markets, including Taiwan and Hong Kong.<sup>29</sup>

**Unauthorized Mini-VOD Locations:** Regulations on mini-VOD cinemas and chains entered into force in March 2018, but an estimated 14,000 of these entities are still operating in different cities across China without proper licenses, and are routinely screening U.S. content without authorization. In early 2019, China's investigation of four

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<sup>25</sup>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 worked with publishers to address the sale of infringing copies of textbooks on the platform.

<sup>26</sup>During 2019, a total of 23 audio and three video sources were forensically matched to cinemas in China. In 2018, there were three audio and 13 video matches.

<sup>27</sup>According to the announcement, beginning in February 2019, police investigated 25 film piracy cases, including four camcording syndicates, and made 251 arrests. According to Ministry of Public Security (MPS), the amount of illegal business volume and the value of the main facilities and equipment used for the illegal activities was approximately RMB230 million yuan (US\$34.2 million). Among the cases, Jiangsu police broke up a film piracy syndicate, and seized a cloned server dubbed "phantom number one" (No. A15591), which had been used to pirate 31 films since 2017.

<sup>28</sup>Shenzhen 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.

<sup>29</sup>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.

illegal camcording syndicates revealed that most illegal camcordered copies were destined for mini-VOD theaters. In August 2019, the China Film Administration (CFA) clarified that mini-VOD cinemas and chains are classified as entertainment premises and must license rights for theatrical screening, not for online VOD. Instead of legitimizing the operations of these facilities, China should severely penalize or shut down these businesses if they violate the copyright law. A related problem is that Chinese entities that contract for the rights to distribute film and television content in various home video formats often ignore the differentiation between rights for home use and those for public use. As a result, U.S. content is frequently used for unauthorized public performances.<sup>30</sup>

## **ENFORCEMENT UPDATES IN CHINA**

As highlighted in past filings, in recent years China has increased its enforcement efforts, contributing to improved protection and development of the legitimate marketplace for some creative sectors; but these actions, while helpful, are not enough. China's growing Internet user base creates potential opportunities for rights holders; but overbroad interpretation of ISP safe harbor rules, especially by law enforcement authorities, as well as a historic toleration for piracy, have kept the creative marketplace from reaching its potential, and hampered the development of legitimate services.<sup>31</sup> IIPA is hopeful that China will fully implement commitments under the Phase One agreement to improve its enforcement framework, which would make progress on some of the concerns identified below.

**Administrative Actions Helpful, But Insufficient:** China has been operating its annual “Sword Net” anti-piracy campaign for 14 years. However, during that time, there have been just 600 copyright infringement cases. While those administrative enforcement campaigns have been important, notably following NCAC's 2015 Notice requiring online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, the campaigns are not enough.<sup>32</sup> The 2019 Annual “Sword Net” Campaign focused on combatting piracy of films in theatrical release, and combatting unauthorized access to video streaming services.<sup>33</sup> As part of this campaign, China took enforcement actions against the following activities: illegal camcording and the sharing of pirated films through cyberlocker links, social media, and e-commerce platforms; piracy at VOD mini-theaters and chains; pirated movies and TV content hosted outside of China; unauthorized content made available through Internet Protocol Television (IPTV), Over-the-Top (OTT) services, and smart devices and apps (including aggregating apps) for streaming media; and the sale on e-commerce platforms of OTT products that enable access of unauthorized content. In the 2019 campaign, the motion picture industry referred nine piracy websites and seven piracy apps, which were accepted.<sup>34</sup> In December 2019, NCAC announced the results of the 2019 campaign, which included: 450 cases related to online copyright infringement, including 160 cases referred for criminal investigation with a total monetary value of RMB524 (US\$75.5 million); deletion of 1.1 million infringing links; and seizure of 10.75 million pieces of pirated products.<sup>35</sup>

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<sup>30</sup>One example is that some Chinese pay-TV operators or digital licensees distribute U.S. content to hotels for public viewing.

<sup>31</sup>It 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.

<sup>32</sup>For a summary of recent Sword Net campaigns, see prior IIPA China country reports (e.g., IIPA 2019 at 22).

<sup>33</sup>The six-month campaign was announced on World IP Day (April 26, 2019) by the NCAC, the Cyberspace Administration of China (CAC), the Ministry of Public Security (MPS), and the Ministry of Industry and Information Technology (MIIT) at the National Conference of Copyright Protection and Development in the Digital Environment.

<sup>34</sup>The piracy apps *Movie Daquan* and *Film and TV Daquan* have been removed from app stores; the *Languang Kampianwang* app has been removed from app stores (and appears to have ceased operating); the *BoboTV* app has issued a written apology, removed infringing content, and paid a fine of RMB 30,000; and investigation of three major piracy websites and one major piracy app are currently under police investigation.

<sup>35</sup>NCAC highlighted ten top cases, five of which were supported by IIPA member evidence collection and title verification. These five cases included: 1) an illegal camcording syndicate (arrests were made and criminal prosecution is underway), 2) a case involving a group of rogue piracy websites' involvement in infringement of hundreds of U.S. motion picture titles, resulting in imprisonment and criminal fines, 3) a case involving a notorious website *cnscg.com* in Shanxi Province involving the infringement of hundreds of U.S. motion picture titles, and resulting in a prison sentence and fine against the principal perpetrator, 4) a case involving a major piracy source website *91zy.cc* in Hubei Province that supplies over 100,000 domestic and overseas films and TV dramas, including 554 U.S. motion pictures, to over 500 piracy websites, which has resulted in arrests and confiscation of illegal criminal gains (prosecution is underway), and 5) a case involving a WeChat public account “movie\_6666” in Jiangxi Province through which more than 2,500 U.S. motion picture titles were infringed, resulting in detention of the main operator and imposition of a fine.

**More Sustained, Holistic Enforcement Approach Needed:** In November 2018, NCAC stated that China would increase focus on combatting online infringement, and local copyright law enforcement agencies have indicated they will strengthen administrative penalties for infringement. But penalties remain low and, unless the source of the piracy can be definitively established to be located in China, are unlikely to be imposed. It is often very difficult to locate those responsible for piracy sites because many infringers use fake registration information to register their websites.<sup>36</sup> These rogue services effectively cannot be sued. The NCAC should establish a mechanism with MIIT and ISPs to shut down these infringing sites operating without a business license. Even when it is possible to identify piracy operations, rights holders attempting to enforce their rights are stymied by: burdensome evidentiary procedures slowing and/or hindering case development (including the restrictions on foreign investigations in China); and political influences that make it difficult to seek enforcement against highly-connected individuals and risky for foreign rights holders to seek enforcement actions in an environment of limited commercial opportunities for foreign rights holders (discussed below in the Market Access section). Moreover, civil suits, while helpful, are ultimately insufficient to address major piracy problems because damages awards are relatively low and non-deterrent.<sup>37</sup> And criminal enforcement is inadequate mainly because criminal thresholds are too high.<sup>38</sup> One welcome development is that China has created a dedicated criminal department within the MPS, the Food and Drug Crime Investigation Department (FDCID), tasked with, among other things, the investigation and prosecution of all IPR cases. It is hoped that this will lead to enhanced administrative and criminal enforcement. To improve enforcement against internet piracy, IIPA urges the Chinese Government to undertake the following measures:

- Follow through on reforms to the copyright law and implementation of the *Guidelines on Strengthening the Protection of Intellectual Property Rights* to improve the legal framework to meet the challenges of copyright enforcement in the digital environment, as detailed below and in the Copyright Law Update section.
- Adopt reforms that address shortcomings in China's Criminal Law that IIPA has identified in previous reports.<sup>39</sup> In particular, China should meet its obligations in the WTO TRIPS Agreement by revising the criminal threshold to ensure that criminal penalties are available for all online piracy on a "commercial scale" (which is addressed in the *Guidelines*),<sup>40</sup> and separately defining criminal violations regarding circumvention of TPMs, or trafficking in circumvention technologies.
- Ensure prompt transfer for criminal investigation and prosecution.
- Issue deterrent-level civil and criminal 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.
- NCAC should establish a mechanism with MIIT and ISPs to shut down infringing websites operating without a business license.
- 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 (i.e., reject the "server principle").

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<sup>36</sup>All websites in China must register with *milibeian.gov.cn*, and the owners of websites can be identified through searches using their registration numbers, domain names, IP addresses, or "Whois" data.

<sup>37</sup>As previously reported, the motion picture studios prevailed in a lawsuit (originally filed in January 2015) against Shenzhen Xunlei Networking Technologies Co. (Xunlei) for infringement of 28 studio titles. Xunlei withdrew its appeals and paid the civil damages awards plus costs of nearly US\$250,000. 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.

<sup>38</sup>Currently, 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. However, for local rights holders authorities have recently been more flexible with this threshold or have used a 50,000 click threshold (or a combination of thresholds under the Criminal Law and judicial interpretations) to bring criminal enforcement actions against piracy websites that clearly have high visitations or piracy apps that clearly have huge numbers of downloads.

<sup>39</sup>See, e.g., IIPA 2017 at 15. China's Ninth Amendment to its Criminal Law ("Ninth Amendment") in 2015 failed to address the intellectual property provisions. This was a major missed opportunity, although the Amendment did add a potentially helpful offense of "assisting criminal activities over information networks." Implementation of this provision should be monitored closely to ensure it provides effective secondary liability for criminal copyright infringement. In late 2019, the Supreme People's Court and the Supreme People's Procurate issued an Interpretation, which entered into force in November 2019, defining the conditions for "knowing others are using information networks to perpetrate crimes." It is unclear what practical impact this Interpretation will have.

<sup>40</sup>China should clarify that a single episode of a television program counts as one copy toward the threshold.

- 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. Injunctions should be available against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content that has been subject to administrative law enforcement action, but remains available.
- 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.
- Revise the 2011 IPR Opinions<sup>41</sup> to enable more effective and more frequent investigation and criminal prosecution of online copyright infringement cases, including ensuring MPS prioritizes criminal investigations.
- 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.

As noted below, some of these measures would be addressed through implementation of the Phase One agreement, which China should fully and swiftly implement.

**Guidelines on Strengthening the Protection of Intellectual Property Rights:** In a hopeful sign, on November 24, the Communist Party of China’s Central Committee (CPCCC) and the State Council, jointly issued *Guidelines on Strengthening the Protection of Intellectual Property Rights*, which address many important enforcement priorities identified above. The *Guidelines* outline areas in which the government plans to take steps to strengthen IPR protection (including copyright, patent, and trademark) by 2022, and for China to achieve “social satisfaction” with the improved and strengthened IPR protection system in place by 2025. The *Guidelines* appear to underscore the importance the government is attaching to improving the protection of intellectual property in order to boost Chinese economic competitiveness. Importantly, they would make protection of intellectual property one of the criteria for evaluating local government officials’ performance, creating a greater incentive for compliance. The key points in these *Guidelines* direct the government to:

- implement punitive damages for IPR infringements, including copyright, raise the ceiling for civil compensation, and enhance administrative penalties (Clause 2.1);
- revise the criminal law, including “lowering the threshold for criminal prosecution of IPR offenses” and “enhance punishment[s]” (Clause 2.1);
- standardize criteria of evidence, lighten rights holders’ burden in giving evidence, establish efficiencies in the notarization process, including bringing costs down, and establish “e-notarization” (Clauses 2.2, 2.4);
- issue a “judicial interpretation on evidence rules for IPR infringement in the civil justice system” (Clause 2.2);
- establish a “blacklist” of repeat infringers (Clause 2.3);
- enhance supervision and inspection for cases handled across departments and regions to avoid local protectionism (Clauses 2.3, 4.9);
- strengthen IPR protection in sports broadcasting (Clause 2.4);
- formulate protection and management standards for e-commerce platforms (Clause 2.4);
- guide and regulate management of all types of websites to “remove infringing content, block or disconnect pirated website links, stop the dissemination of infringing information” (Clause 4.10); and
- improve foreign-related communication mechanisms, build a “level playing field” for IPR protection, organize briefings to inform media and the public about major issues to enhance trust, clarify doubts and actively respond to domestic and foreign rights holders’ concerns (Clause 4.13).

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<sup>41</sup>Opinions of Supreme People’s Court, Supreme People’s Procurate and Ministry of Public Security on Several Issues Concern the Application of Law in Handling Criminal Cases Concerning the Infringement of Intellectual Property Rights (2011).

IIPA urges the Chinese Government to follow through on these important commitments this year.

## **COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE**

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including copyright and criminal law reform efforts.<sup>42</sup> These reform processes, including the impending implementation of the Phase One agreement, provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

**Copyright Law Amendments Should Be Improved:** 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, although there was little information regarding the status of the amendments in 2019. 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 public consultation. The bill can then be entered on the legislative agenda for the National People's Congress (NPC). IIPA understands that the bill is being revised.

As previously reported, IIPA hopes that the bill retains certain important provisions already in the last publicly available draft, adds provisions to address deficiencies in China's legal framework, and includes changes to certain provisions that appear to conflict with China's WTO obligations or are inconsistent with current international or best commercial practices.<sup>43</sup> In particular, the bill should retain provisions that:

- provide rights of public performance and broadcasting for producers of sound recordings, which reflect the importance of these uses and are critical for the future of the music industry in China; and
- provide a basis for joint liability of service providers that knowingly and actively encourage infringement, which would significantly enhance online enforcement.

To address deficiencies in China's legal framework, the bill should include provisions that:

- ensure adequate and effective enforcement against apps and websites that facilitate unauthorized access to copyrighted works stored on remote servers by clarifying the right of "communication over information networks" to reject the "server principle" and by ensuring liability attaches when an app or service circumvents TPMs that rights holders use to prevent unauthorized access (i.e., access controls) to copyrighted content (regardless of where that content is stored);<sup>44</sup>
- provide protection against unauthorized retransmissions of copyrighted content over the Internet (including live streaming);
- update China's outdated term of copyright protection to bring it in line with evolving global norms;<sup>45</sup>

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<sup>42</sup>See, e.g., IIPA 2019. 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.

<sup>43</sup>For a more detailed discussion of the concerns with the draft copyright bill, see IIPA 2019 at 24-25.

<sup>44</sup>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.

<sup>45</sup>China 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.

- provide 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;<sup>46</sup> and
- provide for criminal liability for the manufacture, distribution, and exportation of circumvention devices and software components.

Finally, to avoid conflicts with China's WTO obligations, or inconsistencies with current international or best commercial practices, certain provisions in the prior draft should be revised, including:

- the ISP liability provisions to ensure that only passive and neutral intermediaries that do not contribute to infringing activities are eligible for the safe harbors and that, upon notice or otherwise obtaining knowledge of infringement, intermediaries 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; and
- the proposed exceptions to and limitations on copyright to ensure they are adequately defined and appropriately narrow in scope, and otherwise consistent with the WTO TRIPS three-step test.

We understand that a non-public 2018 draft of the legislation did not contain many of the controversial provisions in the prior draft, including resale rights and extended collective management provisions, but unfortunately, it also did not contain many of these recommendations, including an extension of China's outdated copyright term and a clarification of the current ISP liability framework.

**Clarify the Network Rules:** Safe harbors under the current ISP liability framework are being misapplied to UUC and other sites and services that are not neutral or passive intermediaries, which has negatively impacted the music and audiovisual markets and contributed to the proliferation of pirated content, such as motion picture and television content and music videos, available for streaming on these services. The Network Rules<sup>47</sup> should be clarified to ensure that the safe harbors are only available for online services that function as neutral and passive intermediaries (i.e., only activities that are merely technical, automatic or passive) and that, upon notice or otherwise obtaining knowledge of infringement, promptly take reasonable steps to stop and prevent the infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement.<sup>48</sup> As noted above, these requirements should similarly be reflected in the Copyright Law amendment. In addition, as discussed below, proposed amendments to the Civil Code Tort Chapter regarding intermediary liability should ensure coherence with the Network Rules.

**E-Commerce Law:** On January 1, 2019 China's first "e-commerce" law entered into force. The law applies only to online transaction of infringing goods, while copyright liability limitations for digital content platforms continue to be decided exclusively in the framework of the existing copyright law and related regulations. The law requires platform operators to take "necessary measures" against infringing goods or services and, importantly, the standard of knowledge for a platform operator to take action is that the platform "knows or should know" that the good is infringing. Unfortunately, Article 43 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 rights holders' notices of infringement. The Chinese Government should interpret and implement the law to prevent this outcome. Furthermore, it is critical that the e-commerce law support rights holders' actions to prevent illegal trafficking of infringing goods on e-commerce platforms,<sup>49</sup> and where there is already good cooperation between rights holders and some e-

<sup>46</sup>Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties.

<sup>47</sup>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.

<sup>48</sup>Two recent cases (*iQiyi v. Kuanyu* and *Yang Zhi v. Apple Inc.*) in China found that platforms in China have a duty of care to ensure their services are not used for infringement, a helpful development in clarifying the Network Rules.

<sup>49</sup>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 marketplaces. Likewise, as discussed above, Piracy Devices and circumvention devices, both used primarily to access pirated content, remain significant problems in China.

commerce platforms through voluntary arrangements, implementation of the 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.

**Tort Law:** China is also presently considering amendments to its Civil Code Tort Chapter (the “Draft Code”) law that include notice and takedown provisions similar to those in the e-commerce law, and the scope of these provisions apparently will extend to digital content. Unfortunately, these provisions include many of the same shortcomings discussed above, 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 rights holders’ notices of infringement. Furthermore, the Draft Code should be clarified to eliminate uncertainty regarding its interplay with the intermediary liability provisions in the Network Rules and the E-Commerce Law. As noted above, the E-Commerce law does not apply to digital content, while the Network Rules do. Although Article 955 of the Draft Code provides that “if this Law or other laws contain other stipulations on exemption or limitation of liability, such stipulations prevail,” it remains unclear how the Draft Code would interact with the Network Rules and what the requirements or liabilities of Internet intermediaries would be, particularly considering that the Network Rules and the Civil Code Tort Chapter are on different levels of hierarchy. To ensure coherence across the legal framework, a provision should be added to the Draft Code ensuring that network service providers that store and provide public access to infringing contents and whose activities are not merely technical, automatic, and passive may be held liable, and making clear that this provision prevails over other laws or regulations that may state the contrary.

#### **Regulations on Optimizing the Business Environment and Opinions on Strengthening IP Protection:**

In October 2019, Chinese Premier Li Keqiang issued State Council Decree No. 722, which included Regulations on Optimizing the Business Environment, and entered into force in January 2020. According to the Regulations, China will enhance IP protection by establishing a punitive damages system for IP infringement, promoting the establishment of a rapid protection mechanism for IPR and improving the settlement mechanism for IP disputes. IIPA encourages China to swiftly implement the Regulations, and to address the many other deficiencies in China’s enforcement framework identified above.

**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.<sup>50</sup>

**Phase One Agreement:** IIPA welcomes the recent conclusion of the Phase One economic and trade agreement signed by the United States and China on January 15, 2020. In the Agreement, China made a number of enforceable commitments that address certain concerns identified in this report, particularly regarding IPR enforcement. These commitments reinforce WTO obligations and recognize Special 301 standards (i.e., ensuring “adequate [and] effective protection and enforcement of intellectual property rights” and “fair and equitable market access to persons . . . that rely upon intellectual property protection” (Article 1.2)), and also expand on these disciplines, calling on China to improve its enforcement framework, particularly against online infringement and trade in pirated goods on e-commerce platforms.<sup>51</sup> IIPA urges China to follow through on these commitments, and encourages the

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<sup>50</sup>Presently, 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.

<sup>51</sup>China’s commitments include to: “provide enforcement procedures that permit effective and expeditious action by right holders against infringement that occurs in the online environment, including an effective notice and takedown system to address infringement” (Article 1.13); “combat the prevalence of counterfeit or pirated goods on e-commerce platforms by taking effective action with respect to major e-commerce platforms that fail to take necessary measures against the infringement of intellectual property rights,” including providing “that e-commerce platforms may have their operating licenses revoked for repeated failures to curb

U.S. Government to ensure that China fully implements them. IIPA is hopeful that Phase Two of the agreement will address the many other important priorities outlined in this report, including the deficiencies in China's legal framework outlined above and growing market access concerns, as discussed below.

## **MARKET ACCESS UPDATES AND RELATED ISSUES**

The piracy and enforcement concerns outlined above are exacerbated by China's pursuit of policies that have the effect of impeding foreign creators' access to the Chinese marketplace, thereby restricting the supply of legitimate product to Chinese consumers. China is still not in compliance with the WTO's ruling in the landmark market access case (DS 363) brought by the U.S. regarding many market access barriers in music, audiovisual products, and publications.<sup>52</sup> After the case concluded in 2009, China eased several market access restrictions,<sup>53</sup> but many core activities of copyright industries remain restricted or prohibited. For example, the Negative Investment List, revised in 2019, continues to prohibit, among other things, foreign investment in the "publication and editing of books, newspapers, journals, audiovisual products and electronic publications," and foreign investment in audiovisual production studios, movie distribution, and online video services. While it had been hoped that 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, the 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 and are having a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.<sup>54</sup> Among other things, these rules unfortunately restrict the distribution of foreign audiovisual content on online video platforms, even if the distributor has received a home entertainment permit from the former GAPP. Furthermore, in June 2019, China revised the Foreign Investment Catalogue, lifting certain restrictions, but production and distribution of audio-visual products and "network publication services" remained on the "Prohibited" list. In 2017, 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 new NRTA proposed two draft regulations regulating the production and distribution of foreign audiovisual content.<sup>55</sup> It appears these draft

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the sale of counterfeit or pirated goods" (Article 1.14); provide for forfeiture and destruction of counterfeit and pirated goods, as well as the materials and implements predominantly used in their manufacture (Article 1.20); enhance border enforcement by strengthening cooperation, increasing the number of trained personnel, and increasing border enforcement (Article 1.21); "take sustained and effective action against copyright and trademark infringement at physical markets" (Article 1.22); "require the administrative authorities to transfer a case for criminal enforcement, if, under an objective standard, there is 'reasonable suspicion' based on articulable facts that a criminal violation of an intellectual property right has occurred" (Article 1.26); "provide civil remedies and criminal penalties sufficient to deter future intellectual property theft or infringements," including "by imposing a heavier punishment at or near the statutory maximum permitted under its laws" and by "increasing the range of minimum and maximum preestablished damages, sentences of imprisonment, and monetary fines to deter future intellectual property theft or infringements" (Article 1.27); "ensure expeditious enforcement of any fine, penalty, payment of monetary damages, injunction, or other remedy for a violation of an intellectual property right ordered in a final judgment by its own court" (Article 1.28); provide legal presumptions of copyright ownership, including waiving certain evidentiary requirements to establish ownership, licensing, and infringement in enforcement proceedings (Article 1.29); eliminate or streamline requirements for foreign litigants to authenticate evidence for use in China's courts (Article 1.30); and provide in civil proceedings "a reasonable opportunity to present witnesses or experts in its case and cross-examine any witness testifying in the proceeding" (Article 1.31). Full implementation of these commitments would help to address certain concerns identified in this report.

<sup>52</sup>China—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>.

<sup>53</sup>China eased investment restrictions for some sectors in amendments to the Catalogue of Industries for Guiding Foreign Investment. In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution (although confirmation that distribution of "music videos" is permissible, and that a foreign-invested entity established in the Shanghai FTZ may distribute music throughout China, would be helpful, as it remains unclear whether these activities are permitted). In 2015, China eliminated most restrictions on gaming consoles, paving the way for video game companies to manufacture consoles in all of China, although manufacturers and publishers must still comply with strict regulations including those for pre-sale content review. China also agreed to allow foreign entities to choose their licensees for online music distribution, and to engage in content self-review of music for the first time. New incentives were also introduced for more film co-productions in China.

<sup>54</sup>For 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>.

<sup>55</sup>The "Administrative Provisions on the Importation and Broadcasting of Overseas Audiovisual Programs" would further tighten regulations on foreign broadcasting, banning foreign films, TV dramas and animation from broadcasting during prime time, putting a 30% maximum cap on foreign audiovisual content in certain circumstances, and restricting content that can be disseminated online. The "Administrative Provisions on Overseas Personnel Participation in the Production of

regulations were never published but provisions to further tighten the content review process for imported content were implemented. In May 2016, the former State Administration of Press, Publication, Radio, Film and TV (SAPPRFT) proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.<sup>56</sup> 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 that China has implemented to restrict the online distribution of foreign audiovisual content. For example, in 2014, the government imposed rules capping the online distribution of foreign films and TV dramas at 30% (and this cap was made more restrictive by applying it on a genre-specific basis), and requiring online distributors to register content, obtain permits, and submit content for review, resulting in extended delays and further uncertainty. Furthermore, there are only two opportunities to submit content for registration and review per year, which, because of the nature of television production, does not allow for submission of a full season of a television series when that season is current. The September 2018 draft rules on foreign audiovisual content, discussed above, contained expansions of the 30% cap on foreign content to cartoons, documentaries, and other programs. These rules have substantially reduced the number of U.S. film and television programs licensed in China for online distribution and resulted in delays, effectively curtailing “day-and-date” releases,<sup>57</sup> and in practice further reducing the foreign content caps to less than 30%. Chinese distributors have delayed or decreased licensing activity through multiple layers of restrictions under a non-transparent content review system, significantly delaying and limiting Chinese consumers’ ability to access the most valuable current U.S. television content within a reasonable period of the U.S. release, which has created fertile ground for increased piracy. To help ensure the content review process is transparent, predictable, and expeditious, and does not have a disparate impact on U.S. content, China should adopt a voluntary, age-based classification system.

**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.<sup>58</sup> To highlight just one, China prohibits foreign-owned investment in online video services, and audiovisual production studios and distribution (and, as noted above, the June 2019 revision of the Negative Investment List maintained these prohibitions). U.S. firms are highly competitive globally in these sectors, and these restrictions undermine the ability of U.S. content creators and distributors to compete in the Chinese marketplace, hurting their growth. Moreover, China continues to introduce additional impediments to its market for U.S. audiovisual content. The June 2016 Statement and Rules on Importing TV Formats, which was clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content, has negatively impacted U.S. producers and appears to contravene China’s WTO obligations.<sup>59</sup> A March 2016

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Radio and Television Programs” seeks to regulate the participation of foreigners in the production of radio and TV programs by, for example, banning the employment of foreigners as broadcast TV presenters or newscasters, and banning programs having both a foreign screenwriter and a foreign director.

<sup>56</sup>The proposal was for leading online video platforms to sell up to a 10% “special management stake” and cede at least one board seat to a selected state-owned media company. While this proposal was suspended due to significant opposition from online platforms, there is concern that it may reemerge.

<sup>57</sup>“Day and date” release refers to releasing a film in theaters and making it available on a Video-on-Demand service the same day.

<sup>58</sup>For 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 (US\$100,000). Foreign television and film programming are limited to no more than 25% of total airtime, and other foreign programming to no more than 15% of total air time. Foreign programming is banned during prime time and may not constitute more than 30% of pay television channels. Foreign TV series and movies are limited to 50 episodes. Foreign animation is restricted to no more than 40% of total airtime, and importers of foreign animation must produce a like amount of domestic animation. In addition, under State Council regulations, public screening of foreign films must not exceed one-third of the total annual screen time. The same screen quota was maintained in the Film Promotion Law, which took effect in 2017. China requires home-video license agreements to be for a duration of at least three years, an unnecessary intrusion into copyright owners’ contractual rights. China continues to require digital film prints to be replicated in local laboratories, impeding rights holders’ ability to control the print quality or trace the source of camcording piracy.

<sup>59</sup>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.

Notice allowing refunds from the Film Development Fund to cinemas that report favorable annual box office receipts from the screening of Chinese films incentivizes cinemas to screen more Chinese domestic films, further disadvantaging the competitiveness of foreign films in the Chinese market.<sup>60</sup> 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.

In addition to all of these longstanding and more recent barriers (and the theatrical market access barriers discussed below), beginning mid-2019, without any official announcement, the Chinese government agencies and distribution platforms have significantly slowed the processing and licensing of new U.S. content intended for Chinese online streaming platforms, in what is being called a "soft ban." It continues today, and is dramatically decreasing available U.S. content online in China. U.S. content has also been blocked from online distribution by a combination of Chinese Government delays and censorship failures. Without a prior censorship certificate from theatrical release—which most independent and many other U.S. titles fail to receive—there is no avenue to reach online distribution in China. Finally, Chinese private distributors are inhibited from risking any investment in new U.S. content due to uncertainty about their government's measures and intent. U.S. producers—shut out of the second largest market in the world—are also increasingly inhibited from making significant investments in U.S.-origin content.

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:** China still has not implemented certain key provisions of the 2012 U.S.-China Film Agreement that would greatly improve the distribution marketplace and would remove other market distortions that suppress prices and reduce access for both revenue-sharing films and flat fee films imported into China.

First and foremost, China committed in 2017 to make a meaningful increase to compensation, as the current 25% U.S. share of revenue is far below comparable markets. Furthermore, the official quota of 20-plus-14 (enhanced format) remains. However, review and additional compensation has never occurred, and China must be pressed to comply with its obligations. In addition, China has imposed artificial limits on market access for imported films, despite the huge increases in cinema screens in China since 2012, and the growing number of domestic productions, which were at an all time high in 2019.<sup>61</sup> In the case of "flat fee films," which are imported by private distributors outside of the box office revenue sharing quota system, China has enforced restrictions, including an informal cap on the number of these films that can be imported. Furthermore, China has retained governmental control of key elements of distribution, severely limiting the ability of private Chinese distributors to import and distribute any foreign content. These barriers virtually eliminated U.S. independent films from its theatrical marketplace with only 13 films, the lowest percentage of slots allocated for independent films recorded by IFTA.<sup>62</sup> U.S. producers who rely on private distributors and the payment of minimum guaranteed license fees to raise production financing and secure distribution have seen their licensing revenues plummet.

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<sup>60</sup>According to the Notice, if 66% of a cinema's total annual gross box office comes from Chinese films, that cinema will receive a refund of half of the money generated from Chinese films within the 5% of box office that the cinema contributed to the Film Development Fund.

<sup>61</sup>IFTA Research and Analysis, "China Theatrical Market 2010–2019".

<sup>62</sup>*Id.*

China further committed in the Agreement (and reconfirmed part of that commitment at the June 2015 U.S.–China Strategic and Economic Dialogue (S&ED)) to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported films without the involvement of any State Owned Enterprise, including China Film Group (CFG) and Huaxia Film Distribution Company Ltd. This requirement has also not been fully implemented. The newly-formed CFA, which replaced SAPPRFT in 2018, still permits only one film importer and two distributors of foreign films: CFG and Huaxia. While China affirmed in the Agreement that any properly licensed Chinese enterprise may distribute imported films, CFA has yet to approve any new private Chinese distributors. CFG also still dictates the release dates and length of theatrical runs of foreign films, often restricting the ability of the U.S. producer to market and obtain the full value of the film.

IIPA recommends that China take action on the following issues which have been long delayed: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement, including the requirement to enhance compensation in 2017, and liberalize the distribution market for private third party Chinese distributors; 2) substantially increase U.S. producers' share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of the Chinese locking out U.S. films from the prime release dates, and end the practice of “double booking” theatrical releases; 4) eliminate informal restrictions on the number of imported “flat fee” films so that more independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and online video websites so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films in China; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) do not delay or restrict film and TV imports for theatrical and online distribution through layers of a non-transparent content review system; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and erect no regulation or policy that impedes the collection of license fees to American intellectual property owners.

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

As noted above, China is still not in full compliance with the WTO's market access case (DS 363). 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.<sup>63</sup> Similarly, the many 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. These provisions also appear inconsistent with China's commitment in Article 1.2 of the Phase One agreement to ensure fair and equitable market access to persons that rely upon intellectual property protection.

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

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<sup>63</sup>In 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>.

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 other bilateral engagements, including the recent Phase One agreement discussed above, 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 Piracy Devices, improved enforcement against online piracy, and enhanced protection of academic journals, including strengthening library copyright protection.

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2020.<sup>1</sup>

**Executive Summary:** India plays an important role in the future growth of the U.S. creative industries, with its growing population of consumers and its status as the second largest market worldwide for Internet services and smartphones. The promise of growth, however, is threatened by piracy, market access barriers, overbroad interpretations of statutory licenses for broadcasting musical works and sound recordings, criminal enforcement difficulties and legal requirements that are out-of-step with technological developments.

India's rampant piracy takes many forms, all of which undermine the growth of the Indian marketplace for creative materials. The Government of India, in combination with industry, continued to take significant steps in 2019 to improve enforcement. In 2019, the Delhi High Court established permanent site blocking as a remedy to curtail online infringement in India in *UTV Software Communication Ltd. v. 1337x.TO* and in a slate of follow-on cases. The court's decision to issue "dynamic" orders that allow for the inclusion of additional domains accessing the site already blocked, and then to issue "doubly dynamic" orders to block additional domains even while the case is still being adjudicated, are examples of judicial measures that effectively address piracy. In 2019, the audiovisual and music industries continued to successfully collaborate with the National Internet Exchange of India (NIXI), the agency in charge of the .in domain registrations.

Notwithstanding the excellent results through the courts in 2019 to disable access to 106 sites and nearly 1,000 domains permanently, much more needs to be done to improve the efficiency and capability of law enforcement in handling other digital piracy cases. Enforcement against online piracy operators remains very challenging given the scale of the problem, officers' general lack of familiarity investigating and handling digital forensic evidence, and the ease with which pirates use anonymizing software and infrastructure to continually evade detection. The prospect of seeking criminal enforcement of intellectual property violations is very daunting in India due to the absence of any centralized IP enforcement agency, lack of appetite by local enforcement and significant time delays. The overwhelming challenge lies in the lack of effective interagency cooperation at the national level and across 29 Indian states. As a criminal offence, copyright infringement falls under a national criminal code, but cybercrime enforcement and related proceedings fall upon the individual states.

India needs to improve its legal framework to fully comply with the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) (the WIPO Internet Treaties) to which India acceded in 2018. IIPA urges India to withdraw a problematic 2016 DIPP Office Memorandum concerning the scope of the existing statutory license for broadcasting literary or musical works and sound recordings. Moreover, many significant market access challenges remain.

### PRIORITY ACTIONS REQUESTED IN 2020

#### Enforcement

- Encourage the Maharashtra Cyber Digital Crime Unit (MCDCU), Telangana Intellectual Property Crime Unit (TIPCU) and NIXI to continue their antipiracy activities.

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<sup>1</sup>For more details on India's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of India's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



- Strengthen and standardize the national IP enforcement regime and establish 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.
- Reform the judicial processes to: (i) allow electronic filings and evidence sharing (and dispense with the signing requirements); and (ii) encourage courts to expedite the final adjudication.

## Legislation

- Amend the Copyright Act and Criminal Procedure Codes to fully comply with the WIPO Internet Treaties by: (i) appropriately defining technological protection measures (TPMs), ensuring sanctions apply to both acts of circumvention and trafficking in devices, components, and services that circumvent, and providing civil and criminal penalties; and (ii) adopting definitions and sanctions for the unauthorized removal of rights management information (RMI).
- Amend Section 52(1)(c) of the Copyright Act to ensure that: (i) only neutral and passive service providers are eligible for safe harbor protection; and (ii) Internet service providers (ISPs) employ 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. Clarify that the term “person” in this Section includes ISPs.
- Ensure the private use exception is compatible with the three-step test.
- Repeal the statutory license for broadcasters under Section 31D of the Copyright Act, or at a minimum withdraw the September 2016 administrative Office Memorandum from the Department for the Promotion of Industry and Internal Trade (DPIIT), which interprets the statutory license as extending to Internet transmissions.
- Reject DPIIT’s draft amendments to the Copyright Rules which would appear to broaden the Section 31D statutory license to all internet transmissions of sound recordings and musical works in breach of India’s obligations under WCT, WPPT and WTO TRIPS Agreement (TRIPS).
- Enact the proposed Cinematograph Bill amendments that make it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part, audio and/or video) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording).
- Ensure that any amendments to the Information Technology (Intermediaries Guidelines) Rules 2018 that lift the threshold for safe harbors under the Information Technology Act: (i) clarify that safe harbors apply only to ISPs whose activities are neutral and passive; (ii) maintain Rule 3(4) of the 2011 Rules, which provides for notice and takedown; and (iii) specify that “unlawful content” includes copyright infringing content.

## Market Access

- Simplify the rules and procedures for cinema construction.
- Eliminate local body entertainment taxes (LBET) and other related taxes imposed over and above national Good and Services Tax (GST), and simplify compliance rules.
- Agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.
- Eliminate mandated rates (price controls) for pay-TV providers that inhibit the ability of rights holders to bundle and therefore properly exercise their exclusive rights.
- Eliminate local establishment requirements for the uplink and downlink of audiovisual satellite signals.
- Eliminate “must provide” requirements, which further hinder rights holders’ ability to exercise their exclusive rights.
- Ease the prohibition on direct-to-home (DTH) operators from entering into exclusive contracts with any broadcaster.
- Ease foreign ownership restrictions on news channels.
- Eliminate high tariffs on video game software and hardware.

## **THE DIGITAL MARKETPLACE IN INDIA**

India is the second largest Internet market by number of users in the world. Under the government's *Digital India* initiative to promote increased Internet accessibility across the country, India reached 687.62 million Internet subscribers in September 2019.<sup>2</sup> The creative industries have embraced increased Internet speeds and accessibility as an opportunity to provide consumers in India with online access to even more of the copyrighted content consumers want. For instance, millions now use licensed music streaming services which, in 2018, encompassed 69.7% of the overall Indian recorded music market. Digital formats overall supplied 78% of the total recorded music industry revenue in the country.<sup>3</sup> On the audiovisual front, it is estimated that India will reach more than 500 million users of online video by 2023, positioning India as the second largest market for Video-on-Demand (VOD) after China. It is also estimated that video will account for more than 77% of all Internet traffic in India by 2022.

**Online piracy:** The shift to online consumption of content has resulted in the proliferation of illegal linking and video streaming sites, as well as stream-ripping sites that enable users to make free permanent downloads of music from streaming video services and pre-release piracy of copyrighted content that is especially harmful to rights holders. In addition, an increasing number of users are downloading apps that facilitate infringement and some Piracy Devices (PDs) come pre-loaded with apps that allow users to access infringing content without authorization by circumventing subscription services and by other means. Through its different forms, Internet piracy is the greatest threat to the film and television industry in India. According to a 2018 study by antipiracy consulting firm Muso, Indian consumers rank third highest globally for the number of visits (17 billion) to piracy websites.

The torrent site *Tamilrockers*, along with its many progeny and copycats, constitutes a notorious piracy syndicate for motion pictures. It currently ranks in the top 200 sites in 12 countries and enjoys 26.6 million monthly visits according to SimilarWeb data. The site's operators frequently boast new content offerings on the site within hours of release. The site is now blocked in India, although the group has shown expertise in evading such orders by quickly creating and rotating new domains to continuously thwart blocking efforts. This piracy operation is the perfect example of what Justice Manmohan of the Delhi High Court has called the "Hydra-headed" rogue site that calls for dynamic injunctions. While there have been numerous attempts to identify and enforce against individuals connected with this site, the syndicate's principal operators and server locations are unknown. Other notorious infringing sites that are ranked near the top in India are *Fmovies*, *1337x*, *yts* and *Zooqle*.

As a top market for mobile app downloads, India is also seeing a rise in piracy using mobile apps available on the Apple and Google Play Stores, as well as numerous third party app stores. The *Telegram* app, which has over 200 million users globally, has gained a huge following in India and has become a major conduit for pirated audiovisual content because it creates anonymous channels for members of unlimited size, and enables the sharing of files larger than 1GB. 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*.

Piracy of recorded music is a major issue in India. Despite considerable growth in use of licensed streaming services, both domestic (e.g. *Gaana*, *JioSaavn*, *Wynk*) and international (*Amazon Music*, *Spotify*), music piracy rates are higher in India than in any other country worldwide except for China, according to a 21 country study conducted for IFPI. Two-thirds (67%) of Indian Internet users pirate music each month with more than three-quarters of 16-34 year olds engaged in music piracy. Although stream-ripping—making illegal downloads taken from YouTube videos—is the most popular form of music piracy, rates of downloading music through BitTorrent sites (e.g. *1337x.to* and *torrentz2.eu*) and cyberlockers (e.g. *zippyshare.com* and *uptobox.com*) remain very high in India. Popular stream-ripping sites include *y2mate.com* and *savefrom.net*. Most sites enabling this type of piracy are based outside India, meaning that systems of site blocking are a vital enforcement tool. Ninety five percent of those pirating music said that they would

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<sup>2</sup>[https://main.trai.gov.in/sites/default/files/PIR\\_08012020\\_0.pdf](https://main.trai.gov.in/sites/default/files/PIR_08012020_0.pdf).

<sup>3</sup>IFPI 2019 GMR, p. 43 and 47.

turn to licensed means, primarily online streaming, if they were no longer able to download illegally, demonstrating the significant harm that piracy is causing to the recorded music industry in India.

The video game industry reports that India rose to fourth in the world in 2019 (up from fifth 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 fourth in the world on infringement of games for the PC platform (up from fifth in 2018) and fourth when it comes to infringement of games for mobile (down from first in 2018).

**Unauthorized Camcording** is an ongoing challenge for rights holders in India. In 2019, six new video sources and 47 audio sources were forensically traced to theater locations in Indian, up from two video sources and 23 audio sources matched in 2018. Arrests resulting from enforcement operations in 2013, 2015, 2016 and 2017 show some willingness from state authorities to tackle this pervasive problem. However, camcording copies of new releases sourced from Indian theaters continue to leak online during the films' opening weekends, including from the notorious syndicate *Tamilrockers*, resulting in heavy losses for content owners.

**Unauthorized Book Copying:** Unauthorized commercial-scale photocopying<sup>4</sup> and unauthorized reprints of academic textbooks and professional books (for both the domestic and export markets) continue to be problematic for the publishing industry in India. India-only, lower-priced editions of textbooks continue to be made available in the domestic market to meet domestic needs, but this long-standing practice is jeopardized not only by the export of these editions to developed markets, but also by the increase in the number of counterfeit academic and professional textbooks being produced in India and shipped into other markets, including the U.S. 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).

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

## **COPYRIGHT ENFORCEMENT IN INDIA**

On balance, enforcement against copyright infringement improved somewhat in 2019. In large part, as a result of significant efforts from the creative industries to block sites and support other initiatives such as domain name suspension by the NIXI of sites that have fraudulent Whois information, and GoDaddy's suspension of accounts for terms of service violations when a site is the target of a judicial blocking order. Meanwhile, state-based enforcement units like the MCDCU are taking some enforcement actions by insisting ISPs halt access to domains where there is an alleged criminal IP infringement.

Despite these improvements, enforcement of intellectual property rights remains a challenge across 29 Indian states with the absence of a nationally led enforcement agency.<sup>5</sup> Although the establishment of the IPR Crime Units in Maharashtra (MCDCU) and Telangana (TIPCU), is a positive step, their establishment cannot substitute for a more robust federal approach.

IIPA recommends the following 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)

<sup>4</sup>Unfortunately, the 2017 decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

<sup>5</sup>For 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 IIPA's 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>.

the establishment of a National Copyright Enforcement Task Force (NCETF), including the Enforcement Directorate and CBI, that is overseen by DIPP and directed at copyright infringement occurring online and on mobile devices; (iii) the establishment of a centralized IP crime unit within the CBI Cyber Crime Detective Unit; and (iv) a focus on training prosecutors and police officers on the seriousness of IP offences, linkages to organized crime, and the importance of investigating up the chain.

IIPA is heartened that India's Cell for IPR Promotion and Management (CIPAM) held several IPR training programs for law enforcement officers with cooperation from creative industries, as well as IPR awareness workshops in schools and colleges. CIPAM needs additional resources to expand its activities beyond educational programs and, in particular, to have broader interaction with state governments. The NCETF should be permitted to collaborate across state lines to ensure proper enforcement. Thus far, two state-level crime units (TIPCU in 2016 and 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.

Given the lack of centrally coordinated enforcement in India, much more should be done to improve the efficiency and capability of law enforcement in handling digital piracy cases, and to increase their awareness and understanding of intellectual property rights in general. Enforcement against online piracy operators remains very challenging given the scale of the problem, officers' general lack of familiarity in investigating and handling digital forensic evidence, and the ease with which pirates, such as *Tamilrockers*, use anonymizing software and infrastructure to continually evade detection.

Seeking criminal enforcement for intellectual property violations in India is challenging due to endemic delays and the lack of resources and appetite by local enforcement. In November 2018, MPA filed a criminal complaint with the Kolkata police against a major source pirate 'Unknown' operating with a significant international footprint. The investigation by the Kolkata authorities has stalled without any indication of real progress being made in the case.

### **Civil Enforcement and Case Developments**

Major positive developments occurred in 2019 for copyright protection through the courts in Delhi. In particular, in April 2019, the Delhi High Court firmly established permanent site blocking as a remedy to curtail online infringement in India. In *UTV Software Communication Ltd. V. 1337x.TO*, the court issued "dynamic" orders that allowed for the inclusion of additional domains accessing the site already blocked. In July 2019, the same court decided *Warner Bros. Entertainment Inc. v. Https:Hindilinks4u.To*, where it created a "doubly dynamic" system where domains can be added to a blocking order while a case is still being adjudicated. As a result of these decisions, and many new cases and "impleadments" (whereby additional domains resolving to the same rogue piracy sites are added to the orders), the audiovisual industry has blocked a total of 106 websites comprising 964 domains, which has caused a significant decrease in traffic to the blocked sites and overall piracy in India.

In April 2019, the Mumbai High Court decided *Tips Industries v. Wynk Ltd. & Anr*, where it held that the Section 31D statutory broadcast license did not apply to Internet music download and streaming services. The court rejected the erroneous 2016 interpretation from the Department for the Promotion of Industry and Internal Trade's (DPIIT) and correctly held that, while the statute included radio and television broadcasting, it did not include Internet broadcasting. The court enjoined Wynk Music from using the Tips music catalog. The case is currently on appeal.

Notwithstanding these positive developments, the courts in India can pose challenges, including long latency periods, evidentiary issues, and court costs. In part, the latency periods have been due to overcrowding in the courts and extremely long dockets, leading to cases in the past dragging on for years. In an effort to improve this situation, the Delhi High Court changed its standing rules requiring higher damage claim requirements, and charging higher court filing fees per plaintiff. This has resulted in prohibitively expensive costs. However, these problems appear to have been partly resolved, since cases can be brought by one plaintiff (decreasing by multiples the court filing fees per case), and in the case of site blocking, since one case can now be brought against many sites, decreasing the number

of suits. 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. Indian courts should allow for electronic filings while dispensing with the need to sign each page, and the Delhi High Court should monitor dockets and adjust court filing fees downward should it determine the backlog issue has been resolved.

### **Criminal Enforcement**

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 appropriate approach is criminal enforcement. However, some rights holders find that criminal copyright cases in India generally do not yield effective and deterrent results. 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.

### **Domain Registry Outreach**

A few pirate sites in India have *.in* country code domains. 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 based on false or fraudulent Whois data. The music and film industries have good cooperation with NIXI and MCDCU on this issue. Over the past couple of years, hundreds of domains in India have been suspended by NIXI in conjunction with MCDCU.<sup>6</sup> In conjunction with efforts 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. This agreement continued to be helpful in 2019 and should remain part of India's enforcement strategy.

**Producers' Rights:** Following Phonographic Performance Limited India's (PPL) reorganization and application for an operating license, DPIIT should re-register PPL as a collecting society to license public performance and broadcasting rights. Separately, the existing exception for weddings from the public performance right results in a loss of substantial revenue for record producers and should be repealed.

## **INDIA'S TREATY OBLIGATIONS AND COPYRIGHT LAW REFORM**

India is a member of the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement, and, as of September 25, 2018, also a member of the WIPO Internet Treaties. It is now necessary for the Indian Government to amend its law to fully comply with the WIPO 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 important respects.

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 rights management information (RMI).

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<sup>6</sup>Since 2017, MCDCU has suspended 203 domains, impacting approximately 160 million users accessing these sites per month.

The 2016 Office Memorandum from DPIIT (then DIPP), which interpreted the applicability of statutory license as extending to Internet transmissions, is incompatible with Berne, the WCT, WPPT and TRIPS. Subsequently, DPIIT published draft amendments to the Copyright Rules which appear to broaden the existing Section 31D statutory license to all Internet transmissions of sound recordings and musical works in breach of India's obligations under Berne, WCT, WPPT and TRIPS. Now, DPIIT has launched a consultation on the Copyright Act, with a view toward proposing amendments near the end of 2020. To fully comply with its international obligations, IIPA urges India to repeal the statutory license for broadcasters under Section 31D of the Copyright Act, or at a minimum, withdraw the September 2016 Office Memorandum, and the proposed changes to the Copyright Rules on the scope of the Section 31D statutory licence.

Regarding TPMs, 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 are inadequate. Under current law, the phrase "effective technological measure" is undefined and, thus, does not expressly cover common TPMs, such as access controls. Moreover, the section fails to expressly prohibit the manufacture, importing, trafficking and dealing in circumvention devices as established in the Internet Treaties and as required to effectively cover entities engaged in the provisioning of circumvention services. Also, the current requirement of proof of a nexus between the circumvention and copyright infringement makes the TPMs provision ineffective (and superfluous to infringement actions), and is inconsistent with the Internet Treaties. While Section 65A makes circumvention a criminal offense, it excludes a civil cause of action and remedies. We recommend 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.

To ensure full compliance with the WIPO Internet Treaties, the Government of India should also: (i) amend its 60 year term of protection to 70 years to be consistent with international minimum standards; (ii) 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 only those ISPs whose activities are of a neutral and passive nature; and (iii) revise its law to ensure the private use exception is compatible with the Berne and WTO TRIPS three-step test.<sup>7</sup>

## **LEGISLATION AND REGULATION IN INDIA**

**Anti-Camcording:** For years, industry stakeholders have advocated for effective anti-camcording provisions in Indian law. In February 2019, the Indian Cabinet approved proposed anti-camcording provisions in amendments to the Cinematograph Amendment Bill 2019. However, progress toward passage of the bill stalled due to 2019 elections and it has been reintroduced before the National Parliament. India should swiftly enact legislative amendments to outlaw unauthorized recording of all or part of an audiovisual work in a cinema.

**Administrative Website Blocking:** Currently, the creative industries have sought website blocking through the courts, with good successes to date, particularly, blocking 106 websites comprising 964 domains in the Delhi High Court, and hundreds more domains at least temporarily through MCDU. Still, rights holders are open to alternative enforcement mechanisms to reduce traffic to piracy sites. We understand India is considering further amendments to the Copyright Act, 1957 in order to obtain administrative *suo motu* action by the Ministry of Communication and Information Technology's Computer Emergency Response Team (CERT). This initiative would allow CERT (or some other chosen agency) to act without prompting by judicial orders to disable access to structurally infringing websites. To date, the federal government has been reluctant to take on this role.

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<sup>7</sup>India is considering amending its Copyright Act to enable the Ministry of Communication and Information Technology's Computer Emergency Response Team (CERT) to pursue *suo motu* action to disable access to structurally infringing websites without prompting by judicial orders. Although positive, this amendment is not as important as others to fulfill India's international obligations.

**Statutory License for Broadcasting Under Section 31D of the Copyright Act, 2016 DPIIT Office Memorandum and 2019 Regulatory Amendment Proposal:** 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 the 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 of India’s Copyright Act and undermines the value of rights holders’ broadcast rights. In addition to the music industry, U.S. motion picture studios are also affected by these overbroad licensing rules, as they often produce local films with musical content. These extended compulsory licenses appear inconsistent with India’s commitments in the Berne and TRIPs agreements. Under the three-step test, as codified in the TRIPs Agreement, the Berne Convention, and the WIPO Internet Treaties, limitations and exceptions must be confined 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.” The wholesale application of a limited terrestrial license to the Internet space could implicate India’s obligation to comply with this basic rule in several ways.

As currently drafted, Section 31D enables any broadcasting organization (radio or television) to apply to the Copyright Board for a statutory license, curtailing rights holders’ negotiating power. Additionally, the rate fixed by the Copyright Board may not (and in fact does not) reflect the market rate. India is globally ranked as the IFPI’s 15<sup>th</sup> market, but falls short on producer and performer revenues from broadcast music (it ranks as 29<sup>th</sup> in terms of performance rights revenue) despite ongoing growth of the Indian broadcasting industry. Section 31D forces rights holders to allow broadcasters to use their works, even though they have exclusive property rights, for very low revenue returns. Section 31D should be deleted and replaced with an exclusive right that enables negotiations between rights holders and broadcasting organizations.

In 2016, DPIIT (formerly DIPP) issued an Office Memorandum providing an interpretation of Section 31D that is incompatible with the WCT and WPPT as well as the express wording of Section 31D. The Office Memorandum states that the statutory license of literary or musical works and sound recordings in Section 31D is “not restricted to radio and television broadcasting organizations only, but [also] cover[s] Internet broadcasting organizations.” While not legally binding, the Office Memorandum has created confusion in the market and poses a major threat to the growth and sustainability of India’s digital music and film industries. Some prospective licensees have already sought to rely on the Office Memorandum to influence licensing negotiations, mischaracterize the relevant uses as “broadcasting”, and claim that interactive transmissions fall within the Section 31D statutory license.

The music industry continues to actively fight DPIIT’s interpretation in Indian courts and the Intellectual Property Appellate Board (IPAB). In addition to the aforementioned April 2019 decision from the Mumbai High Court in *Tips Industries v. Wynk Ltd. & Anr.*, which held that the Section 31D statutory broadcast license did not apply to Internet music download and streaming services and is currently on appeal, music publisher Warner Chappell sued Spotify before the same court over the applicability of Section 31D to online streaming. The case was dismissed in January 2020 after the two parties reached an agreement whereby Spotify agreed to enter into a license to make available Warner Chappell’s musical works on its service. *Radio Next Webcastion Pvt. Ltd. v. Union of India and Anr.*, also on the application of the Section 31D license to digital services, is pending before IPAB. After the *Wynk* decision, DPIIT proposed to extend the scope of the statutory license through an amendment to the Copyright Rules of the Copyright Act of 2013. We urge DPIIT to abandon such efforts and for its memo to be withdrawn.

**Clarification of the Safe Harbor Provisions:** There are safe harbor provisions in both the Copyright Act and the IT Act. It remains unclear how the two sets of provisions—in the Copyright Act and the IT Act—interact, causing legal uncertainty and loopholes in copyright enforcement. India should strengthen statutory provisions addressing

online infringements to facilitate timely and effective enforcement against unlicensed content distribution, including requiring expeditious takedown or disabling access to infringing content.

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. To ensure a stronger framework, IIPA recommends the following amendments: (i) clarify that safe harbors apply only to ISPs whose activities are of a neutral and passive nature; and (ii) reinstate Rule 3(4) of the 2011 Rules, which provides for notice and takedown; (iii) expressly include infringement of intellectual property rights as one of the grounds for intermediaries to remove or disable access to certain contents (effectively replacing and superseding the inadequate safe harbor provisions of the Copyright Act described below); (iv) make clear that the obligation to deploy automated tools to identify and remove unlawful content under proposed Rule 3(9) extends to copyright infringing content; and (v) introduce a penalty provision to give teeth to Rule 3 of the pending draft *Information Technology [Intermediaries Guidelines (Amendment) Rules] 2019*.

The Copyright Act also currently includes a safe harbor provision for ISPs which mirrors systems in other countries, i.e. it applies to 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 52(1)(c)). These provisions do not facilitate adequate online copyright enforcement because they are not limited to truly neutral and passive ISPs that have no knowledge or control of the material posted, and they do not prevent the abuse of these “safe harbors” by services that are designed to facilitate or enable copyright infringement. Additionally, the takedown mechanism in Section 52 virtually requires rights holders to obtain an injunctive court order to prevent infringing content from being reinstated after a notice, which is contrary to international best practices and forecloses the intended goal of an efficient and expeditious remedy to online infringement (although through recent site blocking orders, ISPs are now required to be informed of their immediate obligation to block by the Department of Telecommunication within five days of the issuance of the court order). The Copyright Rules also provide that takedowns occur within 36 hours of a notice, which is too long a period when dealing with online infringement, especially in cases of pre-release piracy. 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, and are complying well with site blocking orders. 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.”<sup>8</sup> 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 access *Who/s* data to enforce their rights (in criminal and administrative actions). No known legislation is pending as a result of the white paper.

**Draft National e-Commerce Policy:** In February 2019, DPIIT released a Draft National e-Commerce Policy for stakeholder comment. IIPA suggests this should be an opportunity to meaningfully improve online copyright enforcement. While the objectives of the policy are laudable, and the draft Policy document mentions certain anti-piracy measures to address online distribution of pirated content, the anti-piracy issues in the online environment should be addressed more effectively. In particular, the proposed draft Policy should: (i) limit safe harbor protection to ISPs that are passive and neutral; (ii) require ISPs to implement 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; and (iii) enable consultation among industry stakeholders, including creative industries, to make determinations on “Trusted Entities” (whose complaints are resolved on a priority basis by ISPs) rather than leaving such decisions to the sole discretion of ISPs as provided under the existing draft.

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

## **MARKET ACCESS ISSUES IN INDIA**

The negative economic effects of market access barriers 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.”<sup>9</sup> Some of the more egregious market access barriers in India include:

- **India’s Telecom Regulatory Authority (TRAI) “Must Provide” Rules in the Pay-TV Sector:** The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation prohibits broadcasters from granting exclusive contracts and imposes “must provide” channel programming requirements for any distributor who requests them on a non-discriminatory basis, thereby eliminating all potential for competition among distributions and defeating incentives to develop exclusive programming.
- **Direct to Home (DTH) Guidelines:** These guidelines prohibit DTH operators from entering into exclusive contracts with any broadcaster. They also prohibit DTH operators from carrying signals of any broadcaster who has entered into any exclusive contract with any distribution medium, and/or against whom any litigation is pending in such regard. These regulations limit choice and undermine competition.
- **Broadcast Regulations/Restrictions and Price Controls:** The Indian Government regulates the uplink and downlink of satellite signals beaming into India. Foreign broadcasters are required to set up offices in India licensed by the government and must pay prescribed fees per channel beaming into India. More generally, India’s Telecom Regulatory Authority (TRAI) imposes an onerous set of regulations on the broadcast sector, stifling innovation and hindering competition. For example, TRAI has issued tariff orders that establish the amounts, by genre that broadcasters can charge satellite and cable platforms for content (these orders were upheld by India’s Supreme Court in 2018) and continues to create regulatory uncertainty around pricing of pay-TV channels. The government’s attempt at price controls reduces the incentive for foreign investment in the sector, despite the lifting of many foreign direct investment restrictions in 2015. In August 2019, TRAI issued a consultation paper on Tariff Related Issues for Broadcasting and Cable Services. In response to that paper, industry urged TRAI to avoid price controls, restrictions on market bundling, and restrictions on foreign investment in the broadcast sector.
- **Foreign Direct Investment Caps:** Although India in recent years has raised the foreign direct investment (FDI) cap for Indian television news channels from 26% to 49%, FDI above 49% for news channels requires government approval. Further, FDI in digital news sites is still restricted to the earlier limit of 26%.
- **Local Body Entertainment Tax (LBET):** In 2017, India rolled out a unified GST nationwide. Cinema tickets are subject to 12% and 18% GST rates depending on ticket price. However, LBET collected by state governments have been left out of the GST, prompting state governments (Madhya Pradesh, Tamil Nadu, and Kerala) to attempt to tax entertainment products over and above GST. Local body taxes significantly increase the tax cost for exhibitors and work against the principle of “One Nation, One Tax” and the intent of the GST model, i.e. to remove a multiplicity of high taxes. Additionally, in the case of at least one state government (Tamil Nadu), the current LBET provision is discriminatory based on the language of the film content. India should subsume all taxes into the national GST system and refrain from discriminatory taxes against film content based on language version.
- **Tariffs:** High tariffs on entertainment software and hardware products, including PC video game products, console video game products, video game console hardware, and video game activation cards. IIPA encourages India to join the expanded Information Technology Agreement to reduce tariffs on goods that enhance digital trade in India.
- **Bill on the Registration of Press and Periodicals:** Introduced in November 2019, this bill may have detrimental implications for U.S. journal and book publishers operating in India or seeking to enter the Indian market. The bill would require printing press owners as well as periodical publishers to register and obtain a Certification of Registration from the Press Registrar General before engaging in any kind of publication subject to a penalty of INR 50,000 (around US\$700). The bill is unnecessarily broad in scope and could potentially apply to all print and digital publications—regardless of whether they were published in India. The bill is replete with undefined

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<sup>9</sup>USITC, *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](https://www.usitc.gov/publications/332/pub4501_2.pdf).

requirements that would make it difficult for press and periodical publishers to navigate. For instance, the bill does not clearly identify the criteria on which decisions on registration will be made, or the factors that would adjudge an applicant press or publication eligible for registration.

- **Customs Duties:** India has recently indicated that it may not agree to further extensions of the WTO e-commerce moratorium on customs duties for electronic transmissions, and has raised the possibility of charging customs duties on electronic services such as Subscription Video-on-Demand (SVOD) and digital transmission of films. Such duties would likely raise prices for consumers, place India out of step with regional and international best practices, hamper economic growth, and hinder bilateral trade in digital products. The Indian Government should reconsider its approach on this issue or face increasing frictions with key global trade partners including the U.S.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2020 mainly due to ongoing serious market access challenges. If, at the conclusion of the Generalized System of Preferences (GSP) investigation, the Government of Indonesia has not made adequate progress remedying the deficiencies identified below, IIPA requests suspension or withdrawal of Indonesia's GSP benefits, in whole or in part.<sup>1</sup>

**Executive Summary:** As the fourth most populous country in the world, Indonesia is an important and growing market for the creative industries. For the motion picture and television industry, Indonesia ranks within the top 20 markets for box office revenues. Several years ago the government made improvements to its copyright law, enforcement system, and investment framework, but progress stalled in 2019 because the government took troubling steps backwards on market access, and there are no official plans for further needed reforms for copyright protection and enforcement.

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), Indonesia has taken a number of steps to improve its IPR protection and market access policies for some content industries, though not for others. For example, the implementation of Regulations Nos. 14 and 26 of 2015 to disable access to piracy websites, and the launch of an Infringing Website List (IWL) program to encourage advertisers and marketers not to support piracy websites with advertising revenue, were positive steps. The Indonesian Government has issued numerous administrative orders to block hundreds of piracy sites, and, recently, the notorious piracy site *Indoxi* announced that it would cease operation voluntarily. The effectiveness of the site blocking regulations, however, is hindered by the lack of a comprehensive strategy for addressing online piracy, and lack of a process for addressing "domain hopping"—a common tactic pirates use to evade government-ordered site-blocking. The Government of Indonesia should address these concerns, and do much more to improve the efficiency and capacity of law enforcement in handling digital piracy cases.

IIPA recommends that in 2020 the Government of Indonesia build on past progress and increase efforts to combat online piracy by updating aspects of its legal framework to add effective remedies and to close existing gaps in protection. The Directorate General of Intellectual Property (DGIPR) is undertaking a partial revision of the Copyright Law focused on exceptions and limitations, film ownership, and collective management issues, and it is unclear whether this revision will enhance or weaken copyright protection. It is critical that any such revision complies with Indonesia's international obligations and meets international norms and best practices. Furthermore, any revision of the Copyright Law should revisit a number of problematic provisions that create legal and commercial uncertainty for the copyright industries, including by removing a provision on reversion of rights, removing an overbroad exception to the making available right, clarifying rights of making available and communication to the public, setting forth clear principles of secondary copyright liability, and improving protections for technological protection measures (TPMs). The government should also extend the copyright term of protection for sound recordings and all copyrighted works to 70 years, in line with international best practices. In addition, Indonesia should provide clear guidelines that camcording and live streaming are illegal and implement measures to reduce instances of these activities.

While the government in 2016 took the very positive step of easing its negative investment list and allowing 100% direct foreign investment in film and sound recording production, and film distribution and exhibition, Indonesia has unfortunately regressed back towards a protectionist path. Indonesia should reverse course and address the many

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<sup>1</sup>For more details on Indonesia's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Indonesia's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



market access barriers, investment barriers, and discriminatory treatment against U.S. copyright materials that make it more difficult to do business and compete in the country. The broadcasting and radio sectors remain closed and the government is drafting regulations on the over-the-top (OTT) sector that include heavy-handed localization requirements and content review and classification restrictions. Indonesia's government doubled down on the harmful 2009 Film Law, which continues to cause significant uncertainty for all rights holders and the local exhibitors, issuing regulations in 2019 that affirmed many of the most harmful aspects of that law. Moreover, recent indications that the Government of Indonesia may not agree to further extensions of the WTO e-commerce moratorium on customs duties for electronic transmissions and may seek to charge duties on electronic transmissions are troubling, as such duties could significantly harm the country's market for creative digital content and related services. 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 may take as much as 10% of the collections from rights holders as "operational costs." Finally, Indonesia has still not joined the WTO Information Technology Agreement (ITA) Expansion Agreement to establish best practices on customs issues.

## **PRIORITY ACTIONS REQUESTED IN 2020**

### **Enforcement:**

- Continue *ex officio* enforcement of the Copyright Law and Regulations Nos. 14 and 26 of 2015, including establishing and implementing a dynamic system to block variants, new primary domains, redirects, mirrors, and proxy sites; and develop a comprehensive roadmap for addressing online piracy in consultation with both domestic and foreign copyright stakeholders.
- Combat illegal camcording and streaming piracy, including live streaming, by enacting regulations or guidelines confirming these activities' illegality, followed by implementation of a government program to strictly enforce the laws to reduce instances of these activities.
- 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 variants, new primary domains, redirects, mirrors, and proxy sites can be added to the blocking list quickly and easily.
- Revision of the Copyright Law should include the following amendments and/or implementing regulations:
  - 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)).
  - Clarify rights of making available and communication to the public in line with Indonesia's treaty commitments and international best practices.
  - Narrow the broad scope of the exception under Article 44 exempting a number of different uses for a wide array of purposes, ranging from education to criticism to "security and maintenance of government," because that exception appears to be broader than the three-step test, which confines exceptions and limitations pursuant to Indonesia's international obligations (e.g., WTO TRIPS Agreement (TRIPS) Article 13).
  - Ensure any new exceptions and limitations are confined to the bounds of the three-step test (e.g., TRIPS Article 13).
  - Maintain copyright ownership of audiovisual works in the producer who arranged for the work to be made and is best positioned to commercially exploit the work, consistent with international best practices.

- Provide clear guidelines explaining that live streaming and camcording in cinemas is illegal and violate exclusive rights.
- Extend the copyright protection term to the life of the author plus 70 years, and to at least 70 years for sound recordings and all works calculated from publication to be in line with international best practices and to avoid discrimination against local creators and artists.
- Strengthen the protection of TPMs consistent with Indonesia's international treaty obligations and international best practices, including by ensuring the protection of access controls.
- 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.
- 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 clarify safe harbor provisions for platforms, if any.
- Ensure that any new OTT regulations comport with Indonesia's international obligations and international best practices that protect copyright and related rights, do not interfere with the exercise of these rights, and promote competition through light-touch regulation on commercial and content review matters.
- Improve the collecting society regulations by ensuring that the management of the 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.
- Join the expanded WTO Information Technology Agreement (ITA), and remove the tariff on physical imported films based on the running time of the film, which has resulted in high duties for many feature films.
- Support an extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.
- Remove the requirement in the Broadcasting Law that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced.

## **THE NATURE OF PIRACY IN INDONESIA**

High levels of piracy in Indonesia continue to inflict losses on Indonesian creators, as well as U.S. book, motion picture and television, music, and video game creators. While the Indonesian Government has made efforts to fight online piracy, all actions taken by the government are based on applications by or information from the industry. The most significant concern for the audiovisual industry continues to be online piracy, which consists of various types of websites, including linking, streaming, and torrent sites. Homegrown piracy sites and “brands” such as *Indoxxi* (“Indo Twenty One”),<sup>2</sup> *Nonton*, and *Dunia21* are harming the already fragile creative industry ecosystem.<sup>3</sup> Such 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. The government should address this issue of domain hopping by swiftly issuing orders related to the “hopped” domains. Indonesia should also improve its efforts to address other forms of piracy, which continue to negatively impact its marketplace for creative content, including the growing problem of illegal camcording and live streaming piracy, and Piracy Devices (PDs) and apps, which have emerged as a significant means through which pirated motion picture and television content is accessed.

**Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law:** Broadband Internet access in Indonesia is increasing, and mobile penetration is greater than one device per capita.<sup>4</sup> This evolution means there is enormous potential for the legitimate commercial market for online dissemination of copyright works: services like iTunes, Spotify, JOOX, Netflix, iFlix, CatchPlay, Vue, Genflix, HOOQ and several other international streaming services now operate in Indonesia. However, infringing cyberlocker, video linking and streaming sites, and

<sup>2</sup> USTR included Indoxxi on its list of “notorious markets” in the 2018 Out-of-Cycle Review of Notorious Markets, available at [https://ustr.gov/sites/default/files/2018\\_Notorious\\_Markets\\_List.pdf](https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf).

<sup>3</sup>Sites like these employ gambling advertising and sometimes pornography to lure users.

<sup>4</sup> 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>.

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 (Indonesia Producers Association) and ASIRI (Indonesian Recording Industry Association)), the government has taken effective action by disabling access to hundreds of piracy websites and over 1,500 pirate domains since the process began in 2016. Many of the domains that were the subject of these actions are related to notorious pirate sites like “Indo Twenty One” (i.e., *indoxxi*, *indoxx1*), *Nonton*, *Layarkaca*, or *Dunia21*. In late December 2019, the operators of *Indoxxi* announced plans to cease operations voluntarily, but it remains unclear whether all new primary domains, redirects, mirrors, and proxy sites will also cease infringing. The self-help actions of industry, with cooperation from the Indonesian Government, have resulted in reductions in visits to the blocked audiovisual and music piracy sites. Notably, traffic to the most popular music piracy websites, *Planetlagu* 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 most well-known piracy sites employ domain hopping to circumvent the results of site-blocking efforts. For example, *Planetlagu* constantly changes its domain names, 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 that 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*, remain significant threats due to their popularity and domain hopping, although IIPA will monitor whether *Indoxxi*'s announcement that it intends to cease operations, and recent government statements on the harms due to piracy, help drive consumers to legitimate offerings. The government should streamline the process for rights holders to ensure access to infringing sites is disabled, and to deal efficiently with the problem of domain hopping.

**Music Piracy:** Stream-ripping is currently one of the most popular methods to obtain unlicensed music content online in Indonesia. Many extremely popular infringing websites provide stream-ripping function for users to download music files, including *Y2mate.com*, *MP3juices.cc*, *Yout.com*, and *Clip2mp3.org*.<sup>5</sup> Cyberlockers, most notably *Zippyshare.com*, which receives the highest traffic from Indonesia, *4shared.com*, *Uptobox.com*, and *Solidfiles.com* also remain very popular.

**Unauthorized Camcording of Movies:** Unfortunately, there was an increase in camcording incidents in 2019. 15 video captures of MPA member motion pictures were forensically matched to Indonesia in 2019, up from 5 in 2018.<sup>6</sup> Illegal camcording and live streaming piracy remain big concerns. The government should issue clear guidelines and regulations on illegal camcording and live streaming piracy, and take the initiative to reduce instances of these illegal activities as a priority.

**Piracy Devices and Apps:** 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. Often used 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. This content may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale as an “after sale” service, or loaded by the users themselves. PDs and apps are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. IIPA encourages the Indonesian Government to take steps to crack down on piracy apps and on device manufacturers or resellers who preload the devices with apps that facilitate infringement, and take action against key distribution points for devices that are being used illegally.

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<sup>5</sup>*Y2mate.com* received over 1 billion visits globally and *Clip2mp3.org* received over 32 million visits globally in 2019.

<sup>6</sup>There were also three audio matches of MPA member titles.

## **ENFORCEMENT UPDATES**

Although the Indonesian Government has taken significant strides to combat online infringement, notably through implementation of regulations for disabling access to piracy websites, more should be done. Indonesia should increase the capacity of its enforcement officials, who generally lack familiarity in investigating and handling digital forensic evidence, and do not understand the ease with which pirates are able to use anonymizing software and infrastructure to evade detection. Online piracy operators rarely receive deterrent level penalties. The government should develop a comprehensive roadmap for addressing online piracy in consultation with both domestic and foreign copyright stakeholders, and enhance industry efforts to disable access to infringing sites with additional enforcement actions in 2020, with the goal of encouraging consumers to migrate to legitimate offerings. This should include issuing revised website-blocking regulations 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)):** As discussed above, implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015 continued to be successful in 2019, although there is a need to address websites that circumvent the orders through domain hopping. These actions, which are initiated by rights holders, are the strongest form of self-help available to copyright owners in Indonesia. Emerging issues in 2020 include the ability to disable access to proxy portal sites and host sites (i.e., cyberlockers) where the primary purpose or primary effect of the site is to infringe or facilitate infringement of copyright. IIPA recommends that the government prioritize IP-related cases in issuing site-blocking orders, and improve the regulations to allow for “dynamic injunctions” to prevent domain hopping by providing that variants, new primary domains, redirects, mirrors, and proxy sites can be added to the blocking list quickly and easily.

**Infringing Website List (IWL):** In October 2017, APROFI (Indonesia Producers Association), ASIRI (Indonesian Recording Industry Association), and PPPI Jakarta (Advertisers Association), supported by BEKRAF (Creative Economy Agency), 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. Many of the IWL targets overlap with the list of targets for site blocking (discussed above). Starving piracy websites of advertising revenues is an important additional tool in addressing online piracy.

**Comprehensive Enforcement and Judicial Reform:** The National IP Task Force took the first steps towards the kind of multi-faceted enforcement reform process needed to make significant progress against piracy in Indonesia. Under the direction of the Task Force and with the oversight of the Anti-Corruption Commission, Indonesia should undertake comprehensive enforcement reform and should also implement judicial reforms. IIPA has outlined recommended steps for such comprehensive enforcement reform and judicial reform in prior filings.<sup>7</sup>

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright law in Indonesia is governed by the Law Concerning Copyright (Number 28 of 2014), which went into force in 2014, and replaced the prior 2002 law and Regulations Nos. 14 and 26 of 2015, which implemented key provisions concerning online and digital forms of infringement, including provisions intended to implement Indonesia’s international obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).<sup>8</sup>

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<sup>7</sup>See e.g., IIPA 2019 at 151.

<sup>8</sup>Indonesia joined the WIPO Copyright Treaty (WCT) on June 5, 1997 (in force March 6, 2002) and the WIPO Performances and Phonograms Treaty (WPPT) on February 15, 2005.

## Concerning Provisions in the Copyright Law

The Directorate General of Intellectual Property (DGIPR) is currently undertaking a partial revision of the Copyright Law, focusing on copyright ownership and collective management issues, as well as exceptions and limitations. The first phase focuses on (1) exceptions and limitations for education, libraries, and archives, and (2) clarifying copyright ownership in films. Next year, DGIPR intends to establish a CMO for films in cinemas and on VOD. It remains to be seen whether this revision will result in enhanced or weakened copyright protections. Any new exceptions must be confined to the three-step test, consistent with Indonesia's international obligations (e.g., TRIPS Article 13). On copyright ownership in films, in accordance with best international practices, the copyright should reside with the producer who arranged for the film to be made and is best positioned to commercially exploit the film, unless there is an agreement to the contrary. Finally, consistent with international best practices, any CMO must be voluntary, transparent, and governed by rights holders, without interference by Indonesia's government.

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

**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 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. On its face, this provision 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.

**Clarification of the Making Available/Communication to the Public Right:** Article 27 of the Copyright Law provides equitable remuneration rights to producers and performers for broadcasting and communication to the public of sound recordings. However, the law defines communication to the public to include making available. To the extent this diminishes the right of making available to a mere remuneration right, it is inconsistent with Articles 23 and 24, which provide exclusive rights for performers and producers to make available their sound recordings, and it contravenes Indonesia's obligations under the WPPT.

**Criminal Case Structure and Penalties Weakened:** For criminal cases, the Law raises concerns as it took steps backward from the previous law. The Law makes criminal cases complaint-based, rather than prosecuted on an *ex officio* basis; removes minimum mandatory statutory criminal penalties; and provides for non-deterrent fines, including for landlord criminal liability. Finally, Article 95 of the Law creates a highly unusual provision that 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. The

references in Subsections (1)(a) and (d) to the three-step test omit the limitations of “certain special cases” and uses that do “not conflict with a normal exploitation of the work by the copyright owner.” The two other subsections included in this exception do not contain any safeguards required under the three-step test. IIPA recommends that the Indonesian Government clarify the application of the full three-step test to each use and purpose contained in this exception through amendment of the provision itself or by implementing regulations. Furthermore, implementing regulations should provide guidance to help prospective users determine whether their use falls within the appropriate bounds of the three-step test.

In addition, Article 84 of the Law includes a compulsory license provision that applies to “works” and is not expressly limited to any subject matter. It should be further clarified and narrowed to ensure it is consistent with obligations under TRIPS, the Berne Convention, WCT, and WPPT.

**Rights Management Information (RMI) Violations and TPM Provisions:** The Law provides that RMI violations occur only when moral rights are affected. WCT and WPPT clearly require “adequate and effective legal remedies against ... acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of *any right covered by this Treaty [or the Berne Convention]*” (bracketed text in WCT only; emphasis added). The scope of the RMI provisions should be expanded accordingly. Protections for TPMs should be strengthened consistent with Indonesia’s obligations under the WCT and the WPPT, and with international best practices, including by ensuring the protection of TPMs that control access to copyrighted works (i.e., access controls).

**Registration, Invalidity, and Recordation Requirement:** While registration of copyright remains voluntary under the Law, the substantive examination for voluntary registration will apparently address whether a work is “substantially similar” to another previously registered work as a ground for refusal. This substantive examination is intended to enable the authorities to review and invalidate false applications or registrations to address a concern about abuse of the voluntary copyright registration process through registration, including by IP infringers, of invalid copyrights. IIPA suggests introducing a more forceful deterrent, including fines and penalties, against anyone who knowingly files a false application or applies in bad faith. Additionally, the registration and recordation system potentially violates the prohibition of formalities under the Berne Convention. Article 83 appears to impose a requirement to record licenses, with lack of recordation meaning a license “shall have no legal effect on third parties.” This 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 a failure to record transfers and other changes will not deny copyright protection to the registrant. Moreover, recordation is not feasible for industries and rights holders that control a large number of works.

**Provisional Measures:** Under Article 108 of the Law, preliminary (provisional) injunctions take too long to obtain. Under the Indonesian law, there are no legal remedies, such as preliminary injunctions, available to the claimant before submitting the claim. A claimant, however, 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. Judges, however, may only grant damages 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.

### **Regulations Nos. 14 and 26 of 2015 (Site Blocking)**

As noted above, 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 prevent domain hopping by providing that variants, new primary domains, redirects, mirrors, and proxy sites can be

added to the blocking list quickly and easily. 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, France, India, and Singapore). Specifically, new subsection (3) to Article 6 of the Regulations could be amended to provide: "Additional domains, sub-domains, URLs or other IP addresses whose sole or predominant purpose is to enable or facilitate access to the same website in the report shall be added to the receipt report register of Copyright infringement and/or related rights, when reported to, and verified by, the Director General of Intellectual Property, from time to time, and subject to the same recommendation."

## 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 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.<sup>9</sup> As noted above, camcording incidents increased in 2019. In addition to increased enforcement efforts, regulations should be introduced that would provide a clear legal basis to prohibit camcording (as well as live streaming) 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 provide greater incentives for production and give producers a stronger incentive to invest in local industry, thus spurring economic growth and tax revenues; and enable producers to continue offering content to local consumers in the latest formats. After the 2014 Copyright Law amendment, 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.<sup>10</sup> 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 was 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. Prohibited content includes content that infringes intellectual property and content that contains "goods or services that contain hacking services content and/or provide access without rights." This language is unclear, but it could refer to content that demonstrates or effects circumvention of TPMs. The Circular Letter provides for a form of notice and takedown that includes a requirement for the service provider that has been notified of an infringing work to take steps to ensure that

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<sup>9</sup>Preferably, 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.

<sup>10</sup>Note that the term of protection has limited practical effect for certain works in view the 25-year reversion of rights regarding literary works, performances, and musical works, as discussed above.

all other copies of (or URL links to) that same work are also removed. For content that infringes intellectual property, the period of time required to take action can be up to 14 days, which is excessively slow. The Circular Letter also requires platforms to monitor user activities on UGC trading platforms. Unfortunately, it does not specify any punishments or sanctions for users and/or platforms that fail to comply. The Director General of Kominfo has indicated that further comprehensive regulations for all Internet platforms will follow, and that 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 clarifying safe harbor provisions for platforms, if any.<sup>11</sup>

## **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.<sup>12</sup>

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:** In 2019, the Indonesian government expressed its intention to amend the 2009 Film Law, but regulations issued in late 2019 affirmed harmful provisions in the existing Film Law, including a 60% screen quota for Indonesian films and a prohibition on dubbing of imported films (with limited exceptions). If implemented, the screen quota would likely lead to lost revenue in local theaters and limited choices for Indonesian consumers, limit local industry's exposure to the expertise and skill of foreign producers, and leave a huge opening for the purveyors of pirated content. Dubbing of imported films into a local language is a commercial decision that should be left to content owners based on business considerations and market forces.

Furthermore, the 2009 Film Law and regulations therein include some ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct, such as restrictions on vertical integration and arbitrary limits on vertical supply between content distributors and theatrical exhibitors. Indonesian authorities should remove these provisions because they could have unintended consequences, such as restricting foreign participation in the market and curbing business efficiency. Indonesia should amend the Film Law 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.

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<sup>11</sup>Such 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.

<sup>12</sup>The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

**Collective Management Organizations:** A December 2018 amendment to the Regulation for Collective Management Institutions (Regulation No. 36/2018) has not improved collective licensing issues faced by the music industry. Certain CMOs for musical works and sound recordings continue to be placed under the single-window LMKN as a “national CMO” that adds an unnecessary extra layer to the collective licensing system. 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. As a result, those rights holders involved have little control over LMKN’s governance and operations, including the setting of tariffs, which are fixed and set extremely low. Even though LMKN delegates the collection function to some of the CMOs, the regulation permits LMKN to deduct 10% from the collections as operation costs at the expense of rights holders’ interests. Further, the problem of the existence of numerous CMOs to manage the same categories of rights remains, which has caused unnecessary confusion and inefficiencies in collective licensing.

**Advertising Restrictions:** Indonesia’s Broadcasting Law (No. 32 of 2002) includes a requirement that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced. Although regulations issued in 2007 provided a series of exemptions, the Indonesian Broadcasting Commission’s (KPI) 2015 statements regarding implementation raised concerns. If implemented, such a burdensome rule would be harmful to consumers, who would likely absorb the additional associated costs. The timeline for revising the Broadcasting Law remains unclear.

**Customs Valuation:** Indonesia imposes a tariff on imported films that is based on the running time of the film, resulting in high duties for many U.S. feature films. Indonesia should join the expanded WTO Information Technology Agreement (ITA) to address this issue and to stay consistent with international best practices.

**Customs Duties on Electronic Transmissions:** In 2018, Indonesia amended its tariff schedule via Regulation No. 17/PMK.010/2018 to add new tariff lines that may cover electronic transmissions of music, film, publications, and other digital products. In creating new tariff lines for digital products that are transmitted electronically, which includes a threat of imposing customs duties on those products, Indonesia has set a troubling precedent that raises serious concerns with respect to the WTO e-commerce moratorium on customs duties for electronic transmissions. Heightening this concern, the Government of Indonesia has recently indicated that it may not agree to further extensions of the moratorium. These actions could significantly harm the country’s market for creative digital content and related services, including Subscription-based Video on Demand (SVOD) services.

**Content Review:** In October 2015, KPI notified platform operators regarding pre-release content review 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. In August 2019, KPI indicated it would seek to subject SVOD providers to its strict content review and classification requirements. If implemented, these new standards would likewise reduce consumer choice, raise costs, and disincentivize foreign investment in Indonesia’s OTT sector.

**OTT Regulations:** The Ministry of Communication and Informatics is considering OTT regulations that could require foreign OTT service providers to set up local permanent establishments and use local national payment gateways, in addition to providing content filtering and censorship mechanisms. If implemented, such requirements would stifle business development and add a burdensome barrier to market entry.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

In January 2020, USTR, pursuant to the 2012 investigation, held a public hearing to review country practices in Indonesia regarding intellectual property rights and market access issues, and to determine whether Indonesia still qualifies for beneficiary status under the GSP. Under the statute, the President of the United States must consider, in determining whether a country should continue to be designated as a GSP beneficiary country, “the extent to which

such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.”<sup>13</sup> While the Indonesian Government has made past progress towards meeting the GSP criteria, these efforts have recently stalled and even regressed in some respects. If, at the conclusion of the GSP review, the Government of Indonesia has not made adequate progress remedying the deficiencies outlined in this report, IIPA requests suspension or withdrawal of Indonesia’s GSP benefits, in whole or in part

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

While passage of the Copyright Law of 2014 made progress toward fulfilling Indonesia’s obligations under 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 recodation requirement appear to be out of compliance with Indonesia’s international obligations. In addition, as set forth in the “Market Access” section, there are areas in which the Government of Indonesia may fail to provide equitable and reasonable market access to foreign rights holders, as set forth in the GSP criteria.

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<sup>13</sup>19 U.S.C. §§ 2462(c)(4) and (5).

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be placed on the Priority Watch List in 2020.<sup>1</sup>

**Executive Summary:** The growth of the digital marketplace in Mexico has been severely hampered by an IPR legal framework that is decades behind international norms and cannot properly address online infringement by sites and services. Criminal enforcement activity has been uncoordinated and generally weak, slowed by procedural and structural deficiencies, as well as by a lack of adequate resources. Although it ratified the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) in 2002, Mexico has yet to fully implement these treaties. The obligations in the U.S.–Mexico–Canada Agreement (USMCA) will also require Mexico to make significant improvements in its current IPR regime, including protections against the circumvention of technological protection measures (TPMs) and for rights management information (RMI)—two key components of the Internet Treaties that gave rise to new content delivery models such as streaming and on-demand services. These and other legal reforms to modernize the Mexican legal regime for the digital marketplace (detailed below) are long overdue.

Criminal and civil copyright cases face numerous obstacles not found in other countries. Success in a criminal case depends on proving a “direct economic benefit” to the infringer, instead of focusing on the harm caused to a rights holder by infringement. This is a difficult hurdle to overcome for a prosecutor willing to commence a criminal case in a country already short on resources for such cases. Civil cases are expensive and difficult for rights holders to undertake, and are slowed by procedural hurdles. The IPR legal regime is missing basic tools to address online infringements and to spur cooperation between rights holders and website owners and service providers. For example, there are currently no clear principles of third party liability for those inducing or promoting copyright infringement, which are necessary to 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 clearly identified.

### **PRIORITY ACTIONS REQUESTED IN 2020**

The copyright industries recommend the following to the Government of Mexico as priority legal reform and enforcement steps for 2020:

#### **Legal Reforms**

- Fully modernize laws, including by implementing the USMCA and other treaty obligations—in the Copyright Law, and in the Industrial Property, Criminal, and Criminal Procedure Codes by:
  - (i) removing the proof-of-profit (“direct economic benefit”) requirement as a prerequisite to criminal liability; adding aiding and abetting criminal provisions; removing the for profit limitation on the making available right, and clearly including a violation of making available in the Criminal Code;
  - (ii) 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 of TPMs. This should include sanctions for “acts” as well as the distribution, marketing or trafficking in anti-circumvention devices, components and services;

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<sup>1</sup>For more details on Mexico’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Mexico’s Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



- (iii) adopting definitions and sanctions for rights management information (RMI);
  - (iv) granting customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that the Attorney General's Office (FGR) and Customs can and will act against so-called "goods in transit";
  - (v) enacting legislation 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;
  - (vi) enacting provisions to properly address cable and satellite signal theft;
  - (vii) enacting legislation to provide clear modern rules establishing third party liability for copyright infringement, including for parties contributing, inducing or promoting infringement of copyright and related rights, along with proper injunctive relief and incentives for efficient and effective notice and takedown systems with ISPs, and including repeat infringer measures.
- Enact an amendment to Article 189 of the Industrial Property Law to allow the Institute of Industrial Property, (IMPI) to notify defendants via e-mail or any other digital mean, for administrative IPR violations online.

### **Criminal Actions, Raids and Prosecutions**

- Fully implement the USCMA enforcement obligations by:
  - (i) implementing a strategic national *ex officio* anti-piracy campaign with a consistent focus on major targets emphasizing coordination of the police and prosecutorial resources;
  - (ii) improving the FGR forensic standards for digital enforcement and eliminating the required experts and mandated registrations (as a practice, if not a legal requirement) for criminal cases;
  - (iii) addressing the importation of circumvention devices used in video games that are entering Mexico in small consignments and via courier packages;
  - (iv) ensuring timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market.

### **Administrative Enforcement**

- Fully implement the USCMA enforcement obligations by:
  - (i) providing IMPI with: (1) resources and political directives to apply its *ex officio* powers to investigate online infringements and inspections of infringing websites; (2) additional resources for the takedown of infringing materials; and (3) the ability for regional officers to conduct local raids. Also IMPI should improve coordination with the Federal Police so that IMPI can take enforcement actions in difficult or risky areas with police security;
  - (ii) providing INDAUTOR (the National Author's Rights Institute) with more resources to increase and strengthen its mediation capabilities.
- Support the Coalition for the Legal Access to Culture (CLAC) initiative to spur active cooperation between Internet services and rights holders.

### **Prosecutions, Judges and Courts**

- Encourage prosecutors to take *ex officio* actions against online piracy and hard copy piracy; focusing on online service operators, and seeking deterrent sentences, including jail time and fines;
- Investigate and prosecute IPR infringement cases absent proof of actual lost profits.

## **THE COPYRIGHT MARKETPLACE IN MEXICO**

In the past two decades, there has been an explosive growth of online access in Mexico, including by the use of mobile phones and smartphones. For example, a 2019 IFPI study revealed that 95% of consumers surveyed used their smartphones to listen to music (during a three-month period), and that they listened to an average of 25.6 hours of music per week in Mexico. Although online markets have steadily developed, healthier growth has been hindered by weak enforcement, as well as by outdated copyright and related laws. Competing with the legitimate

digital markets are a wide variety of popular pirate services in Mexico, including 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, including usernames, passwords and user account information. Although there are some local websites, many of the infringing sites and services are hosted outside of Mexico (e.g., in Peru, Europe, Russia, and Ukraine, among others), but are routinely accessed by individuals in Mexico.

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. For recorded music, the vast majority of legitimate revenue in Mexico is from digital music services, including subscription services. Although music industry revenue continues to increase, the per capita spending on music in Mexico is only US\$1.18 per year, compared with US\$20.26 per capita in the U.S. per the IFPI Music Listening Report 2019. At the same time that music streaming services are developing, the most widespread source of music piracy 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, and these platforms are especially popular distribution channels for pre-release piracy.

A major concern to the growth of healthy legal markets is the increased availability of piracy devices (i.e., illicit streaming devices (ISDs)) and applications (apps), including media boxes, set-top boxes or other devices that allow users, in combination with illegal software apps, to stream, download, or otherwise access unauthorized content from the Internet. The Motion Picture Association (MPA) reports that subscription television piracy and the use of ISDs are the two fastest growing problems in Mexico. The use of hardware devices, and software, to pirate television programming, including subscription streaming services, is sophisticated and ubiquitous, with these devices widely available in Mexican grey markets. This includes the use of web browsers and video apps to allow playback of films and television programming. These devices are part of a sophisticated online ecosystem facilitating access to pirated audiovisual materials; they are advertised as facilitating easy access to remote online sources of unauthorized entertainment content. The devices are imported into Mexico either pre-loaded with the apps, as an after-sale service, or users can easily obtain the apps themselves to access infringing content. Enforcement authorities should take criminal actions against these vendors and the operators of the infringing apps used on these devices.

There are over 200 websites with film and television materials harming the Mexican market, including some with over 13,000 illegally reproduced titles. One site, *pelisplus.co*, has tens of thousands of links to illegal film and television titles. 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 2019, Mexico ranked 14th overall in the world (down from 11th in 2018) in the number of connections by peers participating in unauthorized file sharing of video games on public P2P networks. Mexico ranked fourth (down from third in 2018) in unauthorized file-sharing of console-based games, 14th for video games on mobile devices (down from 11th in 2018), and 20th using PCs (down from 14th in 2018).

The widespread availability of circumvention devices and technologies in many markets, and, increasingly, from online auction and e-commerce sites, underpins and facilitates the growing problem of online infringement of entertainment software in Mexico. Circumvention is accomplished by installing “modification chips” 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 that are then assembled in Mexico. In 2019, the video game industry reported few (for some companies no) seizures at the

border, but there are plenty of online markets selling these devices. Vendors and online marketplaces such as Mercado Libre, sell circumvention devices 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—the USMCA obligates Mexico to correct this deficiency. Sellers merely relist their offerings with little deterrence after infringing online listings are removed.

**Hard goods piracy:** Although stemming digital piracy is the priority of the copyright industries, hard goods piracy continues on the street and at markets. Two physical markets remain on the U.S. Government’s Notorious Markets list (as they have every year since 2012): (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, a place which has become, as the U.S. Government acknowledges, too dangerous for rights holders to enforce their rights. In 2019, FGR successfully raided a facility in Jalisco that was part of a larger illegal network (FasterFTP); FGR also disrupted camcording activities in theaters in Mexico City and in Puebla. The Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDD-API), within the FGR, raided another camcording operation in Puebla, seizing illegal film materials, as well as drugs and firearms.

**Camcord piracy:** To date, overall criminal enforcement against camcording has been ineffective because of a weak law (and one that is rarely applied). The few criminal convictions that have been successful in recent years were the result of prosecutions based on an array of crimes other than camcording. Under the flawed current law, a successful criminal 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, significant economic 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. Implementation of this USMCA obligation should be done properly (which would not require a finding of a “for profit” motive to commence a criminal case). The number of MPA member films sourced from illicit camcords in Mexican theaters fell to 22 in 2019, down from 98 in 2018. This decline is in part due to rights holder activities with law enforcement and exhibitors to target some of the more active release groups. But, new laws and better enforcement is needed to properly address this problem.

**Satellite and Cable Issues:** Satellite and signal piracy remain a major 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. In accordance with the USMCA (Article 20.86), Mexico needs to amend its laws to provide civil and criminal remedies for cable piracy, as well as satellite piracy. Additionally, Mexico needs to amend its Criminal Code to eliminate the “for profit” requirement for acts of decryption of satellite, include cable systems in the decryption laws, and amend its Copyright Law to apply clear protection for both cable and satellite dissemination.

## **COPYRIGHT ENFORCEMENT IN MEXICO**

Budget cuts in recent years, including in several key IPR enforcement agencies (e.g., IMPI), have led to reductions or curtailments in effective enforcement activities. There continues to be no coherent or coordinated plan to address online piracy, as hard goods piracy still appears to be the primary focus of enforcement officials. One long-recommended enforcement step is the development and adoption of a high-level national anti-piracy plan to

target major online piracy and counterfeiting operations, and to coordinate federal, state and municipal enforcement activities. This would help in many regions of the country where state and municipal government anti-piracy efforts continue to be weak overall, including in local entities that rarely work on combating piracy at all. Instead of a centralized coordinator for copyright enforcement, there are three federal agencies engaged in copyright enforcement in Mexico. The FGR (formerly, 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 seized domain names of infringing sites). In the past, an inter-agency committee (COIDAPI) periodically prepared strategic national enforcement plans, but that process was replaced by informal discussions between various IP enforcement agencies and rights holders.

### **Criminal Enforcement**

Since Mexico transitioned to an adversarial justice system, criminal copyright cases are no longer prosecuted *ex officio*, but only upon the filing of a complaint against an infringer. This has resulted in prosecutorial delays of IP related crimes, including at FGR. Good cooperation continues to exist between rights holders and IMPI and FGR, as well as with the Mexican Tax Administration (SAT); some industries also report improved cooperation with INDAUTOR. However FGR prosecution continues to suffer from outdated procedures, insufficient resources, long delays (years) for cases to resolve, and the lack of deterrent sentences. The formation of the new government late in 2018 required the re-appointment of all FGR prosecutors and department heads, which further stalled progress.

A complicating element in combatting video game, music, and motion picture piracy in Mexico is the cumbersome requirement (by FGR) that each copy of an infringing product must be accompanied in prosecution files by a physical copy of a legitimate original for comparative examination by experts (*peritos*); this 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 much too long to complete and the *peritos* are insufficiently trained in digital issues and often reluctant to cooperate with investigations and prosecutions. Per the USMCA, the Mexican laws need to be amended to provide clear presumptions of ownership in civil, criminal and administrative matters, based on the copyright notice appearing on the work, or on a screen, and, without the need for a mandatory and certified registration (a current requirement to commence a criminal case).

One major obstacle to effective criminal enforcement is that file sharing via online networks is generally not considered a serious legal violation by Mexican courts. As noted, Article 424*bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement which has thwarted effective prosecutions in Internet file sharing cases. There were no new Internet piracy criminal cases to report in 2019.

**Structural reforms and jurisdictional issues:** IIPA continues to recommend several detailed “structural” reforms and agency actions to improve criminal enforcement.<sup>2</sup> An overarching priority is to implement a national *ex officio* anti-piracy campaign. Such an effort would seek to coordinate the various police agencies to identify and target individuals responsible for large-scale distribution and importation of pirated goods, including major organized crime syndicates. The priority should be criminal enforcement directed against digital piracy. Criminal enforcement needs to be undertaken with a coordinated plan among FGR, SAT, IMPI, Federal Bureau of Consumer Interests (PROFECO) and the Federal Police. SAT remains engaged with FGR in support of enforcement actions related to audiovisual and music piracy, especially in cases of suspected money laundering or tax evasion.

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<sup>2</sup>See <https://iipa.org/files/uploads/2019/02/2019SPEC301MEXICO.pdf> at pp. 46-47.

Another recommendation is for FGR to significantly improve its criminal enforcement actions against digital piracy. UEIDDAPI needs resources and training focused on technology to properly undertake criminal investigations directed against digital piracy. Until 2016, there was a specialized IP enforcement sub-unit within UEIDDAPI; the sub-unit was disbanded. The Government of Mexico needs to properly staff and resource UEIDDAPI to address IP cybercrimes, as well as staffing other key IPR enforcement units in FGR and the police. FGR can still take *ex officio* actions, but criminal cases need a complaint to be filed by a rights holder to commence a case. As with other IP enforcement government entities, IMPI, the specialized agency for intellectual property authorized to take administrative actions against infringers, is also severely under-resourced; it is also hampered by outdated procedural rules.

FGR has a special deputy attorney general department to focus on organized crime syndicates—the Office of Attorney General for Federal Crime Investigation (SEIDF)—which also created UEIDDAPI, but this unit is under-resourced. There is also a FGR Organized Crime Investigative Division (FGR-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 FGR-SIEDO and FGR-SEIDF, as well as additional resources and training.

A third structural 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 state governments regularly cooperate on IPR enforcement—the State of Mexico, the Federal District, Jalisco, Queretaro and Puebla. A fourth recommendation is for enforcement agencies to 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 FGR enforcement raids continue to find their way back into the black market. A fifth recommendation is for PROFECO to use its *ex officio* powers for consumer protection to stop street market piracy, and to resource it properly.

**IPR expertise in the Judiciary:** A continuing weak spot in Mexican IPR criminal enforcement is the judiciary. There is an ongoing need for training to improve IPR expertise by judges—especially training on technology, digital distribution and piracy, and the use of circumvention technologies. Other weaknesses include the absence of specialized IP judges and courts, and non-deterrent sentencing in most criminal cases where sentences are rare. Mexico should consider mandatory sentencing regulations for criminal copyright cases, or have the Supreme Court issue recommended guidelines to assist judges with the imposition of deterrent sentences and the award of damages (*reparación del daño*). That court could also issue an advisory to criminal judges nationwide to act expeditiously on search warrant applications. Additionally, Mexico should provide sufficient resources for the IP magistrates within the Tax Court, and consider creating specialized IP administrative circuit courts.

## **Civil Enforcement**

One of the biggest obstacles to effective online civil enforcement is the absence of secondary liability for copyright infringement for ISPs and similar parties in the Civil Code. The USMCA (Article 20.88) requires Mexico to implement “legal incentives for Internet Service Providers to cooperate with copyright owners to deter the unauthorized storage and transmission of infringing materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials.” ISPs need encouragement to meaningfully cooperate with rights holders to deter the unauthorized storage, transmission or making available of copyrighted materials. This can be done by limiting monetary damages for qualified third parties, but only if they comply with pre-conditions for cooperation (e.g., measures to address repeat infringements), and they are neither controlling, initiating, inducing nor directly infringing copyrighted material.

The USMCA (Article 20.88) also requires “Internet Service Providers to expeditiously remove or disable access to material residing on their networks or systems upon obtaining actual knowledge of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent, such as through receiving a notice.” The Mexican law, when amended to comply with the USMCA to provide for such steps, should

require an immediate takedown, without burdensome documentation requirements, and not only when an ISP receives notice of infringement, but upon actual knowledge of the infringement or when the ISP is aware of facts or circumstances from which infringement is apparent (so-called “red flag” knowledge). The USMCA obligations will prohibit the Government of Mexico from re-visiting past proposals to adopt “notice and notice” procedures, in lieu of more effective remedies. 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 online (and physical) piracy, including promoting cooperation between rights holders and ISPs. The CLAC initiatives are still a valuable forum for proposed 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. Article 20.88 should be implemented in Mexico to ensure the eligibility of safe harbors is available only to technical, automatic and passive services, and should include measures that have been demonstrated to be effective in preventing or restraining infringement, including among other things, disabling access to the specific location identified by the rights holder infringing content.

Absent these changes in law, ISPs are currently 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. While some IIPA members report cooperation for hosted content takedowns (as well as with the local domain name registry), 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. In general, the current 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. For file sharing, the two major ISPs (Telmex Infinitum, which has about 70% of the domestic broadband connections in Mexico, and ALESTRA) have, to date, been reluctant to take any actions, which is why legal reforms to address these issues are necessary.

In general, Mexico’s three-tiered civil procedure system makes civil litigation very complicated, time consuming and costly for rights holders, even against obvious infringers. The Copyright Law allows rights holders to seek damages in civil courts even before an administrative infringement decision is issued (or becomes final), but the law does not provide statutory damages (e.g., additional or pre-established damages). Rights holders can seek 40% of the gross sales revenues from infringing products as damage awards. The USMCA provides for pre-established damages, but unfortunately, as a permissive rather than a mandatory obligation of the agreement. There are other problematic procedural formalities to commencing cases in Mexico, for example, burdensome steps to prove copyright ownership in lieu of presumptions of ownership—the USCMA mandates such presumptions. Mexican law grants full validity to electronic documents and discovery, although some judges are unfamiliar with these rules. The Civil Code also provides *ex parte* measures to avoid the destruction of evidence, but these provisions have never been fully implemented.

In 2018, one positive legal reform was the adoption of an amendment to the Copyright Law of Mexico (amending Articles 213 and 215) to provide for preliminary injunctions (“precautionary measures”) in civil cases. This remedy is especially useful to address pre-release piracy. The 2018 amendment also permitted *ex parte* preliminary injunctions, provided rights holders give infringers 72 hours’ written notice before the order goes into effect.

## Administrative Enforcement

**IMPI:** Once granted the administrative authority (in 2013), IMPI took its first action 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 used its authority 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* and the Supreme Court later upheld that ruling, calling IMPI's actions 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. A further limiting factor, even if the case is eventually 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. Rights holders can alternatively initiate an administrative proceeding before IMPI, or bring a court case for civil damages, or request an injunction.

While the two major telecom (ISP) companies generally do not cooperate, 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. But, 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. One legislative proposal (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 2019, IMPI reported 3,440 administrative actions, mostly taken against individuals (not websites), including both copyright and trademark actions. In 2019, IMPI also approved the destruction of almost 5.1 million pirated works, the largest in a single year.

**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 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. Since 2015, INDAUTOR has been funded and housed within the Ministry of Culture, which was created to oversee cultural policy and funding (prior to that INDAUTOR was housed in the Ministry of Education).

## Border Enforcement

Although the Customs Code was amended in 2018, the changes did not provide the necessary *ex officio* authority for Customs officials to conduct independent seizures of infringing goods and components. Under the current Code, it is unclear what authority Customs officials have to seize and retain infringing materials. There remain formal and onerous requirements to initiate border actions in Mexico. For example, absent an official order from IMPI, Customs authorities will not seize infringing product entering the country, or detain it for more than a few hours, even where the material is clearly infringing. Because IMPI does not issue expedited authorizations to seize products identified by Customs as infringing, suspect merchandise is usually allowed to enter Mexico. 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.

The video game industry reports that in 2019, there were 95 seizures by Customs authorities, including the confiscation of over 39,000 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 2019, there were nine such instances). Without criminal prosecutions or other severe penalties, there are no deterrents for these parties to cease these practices; instead, shipment interdictions are treated as a cost of doing business for infringers. 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, at least one major company reported no seizures of circumvention devices by Customs in 2019. 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. The industry reports that small-quantity seizures are being dropped by prosecutors for a lack of tariff classification (which treats the material as never having been imported), requiring an appeal and additional expenses by rights holders.

Over a decade ago, FGR 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, FGR halted its seizure of in-transit containers, claiming a lack of authority, and it never implemented a new “protocol” between FGR 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 FGR, SAT, and rights holders have resulted in a few seizures of illegal imported raw material.

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 FGR 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, as in the case of the tariff classification problems. FGR should instead develop a clear unified rule on chain of custody procedures that shifts the burden to the prosecutor to prove that evidence was altered.

## **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. As noted, there are many WIPO Internet Treaties, and now USMCA obligations, that Mexico must implement once that treaty is fully ratified (and that cannot await the four-year implementation period).

One missing WTO TRIPS enforcement obligation that Mexico should address is the requirement in TRIPS (Article 61) 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 the procedural hurdles already noted regarding proof of ownership and the “for profit” motive.

## **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. It is hoped that USMCA implementation, which would include implementation of the Internet Treaties, will proceed in 2020. Draft laws for USMCA implementation are currently being prepared by INDAUTOR along with the Ministry of Economy for submission to Congress.

The full list of legal reforms (many 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) establishing third party liability and strong incentives for the operation of effective and efficient takedown notices, and remedies against repeat infringers; (iii) confirming (i.e., clarifying by separately enumerating) the making available right for works in Article 27 and 131 of the Copyright Law; (iv) criminalizing camcording (and eliminating the required proof of commercial intent); (v) raising civil penalties to deterrent levels—and including statutory damages (or “additional damages”) or the recovery of costs and attorney’s fees; (vi) amending the Criminal Code to delete the “for profit” provisions and replace them with “acts carried out for commercial advantage or financial gain or that result in substantial harm to rights holders”; (vii) amending the Industrial Property Law to give IMPI authority to initiate actions against foreign websites that infringe copyright within Mexico; (viii) amending the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates; (ix) 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; (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.

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. One positive note in 2019 was a Supreme Court case holding a hotel in violation of the right of public communication where hotel guests accessed copyrighted materials in their rooms via a hotel streaming service. In addition, 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 local content quotas (including one introduced in the Senate in 2019), which if adopted, would severely limit the distribution of U.S. films in Mexico—and, if adopted would violate the USMCA (and 1992 NAFTA Agreement), and should be opposed.

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 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 2020.<sup>1</sup>

**Executive Summary:** Russia, in recent years, has made significant reforms to its civil procedures and streamlined its processes, to require websites with infringing content to comply with rights holders' takedown notices. These reforms have allowed the Russian courts (in particular, the Moscow City Court), working with RosKomNadzor (the Federal Service on Communications and Mass Media) to disable access to infringing sites. Additionally, the court orders can extend—without reapplication to the court—to clone, proxy and mirror websites containing infringing content. Online search services are also required to exclude infringing websites (identified in the court orders) from search results. A Memorandum of Understanding (MOU) between key Russian Internet companies (Yandex, *Mail.ru* and Rambler) and rights holders—signed in November 2018—is now being re-worked into legislation for possible adoption by the Duma in 2020. The legislation would convert the MOU from a voluntary agreement to cooperate into an obligation for search engines to delist sites identified either by court order or on a registry of infringing sites, and will be broadened to cover all copyrighted works (not just audiovisual works as in the original MOU).

Overall, these reforms have blocked or slowed access to some major infringing sites and services. Unfortunately, American rights holders continue to report that these procedures are being 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. This has resulted in a substantial and persistent international copyright piracy problem, with users in major markets accessing infringing Russian sites and services. Even the most effective takedown procedures and processes to disable access to websites 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.

Two additional legal reforms are recommended: first, Russia should clarify its Civil Code on the legal liability of Internet Service Providers (ISPs), including that any safe harbors only apply to neutral and passive activities. Second, the takedown procedures should be expanded to cover mobile apps, now the most popular means of infringement. There are two other industry-specific priorities 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 camcording of motion pictures with many feature films being illegally copied in theaters and migrating online.

#### **PRIORITY ACTIONS REQUESTED IN 2020**

- Increase the number and effectiveness of criminal IPR cases focused against digital piracy, including a focus on deterrent criminal actions against organized criminal syndicates. 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 regardless of whether the servers or users are located in Russia.

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<sup>1</sup>For more details on Russia's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Russia's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



- 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, 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.
- Amend the Civil Code in Article 1299 to provide civil liability for commercial trafficking in 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.

## **THE COPYRIGHT MARKETPLACE IN RUSSIA**

**Internet Use and Piracy:** Internet access has grown exponentially in the past few years—109.4 million Russians (of a total population of 144 million) have Internet access, and of those, 92 million are mobile Internet users. However, despite laudable legal reforms to mitigate digital piracy, Russia remains home to many of the most popular illegal services in the world, with commercial-scale infringing websites, including web-based (and peer-to-peer (P2P)) downloading and streaming sites, linking sites, and cyberlockers, offering access to unauthorized music, film, video games, books and journal articles. Many of these sites cater to English-speaking and other non-Russian users, resulting in financial harm to markets outside of Russia. Some BitTorrent and other pirate sites have reportedly moved their sites to foreign hosting locations in response to the new enforcement measures (or court-ordered injunctions) directed at sites within Russia.

While the new laws have helped, most ISPs and website owners do not comply with takedown notices, absent court orders, instead merely forwarding notices to users without taking down material. 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. The 2018, MOU signed by various rights holders and Internet platforms has facilitated cooperation with the platforms who signed the MOU. The MOU, which was set to expire in September 2019, was extended until January 31, 2021. Compliance would improve overall if the MOU obligations were to be enacted into law, and applicable to all Russian platforms and search engines. One set of actors who currently do not cooperate at all with the copyright industries are the advertising agencies and payment processors that financially support infringing sites.

In April 2019, the U.S. Government included several Russian online sites on its Notorious Markets List (the 2018 list, released in April).<sup>2</sup> In that report, USTR retained *rapidgator*, *rutracker*, *sci-hub* and *libgen.io* on its list of Notorious Markets—with the two former sites a perennial presence on the lists since 2012. As USTR noted, the cyberlocker *rapidgator* collects revenue through its premium membership and subscription plans and targets itself to users outside of Russia. The other site, *rutracker.org* (formerly *torrents.ru*) 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 13 million registered users. It was subject to a blocking order (a permanent injunction) by the Moscow City Court, but then moved its

<sup>2</sup>See, [https://ustr.gov/sites/default/files/2018\\_Notorious\\_Markets\\_List.pdf](https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf).

operations to several mirror sites. The third site mentioned by USTR is *seasonvar.ru*, based in St. Petersburg, which is a streaming website of television programs with over 15,000 TV series on the site. USTR also included *vk.com* (*vKontakte*) to the list which is one of the most popular sites in the world distributing thousands of unlicensed motion picture files (even though it negotiated licenses a few years ago with some of the music companies for its use of music).

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. Additionally, Russia is a haven for the production of cloning software and the hacking of entertainment software programs. In 2019, the video game industry noted *rutracker.org*, *torrent-igruha.org* and *nyaa.si* (hosted by a Russian company) as particularly problematic, with the latter BitTorrent site, hosting 34 million visits a month, and very popular in Japan and the U.S. For the seventh 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, Ukraine. In 2019, users with Russian IP addresses accounted for approximately 32% of the global volume of detected infringements occurring on public P2P networks.

The market for recorded music should be much stronger than it is for a country the size of Russia. According to a September 2019 industry report, the per capita spending on music in Russia is only US\$.68 per year, compared with US\$20.26 per capita in the U.S. (IFPI Global Report 2019). The recording industry reports that paid download sites (e.g., *mp3va.com*) remain a source of piracy in Russia along with stream-ripping services, P2P services, linking sites and cyberlockers (e.g., *turbobit.net*), with some sites including pre-release music. The recording industry notes that some stream-ripping services are 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.com*, and in January 2019, it blocked *Flv2mp3.by*. In December 2018, a Danish Court also ordered ISPs there to block access to those sites. In April 2019, courts in Australia and Spain also blocked those sites. Examples of major stream-ripping sites 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 US\$1.50 or less). Some of the other unlicensed pay-per-download sites include: *mp3panda*, *mp3fiesta* (hosted in Russia) and *mp3eagle.com* (hosted in Russia with many of its users 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.

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 has retained *vKontakte* on the Notorious Markets List for the past three years. In its report in April 2019, the U.S. Government noted that despite the agreements with record labels, *vk.com* (now owned by *Mail.ru*) remains a source for thousands of infringing motion picture files. *vk.com* has a functionality specifically designed to enable its members to upload files, which includes hundreds of thousands of unlicensed copyrighted works, especially film materials available in many languages, including English. Beginning in 2016, *vk.com* limited access to third party apps, making it more difficult for users to download content directly, and it also has experimented with content recognition technologies. *Vk.com* also blocks infringing sites from accessing videos stored on its site, 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. The publishing industry (particularly trade book publishing), is similarly affected by e-book piracy on the site. Although the site is responsive to notifications of infringement, piracy remains a concern given the ease with which the site's users can upload and share pirated e-books and audiobooks. The video game industry reported that there has been a continuing decline in the distribution of video game items by groups distributing in-game items on *vk.com* for the past few years, and that the site has been generally responsive to takedown notices. However, in 2019 *vk.com* played a larger role in the distribution of illegal

copies of video games, including by users putting ready-to-download BitTorrent files on their social media pages on the platform.

In general, publishers report online enforcement is hampered by low compliance rates in response to rights holder notifications for links to infringing content, with many sites ignoring the notices altogether. P2P piracy providing free unauthorized access to e-books continues to be an issue as well. Book and journal publishers remain concerned by the prevalence of online book and journal piracy in Russia, particularly on hosted-content websites that are operated by Russian residents. The most egregious actor is the search engine/locker site *Sci-Hub.io* (formerly *Sci-Hub.org*) which appears to collaborate with a group of sites known as the “Library Genesis Project” (now *libgen.io*). *Sci-Hub* claims that as of October 2019, its servers hold some 79 million copyright-protected journal articles (more than 85% of articles published in toll access journals) and over 6 million books.<sup>3</sup> To further its infringing activities, *Sci-Hub* gains unauthorized access to university systems and publisher databases through compromised user credentials, obtaining the credentials through phishing schemes, and using the compromised credentials to harvest copies of copyrighted journal articles, which it then hosts on its own server network, as well as cross-posts to *libgen.io*. Notwithstanding two injunctions against the site, *Sci-Hub* unfortunately remains accessible in the U.S. The *Libgen* site encourages the creation of mirror sites of all of its content, and several such sites remain active.<sup>4</sup> In October 2018, publishers successfully sought an injunction to block the sites’ primary domain in Russia. In 2019, a permanent block issued against *Libgen.org*, while a permanent injunction against the primary site’s continued operation in Russia is expected to take effect this year. In December 2019, the Department of Justice (DOJ) confirmed that it is investigating the founder and operator of *Sci-Hub*, on suspicion this individual is working with Russian intelligence to steal U.S. military secrets from defense contractors.<sup>5</sup>

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 is the agency responsible for enforcement of these laws, and as noted, has been effective and cooperative with rights holders in implementing the new laws, in coordination with the Moscow City Court.

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<sup>3</sup>“Sci-Hub provides access to nearly all scholarly literature.” <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5832410/>.

<sup>4</sup>Active mirror sites include: *b-ok.cc*, *b-ok.org*, *b-ok.xyz*, *b-ok2.org*, *bookfi.net*, *bookre.org*, *gen.lib.rus.ec* (main site), *lib.rus.ec* (main site), *libgen.is*, *libgen.lc*, *libgen.me*, *Libgen.org*, *libgen.pw*, *fiction.libgen.me*, *libgen.li*, *bookslabs.xyz*, *collegefun.org*, *booksdescr.xyz*, and *openlib.xyz*. In a 2015 case brought by an AAP member company, *Sci-hub.org*, the Library Genesis Project (*Libgen*), and its operators were found to have engaged in infringing activity by a court of the Southern District of New York, for the unauthorized reproduction and distribution of journal articles, and to have violated the Computer Fraud and Abuse Act, for *Sci-Hub*’s intrusions into publisher databases. Damages in the amount of \$15 million were awarded, and a permanent injunction issued. In November 2017, following another case brought by another AAP member company, a district court in Virginia issued a second default judgment against *Sci-Hub* (then at *Sci-Hub.io*) of \$4.8 million, enjoining *Sci-Hub* and “those in active concert or participation with them” from infringing the publisher’s copyright, and also ordered “any person or entity in privity with *Sci-Hub* and with notice of the injunction, including Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries, cease facilitating access to any or all domain names and websites through which *Sci-Hub* engages in unlawful access to, use, reproduction, and distribution” of the publisher’s trademarks or copyrighted works.

<sup>5</sup>For a newspaper account of this investigation, see: [https://www.washingtonpost.com/national-security/justice-department-investigates-sci-hub-founder-on-suspicion-of-working-for-russian-intelligence/2019/12/19/9dbc6e6-2277-11ea-a153-dce4b94e4249\\_story.html](https://www.washingtonpost.com/national-security/justice-department-investigates-sci-hub-founder-on-suspicion-of-working-for-russian-intelligence/2019/12/19/9dbc6e6-2277-11ea-a153-dce4b94e4249_story.html).

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 that safe harbors apply only to activities that are merely neutral 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 after notice and takedown to block access to infringing materials or websites. In 2014, amendments expanded the subject-matter scope of 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 the mirror site; an administrative procedure is then used to block mirror site. 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 of a rights holder’s request—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 the subject of 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\$11,300) for search engines that do not comply with de-indexing orders. An additional change was adopted on April 23, 2019 in a Resolution of the Plenum of the Supreme Court (revising Chapter IV of the Civil Code), which amended existing practices to permit the use of screenshots of websites with unauthorized material on them to be treated as sufficient evidence to obtain a court order under the (2015, 2016 and 2017) laws.

A 2018 proposal before the Duma would apply the same website blocking procedures to mobile apps. There are two other pending proposals (recommended by the Ministry of Culture): one to block anonymous pirate websites without applying to a court; the other to accelerate enforcement of site blocking orders (from three days to one day). 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 illegal online 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 2017 to provide monetary penalties (up to 800,000 rubles; US\$12,917), 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 results of all of these new civil laws and procedures have been positive, with increasing numbers of injunctions, including permanent injunctions issuing against various infringing Russian websites. Overall, some sites have seen dramatic decreases in traffic right after such orders (and some sites have even moved out of the country). While these actions are commendable, without the deterrence of criminal prosecutions against the owners and operators of infringing sites and services, many simply resurface in new guises. The motion picture industry reports that in 2019, more than 2,500 domains of copyright infringing websites were blocked (15% the result of court orders and 85% the result of RosKomNadzor decisions against mirror sites, and that since 2015, the annual numbers of sites taken down or blocked have increased yearly. The music industry reports that, to date, over 2,000 music-related sites have been blocked.

The video game industry alone identified over 95 video game-oriented piracy websites blocked in 2018, and 42 sites blocked in 2019. 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* and *rutracker.org* retain millions of monthly users in spite of the laws.

As noted, there was a November 2018 MOU with rights holders (almost exclusively Russian), search engine operators and social networks for operators and networks to remove URLs to illegal content (i.e., audiovisual works), first set to expire in late 2019; it has now been extended until January 31, 2021. A legislative substitute is also under consideration to establish mandatory obligations for operators and networks, and make the current MOU terms applicable to all works, including books, music, and business and entertainment software (video games). In January 2020, RosKomNadzor reported that during the initial term of the MOU (November 2018 to the end of 2019), 2.1 million links were delisted.

**Criminal Enforcement Including Against Online Piracy:** According to the Ministry of Interior, the reported number of crimes related to copyright violations decreased by 22% from January to October 2019 from the same period in 2018. Since the copyright industries continue to report high levels of piracy, criminal enforcement appears to have declined in Russia, continuing the trend of the past several years. Criminal enforcement in Russia has unfortunately, not focused enough on digital piracy. A few industries, such as IFTA, report that physical piracy remains a problem for independent producers and distributors (although not as large a problem as digital piracy). 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.

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 and 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.

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, only the Economic Crime Police are 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.

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. 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 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). However, 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 with respect to 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; the Code should be amended. At present, 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.

**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 sell illegal hard copies. In the past four years, 201 MPA-company films have been camcorded in Russia and, an additional 144 audio-only recordings were sourced from Russia. The total number of sourced audiovisual camcord copies from Russia decreased very slightly in 2019 to 45 (down from 48 in 2018); in 2019 there were 30 audio-only recordings sourced 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 of fair quality, but they remain in high demand by international criminal syndicates. Copies of major film titles often appear online within a few days of theatrical release, damaging revenues worldwide and across the economic lifecycle of the film. The Russian-Anti Piracy Organization (RAPO) assists security personnel (trained by RAPO) whenever possible with interdictions. To address the camcord problem, the Government of Russia needs to amend Article 146 of the Administrative Code; it has been reported that this legislation may be delayed until 2021. The government should also properly resource and undertake more effective enforcement against illegal camcording of motion pictures.

**Civil Enforcement in General:** Civil measures are not capable of providing the requisite level of deterrence against this type of piracy. However, if, properly applied, civil enforcement can be a useful tool for some industries (as it has in the courts' actions against some websites), but this is not viable for all parties and especially independent creators, such as independent film and television producers. For those who are able to pursue civil enforcement, there remain many inadequacies, including: (i) remedies limited to the seizure of specific copies of works that are the object of a lawsuit; (ii) failure to award preliminary injunctions (although 2013 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) absence of personal liability for the directors of infringing companies or enterprises (the only way to bring proceedings in cases where bogus companies operate); (vi) absence of the notion of clear contributory liability under the Russian civil law system dealing with copyright infringements; and (vii) absence 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 imposed by the courts are already too low; further lowering the permissible levels will not be a deterrent. 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\$24 to US\$32), 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\$485 to US\$646), 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.

**Collective Administration:** In 2017, legislation was enacted (in force, 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, 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.”<sup>6</sup> 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

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<sup>6</sup>The U.S. Government last 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>.

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 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.

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

Russia has made progress on legal reforms but gaps remain, 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 define ISPs and the various services they provide, nor does it link liability and safe harbors in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy. Lastly, it does not define secondary liability. 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 of 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.<sup>7</sup>

Article 1299 of the Civil Code prohibits the commercial distribution (i.e., trafficking) in circumvention devices and services that circumvent technological protection measures (TPMs). The law needs to be expanded so that liability applies to the commercial trafficking in all variety of circumvention devices and services. In addition, commercial trafficking in circumvention devices—including by importation—should also be criminalized. IIPA also 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.

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<sup>7</sup>For 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.

## **MARKET ACCESS ISSUES**

There are four existing laws harming the marketplace for audiovisual content in Russia.

In 2015, a law went into force banning advertisements on pay cable and encrypted satellite channels. The law does not affect state-owned television channels because they do not rely on advertising revenue, and exempts terrestrial broadcasters who are heavily dependent on ad revenue. As a result, the law significantly impacts the market for cable and on-demand services, including those services operated by foreign companies, and hinders the growth of the pay-TV industry in Russia.

In 2017, a Mass Media Law amendment was adopted which regulates and licenses online film websites, including streaming platforms, and which limits foreign ownership of such sites to 20%. 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/month). The usage calculation is very unclear, with severe consequences for violations, including barring a foreign entity or individual from owning or participating in these businesses entirely. The law was opposed by Russian and foreign film distributors (as a violation of international treaties) and website owners fearing that, upon adoption, it would become a tool to limit legal websites while alternatively resulting in more, not fewer, piratical film sites. Although it was initially thought to be a law 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.

Further, Russia imposes customs duties on the royalty value of some imported audiovisual materials (which include video games), rather than solely on the value of the physical carrier medium. In practice, however, digital distribution has mitigated its impact, and there have been few reported disputes with the customs authorities on this matter in the past two years. The Value Added Tax (VAT) 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 (which was raised to 20% on January 1, 2019). This is a WTO violation because it denies national treatment for taxes on identical foreign products.

There have been several proposals to limit the percentage of screens that can be taken by any single film. One proposal would limit 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 WTO obligations.

In December 2019, a new law was enacted requiring manufacturers of electronic devices to install Russian software on all smartphones, computers and other devices (by July 1, 2020). The practical implication of this new law remains to be seen and also depends on the software required to be installed. The copyright industries urge the government to ensure that no unlicensed content distribution apps are installed.

# SOUTH AFRICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR place South Africa on the Priority Watch List in 2020.<sup>1</sup> IIPA further recommends that through the Generalized System of Preferences (GSP) review, the U.S. Government continue to send a clear message that the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB) are fatally flawed, and work with the South African Government to remedy the deficiencies in South Africa's legal and enforcement regimes, including by redrafting the bills to address the serious concerns detailed below and in IIPA's previous submissions. If, at the conclusion of the review, South Africa has not made requisite improvements, the U.S. Government should suspend or withdraw GSP benefits to South Africa, in whole or in part.

**Executive Summary:** South Africa's current copyright protection and enforcement framework is not up to the challenges of the digital age. New technologies are providing South Africa's consumers with increasing access to legitimate creative content and exciting opportunities for the growth of the copyright industries and all creators. Unfortunately South Africa's inadequate response to growing piracy enabled by these same technologies threatens to undermine this progress. 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—by ensuring that rights holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their content and develop new legitimate services. IIPA is encouraged that 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.

IIPA is seriously concerned, however, about two bills that are sitting on the President's desk, which are not only inconsistent with the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), but, if enacted, would also violate South Africa's obligations under the TRIPS Agreement, potentially violate South Africa's Constitution, and move South Africa even further away from international norms. Since 2015, South Africa has embarked on a project to update and amend its Copyright Act and Performers' Protection Act, which, after numerous revisions, resulted in two fundamentally problematic bills—the CAB and the PPAB. These bills raise many concerns, including that they undermine the potential of the modern marketplace because they fail to establish a clear legal framework—particularly in the digital arena where the potential for growth is most evident. Many of these defects stem from an approach that focuses on government interference in negotiations and the distribution of revenue from licensing, rather than on laying a foundation for a vibrant free market in creative materials. A number of troubling issues in the bills have clear potential to drive a formal challenge in the Constitutional Court. Among these, the bills' inadequate protections for trade of copyrighted works and sound recordings in the digital environment would render South Africa's law incompatible with the very standards the government has stated an intention to implement.

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 require redrafting, not only to address their deficiencies as outlined by multiple stakeholders, but also to reduce ambiguity and thereby establish greater certainty in the law

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<sup>1</sup>For more details on South Africa's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of South Africa's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



for rights holders and users alike. As currently drafted, the bills would put South African creators and artists at a serious disadvantage relative to their counterparts in other countries. 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 continue to send a clear message that the proposed bills are fundamentally flawed and should be returned to Parliament due to fundamental reservations regarding their constitutionality (as has been raised by local creators and copyright owners) for redrafting to address the concerns of *all* stakeholders and ensure the provisions comply with international agreements.

## **PRIORITY ACTIONS REQUESTED IN 2020**

- Redraft the CAB and the PPAB to make them implementable, ensure compatibility with international agreements and commitments, and 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 WIPO Internet Treaties.
- Monitor implementation of 4G and 5G networks to ensure it does not lead to a higher level of piracy, and improve education and increase enforcement commensurate to the increased threat.

## **COPYRIGHT LAW IN SOUTH AFRICA**

Significant reforms are needed to South Africa's Copyright Law and Performers' Protection Act in order to bring the country's laws into compliance with international agreements, including TRIPS, and the WIPO Internet Treaties.<sup>2</sup>

In 2017, a CAB was introduced, which was preceded by a PPAB, intended to bring South Africa's laws into compliance with international agreements. However, as IIPA detailed in extensive comments to the Portfolio Committee of the National Assembly of the South African Parliament, these bills fell far short of international norms for the protection of copyrighted works in the digital era. Following criticism from many local and foreign rights holder groups, including IIPA, the Portfolio Committee undertook a revision of the bills, culminating at the end of 2018 in revised versions of the CAB and the PPAB.

Unfortunately, the revisions of the CAB and the PPAB addressed only a few discrete problems; many of the most problematic provisions for rights holders carried over to the new versions. Moreover, even more troubling provisions were introduced in the new versions. This process transpired without adequate consultation with the public. Where opportunity for public consultations was provided, comments submitted by rights holders apparently were disregarded entirely. These two highly problematic bills were adopted by the National Assembly in December 2018, and by the National Council of the Provinces in March 2019. At the time of this filing, the bills continue to await Presidential assent.

While there seems to be some consideration of the bills in process at the Presidential level, the bills contain many provisions that 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 bills would severely restrict 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. These restrictions would fundamentally impair the value of copyrighted materials by depriving rights holders of the ability to license and otherwise derive value from their copyrighted works and sound recordings. For example, both the CAB and the PPAB limit certain

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

assignments of rights to a maximum of 25 years, and both bills provide ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly any transfer or use of rights.

- The bills would create an overbroad amalgamation of copyright exceptions that includes a more expansive version of the U.S. “fair use” rubric appended to a proliferation of extremely open-ended new exceptions and limitations to copyright protection (on top of “fair dealing” provisions), resulting in a vast and unclear thicket of exceptions and limitations.
- The bills would overly regulate the relationship between creative parties, including mandating the mode of remuneration for audiovisual performers, which would undermine the digital marketplace and severely limit the ability of rights holders to exercise exclusive rights in their copyrighted works and sound recordings, rather than providing a robust legal framework for the protection of creative works within which private parties could freely negotiate the terms of their relationships.
- The bills would not provide adequate criminal and civil remedies for infringement, including online piracy, and would deny rights holders the ability to effectively enforce their rights against infringers, thus thwarting the development of legitimate markets for copyrighted works and sound recordings.
- The bills’ provisions on technological protection measures are inadequate, and overbroad exceptions to prohibitions on the circumvention of such measures will further impinge on the ability of legitimate markets for copyrighted materials to launch and develop.

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) and the Berne Convention (Article 9). Moreover, aspects of both bills are incompatible with the WIPO Internet Treaties.

## **2018 COPYRIGHT AMENDMENT BILL (CAB) AND PERFORMERS’ PROTECTION AMENDMENT BILL (PPAB)**

Beyond their individual failings, the two bills suffer from fundamental systemic failings that are not amenable to discrete fixes. Rather than incentivize new creative output, many of the proposals in the CAB and the PPAB are based on a false premise, i.e., 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. This premise is incorrect, and will instead result in a stagnation of South Africa’s cultural community. Without a fundamental reset of its copyright reform process, 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, and minimal restrictions on contractual freedoms, to allow the creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats, at all price points. 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 CAB 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 is already enumerated in the Copyright Act, as amended by the CAB. Thus, in addition to the very significant flaws in the bills described below, from a technical perspective, the bills are inadequate and risk introducing widespread uncertainty into South African law.

## **1. Severe Intrusions into Contractual Freedom**

Several provisions in the CAB 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 CAB and 3A(3)(c) of the PPAB limit the term of assignments for literary and musical works and performers' rights in sound recordings, respectively, to a maximum term of 25 years from the date of 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, by 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 for the creation and use of sound recordings. This would risk serious harm to the recording industry, performers, and other creators in South Africa because a major incentive for investment would be removed through the effective halving of the term of assignment of recordings from 50 years to 25 years.

In effect, these provisions would make it impossible to clear rights in many works after 25 years, rendering these works unusable, with no one able to receive any revenues from them. Sound recordings typically involve performances from a large number of performers. The copyright owner of a sound recording (i.e., the record company) will often have a long-term relationship with the featured artist, but is far less likely to have such a relationship with, for example, a performer who entered into a one-off agreement to provide the backing vocals or other musical performances in the sound recording. Under the PPAB, each such performer would have rights that, according to Section 3A, would be transferred to the copyright owner (the record company in most cases) to enable the copyright owner to license the use of the sound recording by third parties. Yet Section 3A provides that the record company would cease to have those rights after 25 years, meaning that the record company would need to seek out thousands of performers (with whom, in the case of session or "backing" musicians, the company often has no long-term relationship) to obtain their mutual consent to an extension of the 25-year term. The inability to locate just one session musician involved in a sound recording would render the sound recording unusable, ending the revenues that come to record companies, performers, authors, or publishers from the exploitation of that recording. That cannot be the intent of this legislation.

Section 3A would have a broader negative effect on performers. Introducing new artists to the market and promoting their careers require large upfront investment from record companies, with no certainty 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 by record companies in new talent. The provision requires urgent reconsideration to avoid the serious harm that it risks causing to all participants in the South African music industry. Moreover, although audiovisual works are now excluded from this provision, its enactment would nevertheless 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 film production in South Africa.

**B. Sweeping ministerial powers to set contractual terms:** Section 39 of the CAB and Section 3A(3)(a) of the PPAB create ministerial powers to prescribe "compulsory and standard contractual terms," including setting royalty rates regarding "uses" of copyrighted works and across any form of agreement covering 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.

These provisions would unfortunately restrict the flexibility in transfer agreements between sound recording performers and producers. That flexibility is needed to address the varying relationships between performers and copyright owners. 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 inevitably 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:** The CAB includes a proposal (Section 8A) to regulate the remuneration terms of private contractual agreements between performers and copyright owners. Even though it proposes a significant interference into private contractual arrangements, to the particular detriment of certain performers, Section 8A was never 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. While Section 8A may be intended to provide appropriate remuneration to performers, in practice, the proposal would cause substantial harm to a large category of the performers who perform background roles.

Audiovisual works are comprised of performances by lead/featured performers and extra/non-featured performers. Lead or featured artists are remunerated in accordance with the terms they have negotiated with the producer, and these terms almost invariably are on a royalty basis (in addition to lump-sum advances). Extra/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 longer-term partnerships with producers.

Unfortunately, Section 8A appears to propose removing the possibility of lump-sum payments and replacing them with royalty payments. Rather than benefitting performers, this provision would in fact result in many performers, who otherwise would receive remuneration from performing in an audiovisual work, receiving little or nothing from the exploitations of the work. This is because many creative projects are loss-making for the producer. As a consequence of proposed Section 8A, extra/non-featured performers would no longer enjoy being paid a lump sum immediately in return for their one-off performances and would instead have to wait to be remunerated on a royalty basis, which would only happen if the work in question actually succeeded in generating revenues. The current commercial practices avoid that outcome by paying extra/non-featured performers on a lump sum basis, irrespective of whether the works in which they perform succeed or 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 CAB are further compounded by the prohibition on contractual override in Section 39B(1), which prohibits any contractual terms that deviate from the provisions of the bill, 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 diminished to the level of mere remuneration rights. Furthermore, providing mere remuneration rights with respect to distribution and rental, subject to rate-setting by the Tribunal (Section 5(3)(b)), would prejudicially devalue these performers' rights. Experience in South Africa, and internationally, shows that Tribunal-set remuneration falls well below the commercial value of the rights licensed.

Section 5(1)(b) would also substantially and detrimentally disrupt the sale and rental of sound recordings and audiovisual works because one set of rights would be subject to private negotiation (the producers' rights), and the performers' rights would ultimately be subject to Tribunal rate-setting. The consequence would be a transfer of value from those who create and invest in recorded performances to the licensees of those performances, the latter likely ending up paying less, resulting in reduced revenues for producers to invest in South African performers.

### **3. Fair Use**

The CAB drastically expands the exceptions and limitations to copyright in South Africa's law for, among other things, 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 Internet 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.<sup>3</sup>

While it is true the proposed "fair use" provision resembles certain aspects of the fair use statute in U.S. law, it is inaccurate to contend, as some have suggested, that South Africa is proposing to adopt U.S. fair use. South Africa's proposed broader fair use provision, along with the other proposed exceptions and limitations to copyright protection, are blatantly inconsistent with the three-step test, which is the internationally-recognized standard that confines the scope of copyright exceptions and limitations,<sup>4</sup> for the following reasons:

- First, South Africa lacks a deep and rich body of case law that, in the United States, helps to mitigate the inherent uncertainty of the scope or applicability of the fair use exception. Without the foundation of a well-developed body of case law, South Africa's untested broad fair use doctrine would only result in uncertainty for both rights holders and users on the parameters of permissible uses (since U.S. fair use is determined on a fact-intensive case-by-case basis).<sup>5</sup> Compounding this shortcoming is that high legal fees and protracted timeframes for cases in South Africa will deter and undermine efforts by rights holders to access the courts in hopes of confining this broad exception. The International Center for Law & Economics, analyzing whether the U.S. should require trading partners to adopt U.S.-style fair use, concluded that "the wholesale importation of 'fair use' into other jurisdictions without appropriate restraints may not result in a simple extension of the restrained and clearly elaborated fair use principles that exist in the U.S., but, rather,

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<sup>3</sup>See *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/za/cases/ZAGPJHC/2016/228.pdf>.

<sup>4</sup>See, e.g., Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention.

<sup>5</sup>Although a handful of countries have recently enacted fair use provisions, IIPA is not aware of any significant case law that has been developed under the fair use statutes in any of these countries.

something completely different, possibly even a system untethered from economics and established legal precedents.”<sup>6</sup>

- Second, the South Africa proposal includes language even broader than the U.S. fair use statute, which further heightens the uncertainty discussed above, and the risk that an unacceptably wide range of uses in South Africa will be considered “fair” and non-infringing. For example, the proposal includes “ensuring proper performance of public administration” as among the purposes to which fair use is applicable. Extending fair use to such undefined access and use purposes that are not included in the U.S. statute adds to the uncertainty of how South Africa’s judges will apply fair use, and the risk that they will apply the fair use doctrine well beyond the scope of its application in the United States. In addition, the South Africa proposal requires that “all relevant factors shall be taken into account, including but not limited to” the four factors imported from U.S. law. This dictate to consider “all relevant factors,” which is not affirmatively stated in U.S. law, could similarly result in a broader range of uses in South Africa considered “fair” than those permitted under U.S. law. Therefore, rather than proposing to adopt U.S. fair use, South Africa has proposed a new copyright exception, borrowing certain statutory language from the United States, while adding new and broader language, and without incorporating the corpus of U.S. jurisprudence that is integral to defining the scope of U.S. fair use and its interpretation.
- Third, the proposal retains South Africa’s existing “fair dealing” system, while expanding the impact of fair dealing exceptions by effectively removing the limiting standard of “fair practice.” It also introduces 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. A 2017 study by PricewaterhouseCoopers looked at the impact of these broad exceptions on the South African publishing industry, and predicted “significant negative consequences” would result from the adoption of the proposed fair use provision and the other broad exceptions.<sup>7</sup> Taken alone, the “fair use” and the “fair dealing” aspects of the proposed bill are each too broad. Taken together, the proposed “hybrid” model creates an unprecedented mash-up of exceptions and limitations that will deny rights holders fundamental protections that enable licensing of their copyrighted works and sound recordings, and, because the provision is drafted so unclearly, will also deny users certainty regarding what works and what uses are permissible without a license.
- Fourth, the uncertainty that will be caused by the proposed hybrid model is particularly problematic in South Africa because its legal system lacks statutory and punitive damages, which rights holders in the U.S. rely on to deter and remedy infringement, and enforcement in South Africa has been historically inadequate. As a result, bad actors in South Africa would be undeterred from taking advantage of the uncertainty created by these exceptions to infringe copyrights. A copyright system that consists of open-ended and unclear exceptions, weak affirmative rights, and non-deterrent enforcement is the archetype for inadequate and ineffective protection of intellectual property rights.
- Fifth, the risks posed by the fair use provision, and the other unclear and very broad exceptions discussed above, are further compounded by the prohibition on contractual override in Section 39B(1) (discussed below), which renders unenforceable any contractual term that prevents or restricts a use of a work or sound recording that would not infringe copyright under the Copyright Act (as amended by the CAB).

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<sup>6</sup>See International Center for Law & Economics *Dangerous Exception: The Detrimental Effects of Including ‘Fair Use’ Copyright Exceptions in Free Trade Agreements*, 15 (2015), [http://laweconcenter.org/images/articles/dangerous\\_exception\\_final.pdf](http://laweconcenter.org/images/articles/dangerous_exception_final.pdf).

<sup>7</sup>See *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>. 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 CAB, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

For these reasons, if the proposed legislation is enacted, South Africa's legal framework for exceptions and limitations to copyright protection would clearly violate South Africa's international obligations, would be inconsistent with international treaties it has stated an intent to join, and would further erode the already inadequate level of copyright protection in the country.

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

**D.** Section 12B(1)(a) provides a broad and circular exception for quotation, permitting any quotation provided that "the extent thereof shall not exceed the extent reasonably justified by the purpose," but without enumerating the permitted purposes such as, for example, criticism and review. 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 12D(7)(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 for persons with disabilities, which is defined as, essentially, disabilities that relate to the ability to read books. This provision would benefit from tighter drafting. While South Africa is not a signatory to the Marrakesh VIP Treaty, it would be prudent to bring provisions designed to facilitate access for visually impaired persons in line with the Treaty by including the requirement that the exception may apply only to authorized entities.

## **5. Exclusive Rights of ‘Communication to the Public’ and ‘Making Available’**

The CAB would add Section 9(f) to the Copyright Act, confirming that sound recording producers have the exclusive making available right set out in WPPT Article 14. This is a positive clarification, as this right underpins the digital music industry. However, the wording of proposed Section 9(e) regarding sound recording producers’ exclusive right of communication to the public, omits an express reference to “public performance,” as provided for in the WPPT definition of “communication to the public,” which explicitly “includes making the sounds or representations of sounds fixed in a phonogram audible to the public.” To avoid ambiguity in the legal framework, 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 proposed Section 9A(aA) (and equivalent provisions in relation to exploitation of other categories of works, and in the PPAB with respect to performers’ rights) is not clear. While it is understood that these provisions are intended to ensure accurate reporting of authorized uses of works, to the extent they could be interpreted as providing a legal license for such uses, they would be wholly incompatible with the WIPO Internet Treaties, while undermining the economic feasibility of South African creative industries. These provisions should therefore be clarified to avoid any such confusion.

## **6. Technological Protection Measures**

Technological protection measures (TPMs) are vital tools for the copyright-based sectors in the digital era, enabling creators and rights holders to offer consumers their desired content, at the time and in the manner of their choosing, while also empowering rights holders to explore new markets opened up by current and emerging technologies. It is welcome that the CAB introduces provisions (and the PPAB incorporates them by reference) on TPMs. Unfortunately these provisions are completely inadequate, and therefore fall short of the requirement of Article 18 of WPPT and Article 11 of the WCT that contracting parties provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”

This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the creative industries. While the recorded music industry in South Africa is now predominantly a digital industry, piracy remains a serious obstacle to continued growth in this area. The introduction of adequate provisions on TPMs is therefore essential to protect against piracy and enable the development of new business models. Moreover, many film and television producers are seeking to respond to consumer demand by establishing online platforms to provide content to consumers or licensing film and television programming to online services. TPMs are essential to the functionality of these platforms and to the licensing of this high-value content.

First, the definition of “technological protection measure” in Section 1(i) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies designed to have that effect or control access to copies of works. The plain reading of this definition would be that a TPM that is circumvented is therefore not one that prevents or restricts infringement (because it has not achieved that aim), and therefore the circumvention of it is not an infringement. The provision should be clarified to ensure that a protected TPM is one that effectively protects a right of a copyright owner in a work, or effectively controls access to a work. Furthermore, paragraph (b) of the definition should be removed; that a TPM may prevent access to a work for non-infringing purposes should not have the effect of removing its status as a TPM. This provision is furthermore inconsistent with the proposed exception of Section 28P(2)(a), which is intended to enable the user to seek assistance from the rights

holder in gaining access to the work for a permitted use. As it stands, paragraph (b) of the definition 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 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 encompasses a broader range of harmful TPM circumvention devices, consistent with best international practices.

Finally, the exceptions in Section 28P regarding prohibited conduct with respect to TPMs (in Section 28O) are inadequately defined, therefore rendering them incompatible with 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 not to perform an act permitted by an exception.<sup>8</sup> Additionally, a provider of an unlawful circumvention technology could rely on Section 28P(1)(b) to claim it is acting lawfully merely by showing that the technology can be used to access a work to perform a permitted act. There is a substantial risk that this provision would be abused by those providing circumvention technologies for unlawful purposes. The same is true of Section 28P(2)(b), which permits assisting a user to circumvent TPMs after a “reasonable time.”

## **7. Penalties for Infringement**

The CAB 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 2018 there were an estimated 32.5 billion total visits to streaming piracy sites across both desktops and mobile devices.<sup>9</sup> 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.

IIPA reiterates its recommendations to introduce enforcement provisions that are effective in the digital age and protect the online marketplace, such as: (1) ensuring online platforms do not make or allow unauthorized use of copyrighted works on their platforms; (2) preventing the unauthorized distribution of electronic formats of 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 CAB adds a Schedule 2 to Section 22(3), which would allow any person to apply to the Tribunal for a license to make a translation of a work, including broadcasts, or to reproduce and publish out of print additions for “instructional activities,” with few limitations. To the

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<sup>8</sup>In this regard, see the discussion above regarding the proposed “fair use” and other unclear and overly broad exceptions proposed in the bills, which would compound this problem.

<sup>9</sup>This estimate is based on SimilarWeb data, taking into account streaming sites with at least 10,000 copyright removal requests in the year according to the Google Transparency Report.

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 be inconsistent with industry standards and contrary to the interests of those rights holders, the users (licensees), and the public at large. Joint sound recording producer and performer organizations operate in some 40 territories. By working together on the licensing of rights, performers and producers save costs, increasing the proportion of revenues returned to them. This also reduces transaction costs to users, who can take a license from one CMO that covers both performers’ and producers’ rights. The provision should be clarified.

As a general point, 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 CAB contains concerning provisions that revert rights to the government in situations that could discourage investment, while unnecessarily diminishing the public domain. The proposed Section 5(2) transfers to the state all rights in works “funded by” or made under the direction or control of the state. This provision could be broadly interpreted to include works developed with a modicum of government involvement and may well diminish incentives for public-private cooperation in creative development.

## **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, and for literary, musical, and artistic works, the term of protection is 50 years from the author’s death or 50 years from publication if first published after the author’s death. The CAB should be revised to include a proposal to extend the term of protection for copyrighted works and sound recordings to 70 years. This will provide greater incentives for the production of copyrighted works and sound recordings, and also provide producers with a stronger incentive to invest in the local recording industry, spurring economic growth, as well as tax revenues, and enabling producers to continue offering works and recordings to local consumers in updated and restored formats as those formats are developed.

## **MARKET ACCESS 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%, this onerous 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. Improved infrastructure and accessibility to broadband internet has changed the landscape of copyright piracy in South Africa over the last decade. Physical piracy (e.g., sale of pirated CDs and DVDs) is not as prevalent as it used to be, although the sale of USB drives and CDs containing pirated music, especially of local artists and gospel songs that are not available online, remains a concern. The dominant concern in South Africa, however, is increasing piracy in the digital environment.

**Internet Piracy:** Although South African consumers have increasing options available to stream legitimate creative content, online piracy continues to grow in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. South Africa's government recently agreed to open the spectrum paving the way for implementation of 4G and 5G networks. While this will boost distribution and consumption of legal content, without efforts to increase education and improve enforcement, it also will likely lead to higher levels of 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. South Africa needs 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 memory sticks pre-loaded with infringing content or apps continue to grow in popularity in South Africa. Consumers use these devices to bypass subscription services or to consume unauthorized copyrighted content such as music, movies, TV series, or sporting events. These devices are most commonly sold to South African consumers online. 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 could be replicated in South Africa. It is critical for South Africa to gain more understanding of these approaches and to work proactively with experts from the applicable creative industry sectors to localize and implement similar programs.

**Parallel Imports:** The Copyright Law does not protect against parallel imports. As a result, the motion picture industry has sought protection under the Film and Publications Act. 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:** South Africa's enforcement framework is not up to the challenge of its counterfeiting and piracy problems. Border enforcement is inadequate because of a lack of manpower, and lack of *ex officio* authority, which places a burden on the rights holder to file a complaint and institute costly proceedings to ensure that goods are seized and ultimately destroyed. Civil enforcement is not a practical option because a High Court application or action currently takes two to three years to be heard. And criminal enforcement suffers from a lack of specialized prosecutors and judges equipped to handle intellectual property cases. South Africa recently set up a specialized unit tasked with financial crimes and counterfeiting (known as the "HAWKS" unit), but it does not appear to be adequately

resourced or have a suitable remit to take effective action against digital piracy. There is also a need for ongoing training and education for South Africa's police and customs officials to improve the process for detention and seizure of counterfeit and pirated goods. In particular, law enforcement officials should better understand the arduous procedures and timelines in the Counterfeit Goods Act (which prohibits rights holders from getting involved in many of the required actions), including that non-compliance will result in the release of counterfeit and pirated goods back to the suspected infringer. The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the law that rights holders rely upon for title, site, and link take downs. The lack of cybercrime inspectors continues to limit the full potential of this law. To facilitate a healthy online ecosystem, South Africa should appoint cybercrime inspectors and develop a cybercrime security hub recognizing copyright as one of its priorities.

The enactment of the Films and Publications Amendment Act, No. 11 of 2019, which extends application of the Films and Publications Act to online distributors of publications, films, and video games, could be a positive step for enforcement because it establishes an Enforcement Committee for investigating and adjudicating cases of non-compliance with any provision of the Act. Once it enters into force, South Africa's government should implement the Act to improve enforcement against online piracy.

IIPA encourages South Africa to enact the Cybercrimes Bill, which was passed by the National Assembly in November 2018, and focuses on cyber-related crimes, including copyright infringement through peer-to-peer networks. Financial institutions that become aware their computer systems were involved in the commission of an offense are required to report the offense to the Police Service within 72 hours. It is unclear when this bill will be considered by the National Council of Provinces; but enactment of this Bill would provide additional enforcement tools to combat online infringement.

The Interpol Intellectual Property Crime Conference held recently in Cape Town provided local law enforcement with information on best practices and resources for combatting IP theft, including access to the Interpol Intellectual Property Investigators Crime College (IPIC). Law enforcement should take advantage of these initiatives, including the IPIC training courses to assist with local and regional training of new and existing units.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

In November 2019, USTR opened an investigation, including holding a public hearing in January 2020, to review country practices in South Africa regarding intellectual property rights and market access issues, and to determine whether South Africa still qualifies for beneficiary status under the GSP. Under the statute, the President of the United States must consider, in making GSP beneficiary determinations, "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." IIPA requests that through the GSP review, the U.S. Government continue to send a clear message that the proposed CAB and PPAB are fatally flawed, and work with the South African Government to remedy the deficiencies in South Africa's legal and enforcement regimes, including by redrafting the bills to address the serious concerns detailed above and in IIPA's previous submissions. If, at the conclusion of the review, requisite improvements are not made by the Government of South Africa, IIPA requests that the U.S. Government suspend or withdraw GSP benefits to South Africa, in whole or in part.

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

**Executive Summary:** The creative industries make considerable contributions to Taiwan's economy, but online piracy and other barriers continue to limit access to Taiwan's market for the U.S. creative industries. Once a regional leader in establishing policies that fostered and rewarded creativity, Taiwan has done little in recent years to address its online piracy problems. Instead, Taiwan's government has mostly shrugged off the issue as industry's problem, too controversial, or the problem of other jurisdictions. Yet data suggests that the public in Taiwan would support more effective protection of creative content online, which would also further the Taiwanese Government's stated interest in negotiating a bilateral trade agreement with the U.S.

Online piracy is a serious problem in Taiwan, where laws and local enforcement agencies are struggling to address a growing and complex piracy ecosystem. Piracy websites and software applications (apps) are increasing and facilitating various forms of piracy, including stream-ripping and the proliferation of Piracy Devices (PDs). Illegal camcording has reemerged as a significant concern. 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. One bright spot in 2019 was that Taiwan amended its Copyright Act to provide a clear legal basis for taking action against the proliferation of piracy apps and devices. It is now incumbent upon Taiwan's enforcement authorities to use these new tools to their maximum effect and take action against these unlawful activities, as well as against other forms of piracy that pollute Taiwan's online marketplace.

Taiwan's government needs to update its legal framework to combat its evolving and mounting piracy problems, and should remove other barriers to its market. The government should take the opportunity presented by its legal reform process to draft and pass amendments to the Copyright Act to provide the statutory tools necessary to effectively address Internet piracy. Unfortunately, two separate sets of draft amendments to the Copyright Act under consideration not only fail to address deficiencies in Taiwan's legal framework, but would further weaken it and raise questions regarding Taiwan's commitment to its existing international obligations. While neglecting to take adequate measures to restrict infringing content from its marketplace, Taiwan has been increasingly erecting barriers to its market for legitimate U.S. audiovisual content. These barriers should be removed, and Taiwan should refrain from imposing any new barriers, including proposed regulations of Over-the-Top (OTT) services that require permanent local establishments or mandate local content quotas. IIPA urges the Government of Taiwan to change course and take the steps necessary to address the growing threats to the creative industries, which contribute so significantly to Taiwan's economy and culture.

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<sup>1</sup>For more details on Taiwan's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Taiwan's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2020**

### **Enforcement:**

- Criminal Investigation Bureau (CIB), Telecommunication Police Brigade (TPB), and Criminal Investigation Brigade (CIBr) should continue to prosecute more online piracy cases and cases involving PDs under the amended Copyright Act.
- Ensure that the CIB focuses on online piracy cases and that the 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.
- Take effective action against rising unauthorized camcording incidents.
- Issue a regulation (or equivalent administrative measure) pursuant to Article 87(7) of the Copyright Act confirming that the provision applies to all websites and apps that facilitate infringement of copyright, including stream-ripping, and bring cases under that provision.

### **Legislative:**

- Enact legislation to:
  - provide for a clear legal basis for rights holders to obtain 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 framework to ensure that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities and that all intermediaries are properly incentivized to act against online piracy;
  - further amend Article 87 of the Copyright Act to: 1) clarify that the list of acts setting out “an infringement of copyright” is non-exhaustive to ensure the provision is applied to other acts of infringement, such as stream-ripping; and 2) remove the pre-condition for liability that infringers “receive benefit” from the infringement;
  - extend term of protection in line with international best practices (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 75 years);
  - make unauthorized camcording of motion pictures in theaters or 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., that exceptions to and limitations on copyright are narrowly tailored to avoid overbroad interpretations), including by explicitly referencing the three-step test in all applicable exceptions.
- Eliminate the growing slate of market access barriers that discriminate against U.S. audiovisual content (including investment restrictions in the Cable Radio and Television law, the rate cap for basic cable TV service, local discriminatory content quotas on television content, and television program classification regulations that require display of Taiwanese ratings and warning messages); and ensure that any new OTT regulations do not require foreign OTT service providers to set up local permanent establishments or mandate local content quotas.

## **TAIWAN'S DIGITAL MARKETPLACE AND PIRACY AND ENFORCEMENT UPDATES**

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.<sup>2</sup> Moreover, Taiwan, the 25<sup>th</sup> largest music market in the world in 2019 by revenue, is a hub of music production for the Chinese speaking world and a major exporter of "C-pop." Unfortunately, Taiwan's online marketplace is dominated by unlicensed services and mass access to infringing content. 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.<sup>3</sup>

**Piracy Continues to Grow, Especially Online:** Online and mobile device piracy in Taiwan continued in 2019 in the absence of adequate and effective government action to address the problem. Foreign websites that provide illegal content remain a significant problem and undermine the ability of legitimate rights holders to survive commercially in Taiwan. Examples of such websites include *8maple.ru* (ranked 38<sup>th</sup> in Taiwan according to SimilarWeb), *bowan.su* (ranked 635<sup>th</sup>), and *gimy.tv* (ranked 45<sup>th</sup>), which offer access to thousands of infringing movie and television series titles and make money through advertising. Particularly popular are streaming, forum,<sup>4</sup> 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 foreign-hosted infringing services. This has left Taiwan unable to effectively combat online video piracy syndicates and their products and services, which have expanded from China into Taiwan.

"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. The legal framework in Taiwan presents challenges for taking action against persons who facilitate this activity (i.e., the app developer or website operator). In other jurisdictions, courts have found such services to infringe the reproduction and/or making available rights, and/or to unlawfully circumvent technological protection measures (TPMs), but in Taiwan no such cases have been brought. While it appears possible that Article 87(7) of the Copyright Act, which provides for aiding and abetting liability, could be used, this has not been tested yet. As discussed below, Article 87 should be amended further to clarify that the list of acts setting out "an infringement of copyright" is non-exhaustive to ensure the provision is applied to other acts of infringement, such as stream-ripping.

Social media platforms have also become a popular way to share pirated content. Apps for PDs and mobile devices, such as *Mixerbox 3*,<sup>5</sup> have become a significant platform for disseminating illegal content. Illegal camcording is on the rise, with ten video matches forensically matched to Taiwan cinema locations (including in Kaohsiung) during 2019, up from five in 2018. In addition to improving the legal framework (discussed below), the government should take actions under current law, and work with industry to persuade exhibitors to provide staff with more training and to take proactive security measures.<sup>6</sup>

The publishing industry has long reported continued problems with unauthorized photocopying and use of infringing materials at universities. A "Campus Intellectual Property Protection Action" plan has been incorporated into

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<sup>2</sup>See Oxford Economics, *The Economic Contribution of the Film and TV Industry in Taiwan in 2016*, 5, available at [https://www.mpa-apac.org/wp-content/uploads/2018/03/MPAA\\_Taiwan\\_2016\\_WEB.pdf](https://www.mpa-apac.org/wp-content/uploads/2018/03/MPAA_Taiwan_2016_WEB.pdf).

<sup>3</sup>See, e.g., IIPA, *Taiwan, 2018 Special 301 Report*, (February 8, 2018), available at <https://iipa.org/files/uploads/2018/02/2018SPEC301TAIWAN.pdf>.

<sup>4</sup>Forums are a serious problem, including, for example, *eyny.com*, one of the most popular infringing websites with 33.45 million monthly visits, and 82.25% of its traffic from Taiwan (according to SimilarWeb data). Users can easily share unlicensed content (including movies, TV dramas, and music) in the forum. In addition, *eyny* has a sub-streaming service, *video.eyny.com*, which receives 9.43 million monthly visits and 73.54% of traffic from Taiwan, where users can share unauthorized content (including movies, TV dramas, and music videos) directly with each other.

<sup>5</sup>*Mixerbox.com* is a website that allows users to watch embedded YouTube clips stripped of advertisements, providing a service similar to a streaming service like Spotify or KKBOX, except with unlicensed content. *Mixerbox.com*, which has seriously disrupted the local music streaming market, has 835 thousand monthly visits, with 91.49% of its traffic from Taiwan. The website also disseminates the popular mobile app *Mixerbox 3*, which also provides unauthorized music video content streamed from YouTube, stripped of advertisements.

<sup>6</sup>It has been reported that actions against camcording as "unauthorized duplication" have been brought and sustained under Article 91 of the current Copyright Law; nevertheless, it is important that Taiwan adopt *sui generis* provisions specifically covering the act of camcording.

the Ministry of Education's (MOE) Campus Inspection program since 2006, but it is unclear whether the required inspections are being conducted. These campus inspections should be conducted on a consistent basis and continue to allow industry participation to foster greater cooperation among MOE, university administrators, and rights holders. In 2018, the publishing industry submitted recommendations to MOE regarding measures it should adopt to better address piracy of reading materials. To that end, MOE issued guidelines: 1) requiring 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) warning 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) requiring that warnings against "illegal photocopying, downloading, and dissemination" be included in informational materials provided to students.

Unauthorized photocopying of textbooks at universities is slowly diminishing, but unfortunately, unabated online piracy of textbooks has risen, worsening the overall book piracy situation in Taiwan. An on-campus copy shop equipped with computers and multi-function printers 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.<sup>7</sup> The unmonitored "Teaching Excellence Program," which encourages teachers to make teaching materials they have created available on a university digital platform freely accessible to students, may have inadvertently contributed to the piracy of textbook and related content. Unfortunately, it appears that in addition to original content generated by the instructors themselves, a significant amount of the materials—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.

**Piracy Devices:** The sale of PDs (i.e., media boxes, set-top boxes, or other devices and their corresponding apps and services), has increased in Taiwan. Mostly originating from China, these PDs are available openly throughout Taiwan, including at so-called "3C" shops, and via online retailers, and facilitate unauthorized streaming of motion pictures and television content through apps that direct users to pirated content. These devices often contain, or can connect to, a hard disk to store the downloaded content, and may have an SD card slot, which helps novices connect to foreign piracy sites. More than 30 different brands of such devices are now available in the marketplaces in Taiwan.

As discussed below, recent amendments to Article 87 and 93 of the Copyright Act provide a clear legal basis for enforcement against the dissemination of certain piracy apps and the manufacture and trafficking of PDs. In addition, on July 31, 2019, the IP Court ruled against a company that operated an app that facilitated access to unauthorized television content. Although the Court issued fines against the company that were relatively low and non-deterrent, the Court also issued prison sentences against two officers of the company.<sup>8</sup> These are very positive developments, and IIPA hopes that Taiwan's enforcement authorities strictly enforce these new prohibitions to address the proliferation of PDs and infringing apps. It should also be clarified that the new law applies to resellers of devices that do not have piracy software or apps pre-loaded, but who are well equipped (either by the manufacturer or by middleware providers) to install the software or apps or to enable users to do so, or who circumvent technological protection measures used by rights holders to avoid unauthorized access to their works. Such a clarification would ensure the law accomplishes its goal of deterring the sale of piracy streaming devices in the marketplace. In light of the new law, local associations, including the Taiwan Over-the-Top Media Services Association, are asking the government to set up a specialized enforcement unit to handle cases involving unlawful PDs. The local motion picture industry has recently worked well

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<sup>7</sup>Copy 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.

<sup>8</sup>The case was the result of a claim brought by cable television network Sanlih E-Television (SET) against a company that operated the illegal app *OH!COOL*. The company was fined NT\$200,000 (US\$6,550) and its director and Chief Technology Officer were each sentenced to three months imprisonment and 50 days criminal detention. The Taiwan Shilin District Court delivered another criminal sentence in September 2019 regarding a linking site *ishowfile*, which offered dozens of U.S. motion pictures without permission. The defendant was sentenced to 20 months imprisonment and the case is on appeal. While the sentence was encouraging, the length of the proceedings (4 years and 4 months) is far too long to have a significant deterrence in the marketplace.

with enforcement authorities (including CIB, TPB, and CIBr) on Piracy Device cases, and IIPA is hopeful enforcement authorities continue to pursue such cases, using the new law to its maximum extent.

**Pirated USBs:** USB devices loaded with thousands of pirated songs are becoming more popular in Taiwan. Sold online at a very cheap price (NT\$200–NT\$800, or ~US\$7–US\$27), investigations indicate that these USBs are being manufactured in mainland China and delivered by local couriers in Taiwan, with the money going into Taiwanese bank accounts. Taiwan’s notice-and-takedown mechanism is inapplicable to this kind of infringement because these are physical products and there is no list of infringing content available to identify in a notice. The music industry has initiated four actions against sellers of pirate USBs by filing complaints with the CIBr, and many other cases are being considered, but it appears that CIBr is unwilling to prioritize this kind of infringement. CIBr passed two of four cases directly to the District Attorney offices without conducting any raid actions against the related couriers and bank account owners. CIBr should prioritize these actions and handle them directly.

**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 generally good for domestically-hosted infringement. One problem, however, is that the provision of the Copyright Act penalizing repeat infringers has never been properly implemented so ISPs do not enforce against repeat infringers as is legally required.

Regarding overseas infringing websites, however, Taiwan’s legal framework remains inadequate. No-fault injunctive relief against ISPs to stop infringement by piracy websites does not appear available under current law. Taiwan government officials and stakeholders have had discussions with ISPs about the severe problem of online piracy. While ISPs are generally sympathetic, they require the government to direct them or courts to order them to act. Taiwan has a mechanism to report and ensure permanent removal or blocking of content that facilitates illegal activities such as child pornography, human trafficking, and defamation/cyber-bullying. Government involvement and support is essential to expand this cooperation to content that infringes copyrights. Without such a remedy, Taiwan is becoming an outlier in Asia, as many other countries in the region (and elsewhere in the world) are taking active steps to address the growing online and mobile piracy problem.

Without overall effective remedies, online piracy investigations suffer, and piracy proliferates. 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.<sup>9</sup>

**Provide Adequate Resources for and Prioritize Copyright Cases:** As previously reported, The Government of Taiwan should provide CIBr with adequate human resources, funding, and equipment necessary to investigate digital piracy cases; and CIBr should prioritize copyright cases, with appropriate benchmarks and goals, to ensure it is effectively addressing Taiwan’s piracy problems. In addition, as previously reported, it is critical to reinstate an award budget so that CIBr officers feel that fighting copyright piracy is an important endeavor and that successful efforts will be rewarded. TIPO should also play an important advisory role.<sup>10</sup>

**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. 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 would benefit from and 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

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<sup>9</sup>The Criminal Investigation Brigade (CIBr) brought nine piracy cases in 2019 (four physical and five online).

<sup>10</sup>For more details on IIPA’s concerns with CIBr, see IIPA 2019 at 81-82.

for rights holders; and ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the digital environment.

**Infringing Website List (IWL):** In a positive development, in September 2019, the Taiwan Intellectual Property Alliance (TIPA) concluded a Memorandum of Understanding (MOU) with the Taiwan Digital Media and Marketing Association (DMA), representing major online ad networks (e.g., Google and Yahoo in Taiwan) to join an Infringing Website List (IWL) initiative to eliminate advertising on piracy websites. As previously reported, rights holders had agreed on several MOUs with Taiwanese advertisers, including members of the Taipei Association of Advertising Agencies (TAAA) and the Taiwan Advertisers Association (TAA) on the IWL initiative; however, those advertisers had only the minority of the market and any ads removed were quickly replaced by ads from non-participating online advertising companies. It is hoped that DMA's joining the IWL MOU will change this situation and the IWL will start producing meaningful results.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Amendments to Address Piracy Devices and Apps:** Another positive development was Taiwan's enactment in April 2019 of amendments to Articles 87 and 93 of the Copyright Act. These amendments impose criminal penalties on individuals or entities who: 1) provide software, such as P2P software, or apps that enable members of the public to access unauthorized copies of films and television programs on the internet; 2) assist members of the public to access such unauthorized copies of films and television programs; or 3) manufacture or import devices with such pre-loaded software or apps. The penalties that may be imposed by a court are a sentence of up to two years imprisonment and/or a maximum fine of NT\$500,000 (~US\$16,600). This legislation follows 2018 guidance from TIPO that streaming devices are prohibited under the Copyright Act, and an August 2018 IP Court decision confirming this interpretation.<sup>11</sup> Unfortunately, revised Article 87 maintains the condition that violators must "receive benefit" from their actions. This requirement is unnecessary and should be removed, because proving infringers have received a benefit from their illicit activities is often difficult and onerous for rights holders, thereby limiting the effectiveness of the prohibition. In addition, as noted above, it should be clarified that the list of acts setting out "an infringement of copyright" is non-exhaustive to allow the provision to be applied to other acts of infringement, such as stream-ripping. IIPA hopes that Taiwan's enforcement authorities vigorously use these new tools to better address piracy in the country.

Notwithstanding this recent legislative achievement, other longstanding draft copyright amendments continue to languish before the Legislative Yuan. Taiwan should prioritize copyright reform and move forward legislation to address the serious deficiencies in its copyright law regime, as discussed below.

**Concerns Over Continued Lack of Administrative or Judicial Remedies Against Infringements Emanating from Outside Taiwan:** While many of the online services built on infringing activities of others and/or facilitating infringement are located outside of Taiwan, a significant amount of infringing activity occurs within Taiwan and should create a nexus for action. ISPs in Taiwan have indicated a willingness to address the problem of flagrantly infringing websites, but 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. IIPA believes the Taiwanese Government should propose urgently needed legislation to provide 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 such proposals have been included as part of the copyright reform process. Governments in the region, including Australia, Korea, Singapore, India, Indonesia, Malaysia, and Thailand, have

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<sup>11</sup>See *Taiwan Taichung Local Inspectorate Prosecutor v. Zhang Zhiyuan (first accused) and NESO Technology Pte Ltd (second 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.

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.<sup>12</sup>

**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. Unfortunately, these draft amendments do not address many of the criticisms IIPA raised 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. Prior IIPA submissions have detailed the flaws in the draft amendments.<sup>13</sup> These include failing to address a number of deficiencies in Taiwan's existing legal regime, including the need to:

- provide a mechanism to address the problem of foreign hosted piracy websites that target users in Taiwan;<sup>14</sup>
- clarify ISP liability framework to ensure that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities and that all intermediaries are properly incentivized to act against online piracy;
- deem all criminal copyright infringement, including Internet piracy, "public crimes" (as was so successfully done regarding optical disc piracy);
- extend the term of protection for copyrighted works, including sound recordings, in line with the international trend;<sup>15</sup>
- make it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters or of live musical performances;<sup>16</sup> and
- correct problematic TIPO practices regarding collective management;<sup>17</sup> and
- provide producers and performers exclusive (rather than remuneration) rights for public performance and retransmissions of sound recordings.

In addition, the draft amendments contain a number of provisions that are inconsistent with evolving international norms and raise questions regarding Taiwan's commitment to comply with its existing international obligations, including the following:

- an unjustified exception to the rights of sound recording producers for sound recordings "which have been fixed on audiovisual works";<sup>18</sup>

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<sup>12</sup>IIPA also encourages Taiwan to look at how Europe has addressed this problem, in particular, through Article 8.3 of the European Information Society Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content.

<sup>13</sup>See, e.g., IIPA 2019 at 83-84.

<sup>14</sup>To the extent necessary, additional legislative changes should be made to overcome potential civil procedure restrictions, such as amending the Civil Procedure Code and Article 22 of the Intellectual Property Case Adjudication Act.

<sup>15</sup>Term should be extended 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.

<sup>16</sup>The music industry reports that infringement through camcording live concerts is increasing.

<sup>17</sup>Corrections should include allowing the setting of fair-market based rates for collectively managed rights (instead of tariffs determined by TIPO); establishing judicial dispute resolution mechanisms in lieu of the requirement to have Collective Management Organizations (CMOs) tariffs reviewed, revised, and approved by TIPO; and eliminating TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection. The 2010 amendments to the Copyright Collective Management Organization Act leave in place overbroad authority with TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings, and allow for delays in fixing the rate, thus interfering with the ability of rights holders to collect royalties. A detailed discussion of the shortcomings of the Act appears in previous IIPA filings.

<sup>18</sup>This exception 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 even though it cannot independently join the Treaty). See 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.

- numerous other overbroad exceptions and limitations to protection, including regarding education<sup>19</sup> and fair use,<sup>20</sup> which would call into question Taiwan's compliance with its TRIPS obligations;<sup>21</sup> and
- a reduction of 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);<sup>22</sup> and
- requiring rights holders to file a formal complaint rather than providing *ex officio* authority for law enforcement to take action against criminal acts of infringement.

As reported last year, to further its stated ambition to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which requires compliance with the standard of protection of the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), Taiwan is considering a second set of amendments to the Copyright Law that purport to implement the CPTPP standards.<sup>23</sup> There is no timeline for passage at this stage. While the draft includes some positive aspects, such as establishing digital piracy as a public crime,<sup>24</sup> it does not address most of the deficiencies in Taiwan's legal framework outlined above, including the lack of an effective remedy against flagrantly infringing websites and an inadequate term of protection,<sup>25</sup> and an early draft would have weakened enforcement against pirated optical discs.<sup>26</sup>

## **MARKET ACCESS UPDATES AND RELATED ISSUES**

Taiwan maintains a number of discriminatory barriers against U.S. audiovisual content. In January 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.<sup>27</sup> These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, and restrict U.S. exports. In 2016, NCC issued regulations on Television Program Classification that 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

<sup>19</sup>These include a broad exception for distance learning and compulsory licenses for the benefit of educational institutions and compilers of "pedagogical texts."

<sup>20</sup>Article 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.

<sup>21</sup>Other problematic exceptions include an exception for using "common domestic reception appliances" to publicly retransmit works that have been publicly broadcast, and a broad exception for public performance of works for "nonprofit" activities. To 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.

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

<sup>23</sup>See IIPA 2019 at 84-85.

<sup>24</sup>Unfortunately, to qualify as a public crime, the "whole" work must be exploited "for consideration" and the infringement value must exceed NT\$1M (about US\$32,169). These are unnecessary obstacles that should be removed, particularly the high threshold because calculating the value of infringement is fraught with uncertainty, and the high bar does little to deter online infringement and may actually encourage it.

<sup>25</sup>The 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).

<sup>26</sup>The 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*).

<sup>27</sup>The Administrative Regulation for the Terrestrial TV Stations Broadcasting Local Production Programs and the Administrative Regulation for the Satellite TV Channels Broadcasting Local Production Programs require terrestrial TV stations to broadcast at least 50% of locally produced dramas between 8 pm and 10 pm; 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.

rate cap for cable TV service of NT600 (US\$20) per month per household, which has never been adjusted to keep up with inflation. Other restrictions on television services include a mandatory carriage requirement of 90-100 channels in the basic cable package, and, for all 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.

In 2019, NCC proposed amendments to restrict channel-premier programs to no more than five years from nationwide first release, linking compliance to the renewal of cable and satellite television licenses. NCC subsequently scrapped this proposal in response to complaints from rights holders, but is working on a revised draft. IIPA is hopeful that the revised draft will not include this proposal, which is out of step with international best practices and, if enacted and implemented, would raise significant uncertainties for foreign investment.

**OTT Regulations:** The Ministry of Culture (MOC) and NCC are considering OTT regulations that would require foreign OTT service providers to set up local permanent establishments and potentially mandate local content quotas. Although these agencies state they are primarily concerned with regulating OTT services and streaming content originating from China, such requirements, if applied to all OTT services, would stifle business development and add a burdensome barrier to market entry. IIPA understands that a draft may be available for public consultation soon, and there are a number of other issues that could be included, including registration and licensing of curated video services.

## **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 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. Industry provides 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 2020, 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)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be retained on the Priority Watch List in 2020.<sup>1</sup>

**Executive Summary:** There are two long-standing problems thwarting the growth of the copyright industries in the Ukraine marketplace. The first is very weak criminal enforcement—the result of an antiquated legal regime that cannot properly address online piracy, a lack of resources, and the absence of coordinated and effective campaigns against large-scale illegal operations. The second concerns collective management of music rights. Positive steps were taken in 2019 to address collective management through the accreditation of music-industry and artist supported collective management organizations (CMOs). The Government of Ukraine should be encouraged to continue on its path to normalize the CMO landscape, including taking actions against rogue collecting societies. Additionally, a major revision of the Copyright Law is underway, but the latest draft of the law has not yet been made public. There is much within the Ukrainian copyright system that needs modernization, so a major copyright revision is welcomed if it will lead to significant improvements to allow the film, book, video game and music markets to develop online as they have in neighboring countries. Amendments to the Customs Code were enacted in October 2019 with provisions aimed at improving copyright and trademark protections at the border.

In 2019, as in recent years, there were positive enforcement actions, including the closing of some large infringing websites and services offering unauthorized movies, television shows, video games, and music. There have also been a handful of criminal convictions—although none of these cases resulted in the deterrent sentencing of those found guilty of IPR crimes. IIPA continues to recommend more sustained actions, including deterrent sentencing, with a focus on the major commercial scale operations, and a nationally coordinated plan to address a problem that is significantly worse in Ukraine than in most other countries. The Government of Ukraine has taken other positive steps. Three years ago, it established a specialized IP court—although its jurisdiction is only for civil, not criminal, matters, and the court has not yet commenced operations. A year earlier, the Government of Ukraine established the Cyber Police Department within the National Police of Ukraine. A third positive step was the enactment of a package of anti-piracy legislation in 2017. Included in that package of laws was a clear requirement for Internet Service Providers (ISPs) to respond to notice and takedowns, although the procedures and timetables for takedown notices and responses are unduly complex. Despite these changes, the copyright industries report that there are no effective remedies to enforce the required responses to infringement by ISPs, and no incentives to cooperate because there is also no existing third party liability in the current law. As a result, the 2017 law has not had much impact on ISPs who mostly ignore notices even of clearly infringing material, and who otherwise use their broad liability exemption in the Telecommunications Law to avoid cooperating with rights holders. The Government of Ukraine needs to appoint an adequate number of state IP inspectors to ensure ISP compliance with the law, including the imposition of sanctions (e.g., monetary fines) for non-compliance.

### **PRIORITY ACTIONS REQUESTED IN 2020**

#### **Criminal enforcement:**

- Focus criminal enforcement, using the newly adopted and existing laws, on: (i) owners and operators of 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 CMOs operating without legal

<sup>1</sup>For 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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



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 (and similarly in the Copyright Law as noted below).
- Revise the 2018 Law On Collective Management (CMO Law)—to correct the 2018 deficiencies, including: (i) fixing the rules used to calculate revenue-based tariffs for collective licensing organizations (including the treatment of “expenses”); (ii) adopting rules to identify current and future rates; and (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 2018 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. A draft CMO bill (Bill No. 2255) would address many of these issues, but also includes some provisions in need of further revision, such as onerous database and record-keeping provisions that should not be adopted.
- Amend the Copyright Law to: (i) broaden the scope of works covered under the new notice and takedown procedures (to cover all copyrighted material); (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 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).
- 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.

## **THE COPYRIGHT MARKETPLACE 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. According to the International Telecommunications Union (ITU), a decade ago fewer than one-fifth of the population in Ukraine had access to the Internet whereas in 2020, 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 failure of Ukraine to modernize its law and engage in effective and deterrent enforcement means that legitimate markets cannot develop, and the country remains a major exporter of piracy into both the European Union markets and other countries regionally.

**Internet Enforcement:** The market for licensed materials in Ukraine is being harmed by illegal P2P hosting sites, especially BitTorrent sites (some located in Ukraine), as well as by online streaming sites of music and movies. The video game industry reports that BitTorrent indexing sites, direct download sites and user-generated content (UGC) sites are the most prevalent in Ukraine, with BitTorrent sites being the most popular source of pirated copies of video games in 2019 and direct download sites the second most popular. Piracy on mobile apps has become much more widespread in recent years. In 2019, Ukraine ranked second 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, up from third in 2018. Ukraine is also ranked second in the world for infringement of video games for the PC platform. The music industry reports that they are being harmed by popular BitTorrent indexing sites such as *rutracker.org*, cyberlockers such as *Turbobit.net*, and stream-ripping sites such as *savefrom.net*.

Since its establishment in 2016, the Cyber Police have been active in taking down pirate websites, including streaming, cyberlocker and BitTorrent sites. In 2016, two of the largest and most popular pirate sites in Ukraine—*ex.ua* and *fs.us (fs.to)*—were taken down. Unfortunately, *ex.ua* (for years on the U.S. Government's Notorious Markets list) has resurfaced as a cyberlocker at *fex.net*, and there are some reports of infringing material on that site. According to the copyright industries, sites continue to be taken down by a combination of police action and rights holders actions: in 2017, a total of 45 sites were taken down; in 2018 it was 74 sites; in 2019, it was 173 sites, with the vast majority being streaming sites (154 sites), and the remainder being cyberlocker and BitTorrent sites. Almost all of these sites are Russian language sites, so the sites were blocked in Ukraine (by ISPs), as part of the ban on Russian-based web services initiated by the Government of Ukraine in May 2017. The motion picture industry notes that some infringing sites have used hosting services in Ukraine, such as *yify-torrent.org* and *mejortorrent.org*.

The 2017 package of anti-piracy laws, as noted, created detailed procedures and timetables for takedown notices and responses and other measures meant to assist with civil, but not criminal, enforcement against online piracy. But, the 2017 laws are limited. First, the notice and takedown provisions apply only to audiovisual works, musical works, sound recordings and computer programs, but do not apply to literary works or photographs. Additionally, the law does not provide sufficient deterrent sanctions for non-compliance (there are fines, but not at deterrent levels). Since the Government of Ukraine abolished the State Intellectual Property Service of Ukraine (SIPSU) in 2016, including all of the state IP inspectors at SIPSU, there is no IP enforcement agency in place. A new National Intellectual Property Office (NIPO) within the Ministry for Economic Development, Trade and Agriculture (MEDTA) was formed last year, but without effective enforcement authority or resources; a draft law (Bill No. 2255) is under consideration to consolidate enforcement and other IPR issues within NIPO. In March 2019, MEDTA appointed seven officials in the Intellectual Property Department to serve as IP inspectors in accordance with the Administrative Offences Code (to impose fines for non-compliance with takedown notices or for filing false notices – Articles 164-17 and 164-18), but many more state IP inspectors are needed. The other part of the 2017 anti-piracy package included a judicial reform bill (Law of Ukraine #2147-VIII, in force in 2017) which amended the Commercial Procedure Code, the Civil Procedure Code and the Administrative Offences Code. That bill established a High Court on Intellectual Property Matters for civil cases. The initial plan was to start operations in late 2018, but even after 2019, the court is still not in operation because judges, with proper qualifications, have not yet been appointed to the court. Once operational, it is hoped that the High Court would be properly staffed and resourced and develop guidelines for judges in other courts, to avoid the current problem of defendants who forum shop for courts with little IP experience (and who, as a result, treat IPR offenses leniently).

The 2017 amended law mandates responses by access providers and hosting sites to properly submitted takedown notices from rights holders. The law is unduly complex and it 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, to participate with the Whois database, and provides certain safe harbors if hosting providers properly comply with the law. However, even with many positive provisions, the law has no deterrent enforcement mechanism to compel compliance with the mandates by ISPs (even with knowledge of infringing material on their sites). Rights holders cannot commence civil actions against infringing sites nor can they seek orders to block sites (currently, there is no site-blocking mechanism in Ukraine at all). Rights holders can only send takedown notices under the 2017 laws. In 2019, UAPA issued 2,610 takedown notices, and cease and desist letters, to site operators and hosting providers, including 22 notices sent based on the 2017 law (Article 52-1 of the

Copyright Law). Ukraine should adopt high standard remedies that support today's creative-industry business models, including remedies that effectively respond to current challenges and reflect international best practices.

One key missing tool for effective online enforcement is clear third party liability for ISPs in Ukraine. No such laws exist at present, and in contrast, 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." Further, 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. Citing this statutory language, the Internet Association of Ukraine (IAU), representing the ISPs, takes the position that rights holders need to go after illegal website operators directly, without ISP assistance or cooperation. The 2017 antipiracy package of amendments (which included amendments to the Telecommunications Law, but not Articles 38 or 40) only requires defined "websites" and "hosting providers" to respond to proper takedown notices, but allows them to otherwise retain their immunity from liability. Without a legal obligation to do so, the ISPs will not cooperate as recent actions have shown. Prior commitments by the Government of Ukraine to provide specific and effective steps for online enforcement—including specific actions required in a U.S.-Ukraine Action Plan of 2010—have largely been ignored.

Many of the websites offering pirated copyright materials are thus thriving in part because of the support of local ISPs. This is particularly true in eastern Ukraine where several large piratical operations have started operations, now outside of any enforcement jurisdiction (two music piracy cases have been suspended for this reason). Before the new laws were adopted in 2017 (mandating compliance), UAPA and the Motion Picture Association (MPA) reported that about one in five takedown requests in Ukraine resulted in action. Other industries report that, without a Memorandum of Understanding (MOU), ISPs will not cooperate because the laws essentially grant total immunity, and there were no MOUs agreed to in 2019.

One major initiative of the past two years, 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. In 2018, UAPA 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. After multi-stakeholder conferences (in 2017, 2018 and 2019), a list of pirate websites was created for the brands and advertising agencies to identify easily sites to avoid (*blacklists.org.ua*). Rights holders report that the initiative has, so far, yielded positive results.

**Criminal Enforcement:** While there have been sites taken down by the Cyber Police, there have been no effective criminal enforcement actions taken against the owners and operators of these websites or hosting services. Criminal enforcement against commercial scale actors is rarely pursued and even more rarely successful (or even seriously pursued). It was reported that in 2019 the Cyber Police commenced 41 criminal cases for illegal online activity (and two for camcording activity). Despite a total of 43 cases commencing, only three resulted in criminal convictions in 2019. 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 one major ongoing investigation against a large site operator, but the status of the case is unclear. In 2019, the motion picture industry reported two criminal cases against those creating illegal websites with audiovisual material with identical fines of 17,000 UAH (US\$710) imposed. One acquittal was successfully appealed, and a new criminal case commenced. There were additionally four criminal cases for illegal broadcasts of Ukrainian TV channels online in 2019. The court imposed a fine of 3,400 UAH (US\$142) in three cases, including against two individuals who supplied the equipment used for illegal disseminations; in the fourth case involving illegal set-top boxes, the defendant was acquitted.

Thus, more criminal enforcement against online infringement 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 criminal 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.

Adequate resources for criminal enforcement remain a problem. While the overall number of Cyber Police has risen (at the end of 2019 there were 1,600 officers), the number of investigators dedicated to IP-related crimes remains unclear. The Cyber Police have, unfortunately, focused on non-IP related online crimes to date, and their actions are limited by a lack of resources. 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 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.

It has been long-recommended 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. Once properly resourced, the sub-unit should be tasked with enforcement actions against owners and operators of infringing websites and services without political interference. Another recommendation is for the Government of Ukraine to form a specialized interagency working group of experts to address IPR crimes with representation from the Ministry of Interior (i.e., the National Police and Cyber Police), prosecutors, judges, MEDTA representatives, the State Fiscal Service, and other relevant agencies.

The lack of 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, 2020) is 21,020 UAH (US\$857). 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). The requirement of “material composition of a crime” (causing significant material damage) should be repealed from the Criminal Code (Article 176, part 1). Also, the maximum fines for infringement are low—51,100 UAH (US\$2,136)—and thus, not deterrents.

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 and IPR crimes in general; (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 Criminal Code (Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. Other lingering enforcement

problems are: (1) burdensome required proof of ownership in criminal (and civil) cases, including a complete chain of title; (2) the absence in the Criminal Code of clear provisions for the confiscation and destruction of infringing goods, including the materials and equipment used for manufacturing; and (3) the requirement (since 2017) that parties in all cases be represented by local counsel (no more *pro se* or power of attorney representations).

**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 was intended as a starting point for proper accreditation of CMOs. In 2019, the Ministry of Economy started to implement the law and commenced the process of accreditation of legal CMOs, even over objections and strong resistance (political and legal) from opponents of reforms. After the first accreditation round, the process was halted by the courts, and the Ministry of Economy had to re-launch the process. Three industry and artist-supported organizations were accredited in 2019: (1) the Ukrainian League of Copyright and Related Rights (ULASP), accredited to represent performers and producers of sound recordings (and videograms) for public performances; (2) the Ukrainian Music Alliance (UMA) accredited to represent performers and producers of sound recordings (and videograms) for public broadcasting, but not including cable retransmissions (but including private copying levies); and (3) the Coalition of Audiovisual and Music Rights to license cable retransmissions of copyrighted and neighboring rights works. The All-Ukrainian Agency on Authors Rights was also accredited to collect for: (i) resale royalty rights for works of fine art; and (ii) the reprographic reproduction for literary works. CMOs still need to be accredited for the collection of royalties for public performances, including broadcasting, of musical works (musical compositions); it is expected that this CMO accreditation will be undertaken in 2020. Along with the proper accreditations, the Government of Ukraine also needs to take actions against any remaining rogue societies, including prosecuting those engaged in criminal and fraudulent activities relating to CMOs. Otherwise, while legal CMOs are being properly established, the problem of the rogue CMOs will persist.

A new draft CMO law was prepared for the Rada (Bill No. 2255), but not adopted in 2019, to address some of the shortcomings of the 2018 CMO law. The draft law contains improvements, but also has some troubling provisions that should be corrected before enactment. The shortcomings in the 2018 law that will hopefully be corrected in the new law are: (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 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 old system, CMOs would 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 (PFC) and the Presidential proclamation in December 2017 to remove Ukraine’s Generalized System of Preferences (GSP) benefits.<sup>2</sup>

Proper accreditation should mean that no more than one society representing the majority of commercially used rights and repertoire (in each sector or category of rights and rights holders) be appointed as the CMO managing the rights under the extended collective licensing and mandatory collective management regime. The 2019 CMO legislation (Bill No. 2255) would make three major changes to the 2018 law intended to improve accreditation and the operations of CMOs: (1) a governmental agency, NIPO, would govern accreditations, not the 2018-created Accreditation Commission; (2) it would correct overlapping CMO jurisdiction (deleting references to “additional

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<sup>2</sup>The 2013 PFC designation was made for three reasons: (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.

accredited CMOs”); and (3) it would address (but not fully correct) problems with royalty calculations. The legislation also has several problematic provisions pertaining to the management, exercise and control of a CMO—including who can establish a CMO, mandates for government-run registration of works, and onerous record-keeping and database requirements. In sum, IIPA welcomes the progress that has been made by the Government of Ukraine on these issues, and encourages the government to support the properly accredited CMOs.

**Camcording:** The 2017 package of anti-piracy reforms included 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 that some experts fear may be problematic against camcording activities. In June 2019, the first camcording sentence under the new law—a fine—was imposed. However, even with the new law, 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. These activities are mostly undertaken by criminal syndicates operating in Ukraine and Russia moving quickly between the two countries.

Between 2011 and 2019, over 197 camcords (including audio only and video only recordings) were sourced from Ukraine. In 2019, there were at least three MPA-member company videos sourced from Ukraine (there were four in 2018, six in 2017 and 13 in 2016). During 2019, there were 197 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. Theatrical piracy is also a problem in Ukraine, especially in small theaters which screen pirate prints without a license—a violation of the Administrative Offences Code (Article 164-6). In 2019, there were no cases commenced using Article 164-6, compared with 13 arrests in 2017.

**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-funded 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. Unlike in 2018 (when 35 cable operators were cited), there were no actions taken in 2019, but starting in January 2020, 23 national television channels started to encrypt their satellite signals, which should improve protections.

**Administrative Enforcement:** 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 Offences Code (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. The Administrative Offences 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). However, as noted, there are an insufficient number of state IP inspectors to enforce these (or other) IP violations.

The Government of Ukraine should 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.

**Customs Enforcement:** 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 Customs Service are not sufficiently engaged in enforcement measures and under utilize their authority. Cooperation with right holders could be improved as well. IIPA continues to recommend the abolition of the customs registration system altogether because it impedes effective border enforcement. 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). 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 its infringing actions. The 2019 amendments to the Customs Code (Law No. 202-IX) enacted on October 17, 2019 are aimed at bringing the Ukrainian Customs Code closer to the European Union customs standards and practices, including for the destruction of infringing goods. The amendments broadened the scope of counterfeit and pirated goods to improve enforcement, and provided the tax authorities with broader *ex officio* enforcement authority.

**Hologram Stickers:** In 2018, Law of Ukraine #2514-VIII, amended existing law 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 2018 law 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 combatting piracy for years. This minor change will not improve the situation; instead, the mandatory sticker system should be repealed.

## **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. A decade later, key provisions of the 2010 Action Plan still have not been addressed including: ISP liability, effective administrative remedies, and fixing or eliminating the hologram sticker program. The 2017 anti-piracy package of laws only partially addresses online piracy problems by adopting formal notice and takedown provisions; but this alone is not effective enforcement.

## **LEGAL REFORMS**

The two 2017 laws—Law of Ukraine #1977-VIII (Cinematography Law) and Law of Ukraine #2147-VIII (procedural amendments) amended 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 Offences Code. Significant additional amendments, some now under consideration in a new 2019 draft, are needed to modernize the Ukraine IP regime, including for full WIPO Internet Treaty implementation.

**Copyright Law:** The Copyright Law is undergoing major review to move beyond the 2017 amendments. The 2017 amendments established a notice and takedown regime. 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 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 could 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 a digital 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) they only require the hosting provider notify a webpage owner (which could be an uploader) to take material down, rather than acting to do so; and (5) many of the definitions (“websites” and “webpages”) are unclear and appear to be inconsistent with international norms. In addition to these burdensome procedures, the Copyright Law needs to be amended to broaden the scope of works covered under the new notice and takedown 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 it does not comply with the notice and takedown rules. However, 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”) is covered; the 2017 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 for 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. The e-Commerce law should also be amended accordingly. Additionally, the 2017 law did not establish a duty to provide information to law enforcement agencies and rights holders, which should be provided.

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 rights 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 rights holders and deter further infringement (Article 52—to double actual damages)—the 2018 CMO legislation 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. The new Copyright Law should include: (i) exclusive rights for phonogram producers and performers for broadcasting, public performances and cable retransmissions; (ii) extended term for producers and performers from 50 to 70 years; and (iii) penalties for (treating as infringement) the non-payment of royalties by accredited CMOs and permitting CMOs to represent rights holders in court.

**Criminal Code and Criminal Procedure Code:** The 2017 package of amendments included a change to Article 176 to apply criminal remedies to 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 further 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); and (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. 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:** The 2017 package of amendments also added 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 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.

## **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 (neither is a problem for Ukrainian licensees of foreign films); 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 of 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. In 2012, the government revised the Customs Code and affirmed the duties on royalties for both theatrical and home entertainment imports. These valuations are governed by CMU Resolution No. 446, even though a Supreme Court ruling questioned the validity of these customs valuations.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

IIPA filed a petition in 2011 to have Ukraine’s 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, although some benefits were restored in October 2019.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2020.<sup>1</sup>

**Executive Summary:** The market for creative works in Vietnam remains severely stunted due to worsening piracy and debilitating market access barriers. Vietnam is an important emerging market in Southeast Asia for the creative industries, which are eager to invest in Vietnam's booming economy. However, Vietnam hosts many of the world's most popular illegal websites, and other problems are growing, including the use of Piracy Devices (PDs) and apps to access unauthorized audiovisual content. Unfortunately, the Government of Vietnam has done very little to address these growing problems.

There are major enforcement deficiencies in Vietnam: (1) the government is either unwilling or unable to follow-through on criminal referrals so cases are not being prosecuted; (2) there is a prohibition on investigations into infringing conduct by foreign rights holders, so sufficient evidence can only come from government prosecutors; and (3) the law does not allow civil suits against unknown defendants (e.g., "John Does"). Overall, the criminal enforcement framework is unable to deter online piracy. As an example, there was not a single criminal case prosecuted in 2019 for online piracy in Vietnam. In addition, investigative authorities, prosecutors, and judges lack fundamental knowledge and experience on copyright law to be able to undertake cases properly.

Vietnam must take more affirmative steps against piracy, including issuing deterrent penalties against infringers, acting against repeat infringement (e.g., the case against *chiasenhac.com*), and undertaking criminal prosecutions aimed at large operations. Vietnam must also 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 Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (together, WIPO Internet Treaties) and should, without delay, fully and properly ratify and implement the treaties. The government should also address deficiencies with the Copyright Office of Vietnam (COV), which is understaffed, and has not taken any action to reform the dysfunctional collective management organization for the music industry. Vietnam must also take steps to eliminate the many unnecessary and onerous market access barriers, including foreign entry barriers and investment quotas.

### PRIORITY ACTIONS REQUESTED IN 2020

#### **Enforcement:**

- Ensure enforcement officials, including the Ministry of Information and Communication (MIC), the Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate, and the Ministry of Public Security (MPS) IPR/High-Tech Police and related police units, increase the number and effectiveness of operations focused on online infringement.
- Encourage educational institutions to implement appropriate use and copyright policies to ensure that students and faculty use legitimate textbooks other course materials, and software.

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<sup>1</sup>For more details on Vietnam's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Vietnam's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



- 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 international obligations, including adopting a Resolution that clearly defines and interprets “commercial scale.”
- Strengthen the legal framework to take effective action against digital infringement, including by:
  - Ensuring sound recording 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, PDs 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 Internet Treaties;
  - 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 as required by the Bilateral Trade Agreement (BTA) with the U.S.<sup>2</sup>

#### Market Access:

- Ensure that amendments to Decree 06 that will impose additional market barriers to e-commerce are not adopted.
- Eliminate foreign investment restrictions, including: screen and broadcast quotas; pay-TV regulations that cap the number of foreign channels and require local advertisement production; and other entry barriers with respect to the production, importation and distribution of copyrighted materials.
- Deregister the Recording Industry Association of Vietnam (RIAV) and engage with local and foreign music producers to set up a new collecting society to enable all music producers to effectively manage rights that are subject to collective management in Vietnam.

## **PIRACY AND ENFORCEMENT UPDATES IN VIETNAM**

The Government of Vietnam has long recognized that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights.” The situation did not improve in 2019. Vietnam should take more affirmative enforcement actions against piracy, such as allowing and issuing deterrent penalties against infringing operations, and undertaking criminal prosecutions directed at large-scale operations.

**Growing Online Marketplace Presents Challenges:** A significant and growing percentage of the Vietnamese population is online, with mobile broadband subscriptions being the largest reason. A growing number of licensed Internet music content providers are trying to take advantage of this increase, including NCT (*nhaccuatui.com*), Viettel Media (*keeng.vn*), Vega Corporation (*nhac.vn*), Spotify, iTunes, and Deezer. The same is true in the audiovisual space. Mobile applications like *Pops TV* are 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

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<sup>2</sup>For a more detailed analysis of recommended legal reforms, see IIPA, *Vietnam*, 2019 Special 301 Report, (February 7, 2019), available at <https://iipa.org/files/uploads/2019/02/2019SPEC301VIETNAM.pdf>.

local Vietnamese content. Several Video-on-Demand (VOD) services have been available for the last two to three years, including Film+ (“film plus”), Darnet, Netflix, and Iflix. These channels for digital distribution offer huge potential for the creative industries; however, market access barriers and weak enforcement are preventing this potential from being realized.

Vietnam faces the rising challenges 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. Vietnam is now host to some of the worst piracy sites in the world. These are sites with a global reach and extremely high popularity such as *phimmoi.net* which is ranked 17<sup>th</sup> in Vietnam and 853<sup>rd</sup> globally and receives over 57 million monthly visits (SimilarWeb), as well as *xemphimso.tv* and *vtv16.info*. Further, top Vietnamese piracy sites with Vietnamese operations include, *bilutv.org*, *dongphim.net*, *motphim.net* and *vuviphim.com*. There is no clear or effective enforcement path available against these sites or their operators. The *123movies* case was an excellent example of difficulties in the enforcement apparatus in Vietnam. Rights holders provided extensive evidence to various departments of the MPS of infringing activity of the site. The government’s response was opaque, and while the site shut its doors after the case was politicized at the highest levels (including a U.S. Ambassadorial letter to the Minister for Information and Communications), no one was arrested or brought to account, and within months of *123movies* shutting its doors, hundreds of copycat sites emerged. Piracy apps and PDs, allowing easy access to film and television materials.

*Chiasenhac.com* is the most popular pirate music site in Vietnam. It allows users to stream unlicensed Vietnamese and international music, attracting 84% of its traffic locally and the remainder from territories including the U.S., Mexico, and India. It had 2.95 million monthly visitors in 2019. *Y2mate.com* is one of the most popular stream-ripping sites in the world, and the site owner is located in Vietnam. These and other sites are making it nearly impossible for legitimate online platforms to develop sustainable and properly-monetized content distribution services.

Even licensed music websites may inadvertently contribute to global piracy because most music sites do not have effective geo-blocking systems and, therefore, the content becomes available elsewhere.<sup>3</sup> 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 the coordinated efforts of rights holders and the licensed sites. However, many problematic sites remain operational, such as *trangtainhac.com*, which deeplinks 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 effective legal remedies against these deeplinking sites. Unfortunately, Vietnam’s copyright law does not provide adequate protections against circumventing TPMs.

The Government of Vietnam has been willing to take some steps in its enforcement against online piracy of audiovisual broadcasts over the past few years, demonstrating at least a willingness to cooperate with rights holders in enforcement actions, as well as with training and capacity building. Unfortunately, rights holders note that the administrative and criminal processes in Vietnam are cumbersome and slow, as they are subject to seemingly impossible evidentiary requirements. There is also no guidance with objective criteria for criminal liability and a ban against investigations by foreigners. Moreover, the difficulty in identifying infringers makes civil actions nearly impossible, because such actions cannot be initiated against an unknown infringer (i.e., “John Doe” actions are not permitted in Vietnam), even where the domain name, IP address, and related email addresses are known. The police and prosecutors insist that extensive evidence must be produced before any action is taken, creating an impossible task because the investigation is necessary to uncover the required evidence. Even where the infringement is clear, identification of the infringing website is not enough. Vietnam’s ban on investigations by foreign entities should be eased, but in the meantime, the onus is on the Vietnamese Government to investigate and take appropriate and effective administrative or criminal action.

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<sup>3</sup>SimilarWeb estimates that visitors from the United States and Mexico are the second and third top foreign visitors to Vietnam’s music sites.

IIPA also hopes for increased criminal investigations into online piracy cases by the many police units with responsibility for investigating copyright and online crimes, and then the acceptance of those cases by the Supreme People's Procuracy so that serious criminal cases can be adjudicated in the People's Courts. Furthermore, IIPA recommends that the Government of Vietnam provide the understaffed COV with adequate resources, including additional staff, to develop effective enforcement strategies and policies to tackle online piracy.

**ABEI Mechanism to Disable Access to Piracy:** Over the past couple of years, 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, and most recently, in the first-ever site blocks in Vietnam against egregious websites infringing Vietnamese television rights holders. In late October 2019, the first administrative site blocking case was concluded. It had been brought at the request of the Vietnamese broadcaster and licensee VTV. 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 cut-off 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—has continued to negatively impact the local music market and contributed to Vietnam remaining a major source of trans-border online piracy. The situation for the motion picture industry is also difficult. While most Internet service providers (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.

**Mobile Network Piracy:** With the rapid increase in the number of mobile phone subscribers in Vietnam, mobile network piracy has significantly increased 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:** PDs (also referred to as Illicit Streaming Devices, ISDs) 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 around the world, and are gaining popularity in Vietnam. Camcording in cinemas is often the source of the pirated material accessed through PDs. The Government of Vietnam must increase enforcement efforts, including cracking down on PDs and vendors who preload the devices with apps that facilitate infringement. Moreover, the government should take action against key distribution points for PDs that are being sold and used illegally.

**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 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. A long-standing problem has been 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.

**Increase Efforts Against Camcording:** A great number of movies are stolen right off the screen by professional camcorders, who use video cameras to illicitly copy a movie during its exhibition in a movie theatre—usually very early in its theatrical release. These illicit copies are then distributed to pirate “dealers” throughout the world and over the Internet. Illegal camcording can damage the theatrical or later window for distribution of audiovisual works, harming the U.S. film industry and the local cinema business. More needs to be done in Vietnam to prevent this problem, including stronger cinema procedures for curtailing such activity, and corresponding criminal enforcement mechanisms.

**Collective Management:** Due to market access barriers, 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. COV should engage with foreign music producers to enable reform of collective management to put in place an entity that represents all producers, foreign and local, and has the relevant expertise and technical capability to effectively perform collective management functions to the benefit of right holders and users alike in line with international good practices

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (last amended in 2009), the Criminal Code (as amended in 2017), the Joint Circular (2012), and the Administrative Violations Decree (No. 131) (as amended in 2017). The Civil Code of 2015 remains as a vestigial parallel law. Vietnam is not a member of the WIPO Internet Treaties and should accede (it is obligated to do so through the Comprehensive and Progressive Agreement for Trans-Pacific Partnerships (CPTPP) and the EU-Vietnam Free Trade Agreement). IIPA encourages Vietnam to take the necessary steps to accede and fully implement these treaties.

There are many deficiencies in the legal framework in Vietnam, and international trade and obligations still not met including the WTO TRIPS Agreement and the BTA with the United States. Some recent actions can be seen as steps backwards, not forward to meet these obligations.

**Implementation of the 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 in the Criminal Code. Pursuant to its obligations under the WTO TRIPS Agreement and the BTA, Vietnam is required to criminalize copyright piracy “on a commercial scale.” Vietnam should implement its new Criminal Code consistent with these obligations (there are also detailed obligations on point in the CPTPP).

The Supreme People’s Court has indicated it is working on a draft Resolution to provide guidelines for interpreting “commercial scale” and how to calculate the monetary thresholds, but those efforts which seemed hopeful a year ago appear to have stalled. A Supreme People’s Court Resolution should be issued without delay.

**Court Reform Needed:** IIPA understands that, in addition to the Supreme People’s Court working on a Resolution related to criminal liability, they were also drafting an “IP Manual for Vietnamese Judges.” Unfortunately, it appears that effort has stalled. Once re-commenced, the U.S. Government should, and IIPA members would hope to, weigh in on that process, which would presumably include procedural and evidentiary guidance as well as sentencing guidelines to create an appropriate level of deterrence in copyright cases. In addition, building IP expertise should be part of the overall judicial reform effort. The U.S. Government has stayed involved in training not only to judges, but also to police and prosecutors who will ultimately play an important role in bringing criminal cases before the courts.

**IP Code as Amended Remains Incompatible with Global Norms and with Vietnam’s International Obligations:** The IP Code and amendments showed promise for improved protection of copyright in Vietnam. Yet, they have not been properly implemented and leave questions regarding Vietnam’s compliance with the BTA and other international obligations. The issues that should be resolved in the current Code include 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 of 70 years after the death of the author, or, when the term is calculated based on publication, at least 75 years (or 100 years from fixation) as required by BTA Article 4.4.
- 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.
- 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 neighboring rights (i.e., sound recordings).
- 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.
- Article 17(4) creates an unacceptable hierarchy of the rights of authors versus neighboring rights owners. This is inconsistent with Vietnam’s obligations to provide certain exclusive rights to neighboring rights holders, including producers, performers, and broadcasters, under international agreements, including the WTO TRIPS Agreement. Article 17(4) should be repealed.
- Certain exceptions and limitations in the IP Code may be overly broad and call into question Vietnam’s compliance with its international obligations, including WTO TRIPS Article 13 and Article 4.8 of the BTA. For instance, exceptions for “public information and education purposes” as well as importation of copies of others’ works for personal use are overbroad. Further, a broad compulsory license as to all works except cinematographic works is not in line with international norms.
- 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 WTO TRIPS (Article 9(1)) and the Berne Convention (Article 5, establishing that copyright exists in the absence of formalities, and Article 15, providing a presumption of ownership for an author whose name appears on the work in the usual manner).

**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 sound recordings online. As such, the provision is not sufficiently clear and, if misinterpreted, would raise uncertainty regarding the exclusive rights of phonogram producers for the digital uses of their sound recordings.

**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. No secondary liability provision exists in the JC or elsewhere in Vietnam’s legal framework. The IP or Civil Code should identify the legal liability of ISPs, including that any safe harbors only apply to neutral and passive activities. Overall, these laws should foster cooperation between ISPs and rights holders. The U.S. Government should seek high standard remedies that support today’s business models of the creative industries, including remedies that effectively respond to current challenges and reflect international best practices.

**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 rights 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).

## **MARKET ACCESS BARRIERS IN VIETNAM**

Vietnam continues to generally restrict foreign companies from setting up subsidiaries to produce or distribute “cultural products.” Restrictions via foreign investment quotas, and other entry barriers regarding production, importation, and distribution of copyrighted materials (whether in the physical, online, or mobile marketplaces) persist. The Vietnamese have publicly indicated that they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products. 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 products. Vietnam’s virulent piracy problems would be reduced if the country removed its highly restrictive market access barriers. By limiting access to legitimate content, these barriers push Vietnamese consumers 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.

### **Barriers Specific to the Audiovisual Sector**

**Decree Regulating OTT Services:** In August 2018, MIC issued draft amendments to Decree 06 with the intent to expand it to encompass over-the-top (OTT) services. Several provisions of the draft Decree would create significant barriers to foreign investment, stunt the growth of Vietnam’s e-commerce market, and limit consumer choice and access to information. Of most concern is a licensing scheme that would require a local presence through forced joint ventures. In addition, the proposed revisions include a fixed local content quota and onerous censorship requirements. Over the past year, U.S. industry stakeholders have been intensely engaged in consultations pertaining to the draft Decree 06 amendments, including meeting with various Vietnamese officials to convey rights holders’ significant concerns and highlight international and regional best practices. In late December 2019, Vietnamese officials offered some concessions around consultation processes and substantive issues in Decree 06, but these fall short of industry expectations. A revised draft has not yet been made public.

**Laws Leave Potential Quotas In Place:** Under Cinema Law/Decree 54, Vietnam requires that at least 20% of total screen time be devoted to Vietnamese feature films. Vietnam is producing more local films, which now command over 25% market share in the country, rendering this quota irrelevant, so the quota should be removed. The latest draft amendments to the Cinema Law, issued in August 2019 and expected to be deliberated in the National Assembly in 2020, contain a troubling policy objective of restricting the screening of imported films. These quotas should be lifted or eased significantly, because they limit exports of audiovisual content to the detriment of U.S. producers.

**Foreign Investment Restrictions:** Foreign companies may only invest in film production and distribution, as well as cinema construction, through joint ventures with local Vietnamese partners and these undertakings are subject to government approval and a 51% ownership ceiling. Although the Vietnamese Government has recently proposed amendments to its Cinema Law which would facilitate foreign investment in stand-alone film distribution enterprises,

these amendments maintain the 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.

### **Barriers Specific to the Video Game Industry**

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

For some games, the Decree establishes the enterprise must obtain a license and approval of the contents of the game from MIC. Other restrictions are imposed, including: censorship of the content of video games in order for them to be approved; outright prohibition of certain content within video games data collection; age of users; and license duration limits. The implementation of this Decree should not create structures that unduly impede the ability of foreign rights holders to access the Vietnamese market or that discriminate against them. IIPA urges Vietnam to work towards commitments agreed to in previous trade negotiations to eliminate limitations on foreign investment for the provision of online games and related services in Vietnam.

### **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 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. Under the applicable Decree today, circulation permits for tapes and discs are granted by provincial-level MCST Departments. However, restrictions placed on foreign companies limiting their ability to setup subsidiaries to produce and distribute “cultural products” in Vietnam in turn makes it difficult for foreign companies to obtain circulation permits, as the applications must be submitted by local (Vietnamese) companies. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.

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

As outlined above, Vietnam's copyright protection and enforcement frameworks are inconsistent with its international obligations to the United States in many respects. These include the following:

- All infringements on a commercial scale may not be subject to criminal liability as required by TRIPS Article 61 and BTA Article 14;
- A number of copyright exceptions may be overbroad and inconsistent with the three-step test of TRIPS Article 13 and BTA Article 4.9;
- Remedies for civil, administrative, and border enforcement permit "non-commercial" distribution of infringing goods and the materials and means for producing them, which is inconsistent with the obligations of TRIPS Articles 46 and 59 and BTA Articles 12.4 and 15.12;
- Inadequate enforcement framework including no criminal infringement cases proceeding with prosecutors or to the courts, complicated and non-transparent civil procedures, and inadequate training of enforcement officials all are inconsistent with Vietnam's obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61, and under BTA Articles 11, 12, and 14;
- Limited and inadequate pre-established damages do not meet the requirements of BTA Articles 12.2D and 12.3;
- Term of copyright protection falls short of the requirements of BTA Article 4.4; and
- Presumptions of ownership are inadequate and do not meet the requirements of BTA Article 3.2.

# **WATCH LIST**

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** Brazil has still not ratified the WIPO Internet Treaties, leaving the country disconnected from the standard adopted by 103 countries worldwide, including almost all countries across the Americas, Europe and Asia-Pacific. While there have been signs of progress on enforcement, much more needs to be done, especially to curb access to illegal services; there are also a wide range of market access barriers for legitimate content. In 2019, Brazilian authorities showed a renewed interest in copyright matters, but also some surprising moves in the wake of the transfer of the Secretariat of Culture to the Ministry of Tourism. There were a number of positive developments on the enforcement front and the announcement of a public consultation to update the country's 1998 Copyright Law. IIPA respectfully requests USTR to continue to encourage Brazil to pursue policies and practices that enable a sustainable and thriving creative sector.

After a long period of disinterest in addressing the online piracy ecosystem, Brazilian authorities engaged in several enforcement actions in 2019 (following the success of previously reported *Operation Copyright* in January 2019). Throughout the year, São Paulo's Public Prosecutor cybercrime unit, CyberGaeco, shut down 100 infringing domains—accessed over 23.3 million times every month (an estimated 367 million yearly visits). In November, the Ministry of Justice's National Council to Fight Piracy (Conselho Nacional Contra a Pirataria, CNCP) and the Secretariat of Integrated Operations (Secretaria de Operações Integradas, SEOPI) coordinated *Operation 404*, which resulted in 30 search warrants aimed at online piracy in 12 different Brazilian States. The result: 210 infringing websites and 100 infringing apps taken down, and the delisting and profile removals of the sites and participants from social media platforms. Separately, the CNCP facilitated several promising agreements to prevent the availability of non-certified devices (including rogue IPTV and key sharing devices) in popular online marketplaces, and to stifle the advertising revenue of pirate sites. While these operations and agreements are commendable and encouraging, the scale of piracy in Brazil as well as the size of the country's territory, call for a more comprehensive, coordinated, sustained and well-funded enforcement strategy that includes training and information sharing among police, prosecutors and judges all over the country.

Between June and September 2019, the Secretariat on Authors Rights and Intellectual Property (SDAPI) of the Special Secretariat of Culture (former Ministry of Culture) held a public consultation to reform the country's 1998 copyright law in the face of new technologies and business models. This major legal reform of Brazil's copyright system is a top priority for the creative industries which will participate in and closely monitor all related public hearings and debates in 2020. It is essential for Brazil to finally join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) to ensure its legal framework is interpreted in line with the global standards. Brazil's new law should provide strong copyright protection in line with international best practices, the full set of exclusive rights including the right of making available, as well as properly calibrated limitations and exceptions in accordance with the three-step test.

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<sup>1</sup>For more details on Brazil's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Brazil's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2020**

### **Enforcement**

- Put in place a clear structure, with a high degree of political backing and adequate funding to build on the success of *Operation Copyright*, domain disruption by Cyber Gaeco and *Operation 404*. Ensure that law enforcement agents all over the country are properly trained and coordinated in conducting complex online investigations and have access to the necessary legal tools and framework to launch effective criminal prosecutions against major online piracy operators.
- Ensure that CNCP continues to have the resources and political backing to engage in cross-industry efforts on Internet piracy and develop a national strategic plan to implement the MOU's signed in 2019.
- 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. 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.
- Implement better border controls against the importation of piracy devices (PDs), such as the HTV box, and video game counterfeit hardware.
- Ensure that the Ministry of Culture's Film Agency (ANCINE) and the Brazilian Regulatory Agency for Telecommunications (ANATEL) continue working to implement a system for administrative site blocking for pirate sites.
- Ensure the Brazilian Financial Intelligence Unit (COAF) will investigate suspicious financial transactions resulting from piracy commercialization and report their intelligence to competent enforcement authorities aiming at initiating actions against money laundering, organized crime and other financial crimes.

### **Legislation and Regulation**

- Accede to, ratify, and implement the WCT and WPPT.
- Ensure the new Copyright Law and/or any legislation on copyright (i) implements the WIPO Internet Treaties, in particular, the exclusive making available right without conflating it with communication to the public right ("public performance" right as it is described in current Brazilian law), the anticircumvention of technical protection measures (TPMs), and penalties for trafficking in circumvention devices; (ii) enables courts to issue orders to Internet service providers (ISPs) to block access to offshore websites dedicated to copyright infringement following a valid notice; (iii) covers intermediary liability for inducing or encouraging infringement under certain circumstances, including advertisements placed on pirate sites; (iv) provides criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit, and criminalizes signal theft in the home entertainment sector; (v) implements special cybercrime courts and prosecution units; (vi) penalizes repeat infringers; (vii) provides exceptions and limitations that comply with the three-step test; and (viii) ensures the availability of meaningful compensation for infringement commensurate with the harm suffered and at a level that will deter future infringements.
- Repeal the November 2019 *Medida Provisoria #907*, a temporary order issued by the President, which would deprive music rights holders—composers, artists and sound recording producers—of their present legal entitlement to remuneration when their music is used in hotel rooms and cruise ship cabins.

### **Market Access**

- Further 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; and eliminate audiovisual quotas that discriminate against non-Brazilian content.
- Exempt Over-the-Top (OTT) services from compliance with the existing Pay-TV Law.

## **THE COPYRIGHT MARKETPLACE IN BRAZIL**

**Online marketplace:** Internet access and demand for online content continue to grow in Brazil. At least 80 online platforms offer legal viewing options to Brazilian television and film audiences, with Amazon Prime the most recent entry in the market.<sup>2</sup> 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 half of all music listening in Brazil now takes place through on-demand streaming services such as Spotify, YouTube, and Deezer. There are at least nine legal online music services competing to deliver recorded music to Brazilian listeners at compelling price points; many also offer a free, advertising-supported tier.<sup>3</sup>

Despite this abundance of legal offerings, the ubiquity, variety and adaptability of piracy distribution channels—including infringing sites, devices, hard goods and camcording—continue to inhibit the development of a healthy legitimate online marketplace in Brazil. In areas of the country with fast broadband internet, IPTV rogue devices, infringing streaming sites and apps tend to be most popular, while key sharing devices and signal theft prevail where internet speed is slow. The infringing marketplace in Brazil also offers different price points, from low cost hard media to sophisticated devices that can cost up to US\$200. The music industry has not yet achieved the market turnover results that it had in Brazil in the mid-1990s, in the pre-digital era, when Brazil was the world’s sixth largest music market. Since then, per capita music revenue in Brazil has fallen from US\$8.50 in 1997 to US\$1.41 in 2019 in large part due to the rise of online piracy. For 2019, the scale of the piracy landscape in Brazil remained critical and, despite shifts in distribution channels and some declines, largely unchanged.

**Infringing Linking Sites, Stream-Ripping Sites, Cyberlockers and BitTorrent:** There are three main types of distribution channels for infringing materials in Brazil: (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)<sup>4</sup> networks and indexing sites for torrent files; and (iii) stream-ripping sites which circumvent technological protection measures on licensed streaming sites such as YouTube.

Infringing linking sites dedicated to specific content, such as music or video games, remain among the most popular and damaging forms of piracy in Brazil. These websites rely on magnet torrent links and “sister domains”, i.e. sites that have the same look and feel as the original target site and are registered to the same operator but have no illegal content. “Sister domains” are increasingly used exclusively for payments which allows purveyors of illegal content to protect their revenue stream.

While cyberlockers and linking websites are nearly all hosted and have their domain names registered outside Brazil, they clearly target the Brazilian market. Many rely on social media profiles in Portuguese to promote user engagement, and appear to have local operators and intermediaries (such as advertising providers and payment processors) for monetization channels. 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.<sup>5</sup> 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

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<sup>2</sup><https://videomind.com/ott-opportunity-in-brazil-grows-as-do-woes-for-pay-tv/>.

<sup>3</sup><http://www.pro-music.org/legal-music-services-latin-america.php>.

<sup>4</sup>See the TruOptik study summarized in IIPA’s 2016 Special 301 submission, at p. 67, available at <https://iipa.org/files/uploads/2017/12/2016SPEC301BRAZIL.pdf> (“IIPA 2016”), documenting higher levels of “unmonetized demand” in Brazil than in almost any other market, regardless of population or level of Internet penetration.

<sup>5</sup>NetNames 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>.

as private forums for infringing links, as they are considered more “stable and safe” for sharing links. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent rights holders from detecting links to infringing files through automated monitoring.

Stream-ripping websites continue to be a concern for 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 have surfaced with notable audiences such as *Flvto*, *Y2Mate*, and *Yout*. In June 2019, there were more than 70 million visits to stream-ripping websites from Brazil.

With regards to video games, BitTorrent network activity declined by 30% in 2019 and visits to cyberlockers declined by 40%. As the piracy landscape in Brazil continues to evolve with new technologies, however, these declines are likely the result of an increase in the popularity of specialized linking sites, apps and other services. For the music industry, overall piracy rates appear to be declining according to an industry survey, but still almost half of internet users (44%) indicated they had downloaded pirated music in the previous month, one of the highest levels worldwide.

**Circumvention Devices:** An increasing number of Brazilian sites and online marketplaces, such as *Mercado Livre*, offer so-called video game copiers, controllers 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, which are the great majority of game consoles in Brazil. These websites rely on non-responsive host and torrent link index sites to distribute illegal copies of video games.

**Piracy Devices (PDs) and Signal Theft:** Use of PDs continues to rise in Brazil, exemplified by the increased market penetration of IPTV boxes, and other piracy devices, such as the HTV model which offers a grid of 170+ live pay-TV channels and 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*. Brazil’s economic crisis for the last years combined with the increased broadband availability across the entire country have set the stage for a likely spike in IPTV rogue devices and pirate live streaming of news and sports in coming years.

**Hard Goods Piracy:** Even though Internet piracy is growing faster than physical piracy in Brazil, online products demand high bandwidth, so strong demand persists for pirate physical copies that can be accessed and enjoyed offline. For the audiovisual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly, but remains significant. The HTV box and other 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 as mentioned above; (iii) modified consoles; and (iv) unauthorized digital goods, i.e., infringing versions of digital assets available within a video game environment, such as virtual currencies, digital accounts or “skins.” 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.<sup>6</sup> The lack of criminal investigations and effective action against repeat infringers enable these businesses to continue to thrive.

**Camcording:** 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

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<sup>6</sup>See 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>.

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. The camcording business has been linked to international criminal organizations. In 2019, a total of 19 camcords of MPA-member films were traced to Brazilian theaters, down from 32 during the previous year. Although this trend is encouraging, Brazil must strengthen its enforcement regime to combat this persistent 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 Against Online Piracy**

In 2019, the Brazilian Government took a stronger approach to enforce IPR that included the following successful operations, promising resolutions and voluntary agreements:

**Operação 404:** In November, the Ministry of Justice's National Council to Fight Piracy (*Conselho Nacional Contra a Pirataria*, CNCP) and the Secretariat of Integrated Operations (*Secretaria de Operações Integradas*, SEOPI) coordinated Operation 404, which resulted in 30 search warrants in 12 different Brazilian States aimed at online piracy. The result: 210 infringing websites and 100 infringing apps taken down; the delisting and profile removals of the sites and participants from social media platforms and three people arrested in São Paulo. ANCINE fully supported Operation 404 and facilitated cooperation with rights holders. If this model is maintained and SEOPI continues to carry forward this type of operation, Brazil will likely reach a much higher standard in terms of IPR enforcement.

**Suspension and Cancellation of 106 Infringing Domains in São Paulo:** Based on the "In Our Sites" framework originally applied by the City of London Police Intellectual Property Crime Unit (PIPCU) and Europol, São Paulo's Public Prosecutor cybercrime unit, Cyber Gaeco, took action against 106 infringing music domains and requested a court to suspend 86 infringing domains throughout the year—another 20 domains shut down voluntarily. This was a leading case in Brazil using such type of procedure and legal remedies. Between the suspension request and final cancellation of each site, the prosecutor's office asked all site administrators to present the necessary authorizations for content distribution. A total of 106 infringing domains were shut down based on court orders served on eight registrars and 86 operators in Brazil. These domains and sites had over 23.3 million monthly visits (an estimated 367 million yearly visits).

**Operation Copyright:** In January 2019, a Brazilian federal police unit based in the city of Sorocaba executed nine coordinated raids in five Brazilian States to seize computers and hardware from the administrators of notorious infringing service *Speedshare* and private server service *speedboxBR*. As a result of the raids, both services were shut down and another seven infringing private torrent forum sites voluntarily ceased operations. Combined, these sites attracted over 104 million yearly visits and more than 400 thousand registered users. Criminal charges were presented against *Speedshare* operators in September 2019, totaling 21 individuals involved.

While these operations are commendable and encouraging, the scale of piracy in Brazil, as well as the size of the country's territory, call for a more comprehensive, coordinated and sustained enforcement strategy that should include training, dedication of resources, information sharing, and infusion of political will among police, prosecutors and judges all over the country. In 2020, Brazilian authorities could undertake several actions to continue to sharpen their enforcement efforts and include innovative approaches to effectively disrupt infringing services on a scale that impacts the illegal ecosystem. For instance, Customs and Federal Revenue should conduct more inspections and seizures of large amounts of rogue devices coming into Brazilian ports and borders. The Central Bank's Financial Intelligence Unit (UIF) should pursue "follow the money" actions involving pirate operations as they are usually linked

to criminal organizations involved in money laundering and supporting terrorism. Enforcement officials across Brazil need more integration and education on protocols and rules to address copyright infringement and contraband of rogue devices.

In addition to these enforcement operations, Brazil made progress by issuing the following resolution and facilitating the following MOUs:

**ANATEL Resolução 715:** This resolution, implemented by ANATEL in October 2019, enabled the Agency's officials to search and seize any non-certified devices within the country, including rogue IPTV and key sharing devices sold through e-commerce and marketplaces.

**CNCP MOUs:** Throughout the year, CNCP, part of the Ministry of Justice, held a number of roundtables and events with different stakeholders to reach better standards to address online piracy. In August, CNCP signed a MOU to contribute to WIPO's Building Respect for Intellectual Property (BRIP) database, a "follow the money" initiative to combat online piracy whereby WIPO Member States identify sites known to be infringers of copyrighted material to stem the flow of their advertising revenue. In September, CNCP and PIPCU signed a MOU for cooperation and mutual support on IPR enforcement in Brazil and the UK. In November, CNCP facilitated a MOU between ANCINE and online marketplace *Mercado Livre*, one of the most popular in Brazil, to prevent the availability of non-certified devices, including rogue set-top boxes and key sharing devices. In December, CNCP signed another MOU with the most important advertisement players in Brazil to build a compliance mechanism to prevent advertisement on pirate websites.

The CNCP should build on its work in 2019, develop a strategic plan to give top priority to combatting widespread online enterprises dedicated to copyright infringement, and engage all rights holders and other players in the Internet ecosystem (including ISPs, hosting providers, domain name registrars, search engines, advertising networks, payment providers, etc.), to reach better standards and effective voluntary agreements to fight online piracy. IIPA urges the Brazilian Government to adequately fund the CNCP.

### **Civil Enforcement and Case Developments**

Civil enforcement should also be part of the solution to Brazil's piracy problem, including on the state and even city level. In a positive 2019 development, the Brazilian pay-TV Association (ABTA) filed a civil action for online copyright infringement against an HTV manufacturer in China (an IPTV rogue devices' manufacturer) before the State Court of São Paulo. The court issued several orders to local ISPs blocking IP addresses which created positive precedent in the fight against online piracy. ABTA also obtained blocking orders in another ongoing civil action filed on grounds of unfair competition. These cases show the great potential of injunctive relief in the fight against piracy, especially if orders can be obtained quickly.

While there is no dedicated procedure for blocking access to infringing websites, some rights holders have obtained site blocking injunctions and Brazilian ISPs are usually cooperative when it comes to complying with court-issued site blocking orders because many of them are also pay-tv distributors with an interest in supporting IPR enforcement. Unfortunately, backlogs and delays in the civil justice system routinely diminish the value of this preliminary relief, and the timeframe for actions and replies from local hosting ISPs is usually not ideal. To address this issue, ANATEL and ANCINE are currently discussing a normative instruction that would create language to enable *administrative* blocking of online infringement—which would be a more expedited process. This effort must be highly incentivized by the government, as ISPs usually do not comply with non-judicial blocking requests.

The video game industry is closely monitoring the Brazilian Federation of Associations for Information Technology Companies' constitutional challenge of Federal Decree 3.810/01, which requires US-based companies that maintain user communications data abroad to comply with Brazilian authorities' orders to release this data pursuant to the Marco Civil da Internet. The case, known as ADC-51 (Ação Direta de Constitucionalidade Número 51), is

currently pending before the Supreme Court (Supremo Tribunal Federal, STF). If the constitutional challenge succeeds, investigations of online crimes, including IPR violations, from local servers and sites may be blocked or delayed.

### **Enforcement Against Hard Goods Piracy**

During the first three quarters of 2019, Brazil's Federal Revenue and Customs conducted 3,746 inspections, monitoring and customs enforcement actions and seized R\$2,357,510,498.09 (approximately US\$550 million) in goods. Overall, 11.25% of the total amount of seized goods were electronic equipment, including rogue devices such as paid TV signal decoders, and 0.05% were hard media, including pirated DVDs.

ANATEL led 400 administrative inspection actions in 2019, seizing 11,196 non-certified devices and prohibiting the use and commercialization of an additional 89,105. ANATEL also conducted 20 inspections against e-commerce platforms selling non-certified equipment and took down 42 items from the Internet. ANATEL supported Customs and Brazilian Mail enforcement actions against the importation and contraband of non-certified equipment.

### **Enforcement Cooperation**

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 video game industry has provided training sessions to state prosecutors, police agents, and judges to share investigative best practices and to provide a detailed understanding on industry issues related to digital piracy. Some of those trainings also taught agents to better identify and investigate infringing sites, online marketplaces, and unauthorized digital goods (UDG's). During 2019, the video game industry provided training sessions focused on online piracy to state prosecutors in São Paulo and Brasilia and for the special cybercrime units, Cyber Gaeco and NCyber. IFPI and Pro-Música Brasil also engaged in a number of trainings for the Brazilian law enforcement and other government authorities, from multistakeholder and cross-industry seminars and congresses on IP protection and enforcement topics to tailor-made training sessions for specific groups of law enforcement agents. Some of these events were promoted and supported by foreign government agencies such as USPTO, UK DOJ, UKIPO and EUIPO, which also increased local authorities' interest and provided a high-level forum for exchange of expertise.

These cooperation and training programs increase the quality and the number of opportunities for Brazilian authorities to engage with foreign counterparts and industry experts to generate the necessary discussion on new approaches to addressing digital copyright piracy and other challenges around IP protection in a wide and diverse country such as Brazil. However, more needs to be 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.<sup>7</sup> 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.<sup>8</sup>

## **LEGISLATION AND REGULATION IN BRAZIL**

**Copyright Reform:** Between June and September 2019, the Secretariat on Authors Rights and Intellectual Property (SDAPI) of the Special Secretariat of Culture (former Ministry of Culture) held a public consultation to reform

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<sup>7</sup>See, e.g., IIPA 2015 report, at p. 76, <https://iipa.org/files/uploads/2017/12/2015SPEC301BRAZIL.pdf> ("IIPA 2015").

<sup>8</sup>For 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.

the country's 1998 copyright law in the face of new technologies and business models. Public hearings and debate involving civil society and the creative sector will take place during 2020.

This major legal reform of Brazil's copyright system is a top priority for the creative industries. It is essential for Brazil to join the WCT and WPPT to ensure a forward-looking legal framework that fosters a vibrant legitimate market for Brazilian and foreign content. Brazil's new law should provide strong copyright protection, the full set of exclusive rights including the right of making available, as well as properly calibrated limitations and exceptions in accordance with the three-step test.

More specifically, we make the following recommendations for the new law:

- **Amend Article 105** to confirm that: (1) injunctions, including catalogue-wide injunctions where applicable, are available against all types of copyright infringement, circumvention of TPMs and dealings in circumvention devices and/or components; and (2) injunction recipients bear the burden of ascertaining what they must do to avoid infringement.
- **Amend Article 107**, which covers technical protection measures, to encompass all forms of access and copy control technologies as well as dealings in circumvention devices.
- **Amend Article 103** to expressly allow rights holders to choose the method for calculating damages, including actual damages, infringer's profits and reasonable royalties.
- **Provide a specific administrative procedure for blocking access to infringing websites** to ensure speed and fairness. Since many infringing websites are foreign operated, but clearly targeted at the Brazilian market, local website blocking orders would be helpful to improve online enforcement. The new law should not require that the operator of the site has the opportunity to take part in the proceeding because the identity and location of pirate site operators is often unknown. Brazilian authorities should also facilitate discussions between rights holders and ISPs to agree on a voluntary code to address website blocking.
- **Amend Articles 98 and 99**, which govern Brazil's collective management of broadcast and public performance rights for authors, performers and sound recording producers, to reflect international best practices. The law should, at a minimum, enable rights holders to: (1) determine how to license their rights individually and collectively; and (2) become direct members of the Central Bureau of Rights Collection and Administration (ECAD), a private umbrella collective management organization (CMO), and enjoy fair and balanced representation on its governing bodies. Brazilian authorities should also seize this opportunity to reconsider ECAD's use of a single fee for the licensing of uses of multiple rights of different categories or rights holders—which results in producers receiving only 13.8% of total distributions despite their significant investments.
- **Clarify that interactive streaming involves acts that fall within the producers' exclusive distribution right.** As previously reported, this issue has concerned the music industry since the 2017 decision in *ECAD v. Oi.FM* where the Superior Tribunal Court (STJ, Superior Tribunal de Justiça) erroneously ruled that both interactive and non-interactive streaming involved the public performance right and fell, therefore, under ECAD's collective management mandate. The new law should separately include sound recording producers' exclusive right of making available to the public as established in Article 14 of the WPPT. In the alternative, the new law should expressly indicate that interactive uses of sound recordings fall under Article 93(II) of the existing law rather than under the public performance right.

In light of the ongoing copyright review, it is possible that other bills, laws and regulations relevant to rights holders will be superseded. However, IIPA continues to monitor the following legislative and regulatory activity:

- **Camcording:** The Head of the Committee of Justice and Constitutional Affairs released bill 2714/2019, which appropriately removes the requirement to prove a profit motive. After obtaining unanimous approval from the Committee on Culture, the bill currently sits at the Committee on Constitutional Affairs. Both the committee head and the bill's rapporteur intend to put the bill to a vote in early 2020.
- **Site Blocking:** Bill 5204/16 amends the Marco Civil da Internet to expressly authorize Brazilian courts to issue orders requiring ISPs to block access to websites hosted outside Brazil that are dedicated to copyright

infringement, among other crimes, and provides a penalty of at least two years of imprisonment. In October 2019, House Rep. Gustavo Fruet, from the Committee on Science and Technology, reported favorably on this bill and later changed the report. Given the lack of consensus among the involved stakeholders, the bill is yet to be put to a committee vote. The bill will require further approval by the full House Science & Technology, the Constitutional Affairs Committee and the Senate. There is a similar site blocking bill in the Senate's Committee on Science, Technology, Innovation, Communications and IT. Originally authored by Senator Ciro Nogueira, PL169/2017 is now being reported by Senator Major Olimpio, who is very engaged in fighting organized crime.

- **Medida Provisoria 907:** Signed by the President on November 27, 2019 without consultation from rights holders, this temporary law would deprive rights holders of their existing legal entitlement to payment when their works are used in hotel rooms and cruise ships' cabins—effectively forcing the creative industries to subsidize hotels and cruise ships. If Congress does not approve this temporary law within 120 days of its signing, it will expire. The music industry is currently urging Congress to let this temporary law expire.
- **Online Advertising:** Bill 9744/2018 would impose civil liability on advertising networks involved with local pirate sites. It was introduced in the House and it currently awaits a report at the Committee on Justice and the Constitution. While this bill moves through the legislative process, IIPA members and key stakeholders in the advertisement industry continue to pursue voluntary agreements to address this issue. As mentioned above, the Ministry of Justice's National Council Against Piracy recently facilitated an MOU between industry stakeholders and the Federal Government.
- **Exceptions and Limitations:** House bill 2370/2019, authored by Congresswoman Jandira Feghali, broadens limitations and exceptions in the country's 1998 copyright law. The bill, which was not sufficiently discussed among Brazilian stakeholders, will be voted by the Commission on Culture in November and is subject to review by the Committees on Science, Technology, Innovation, Communications and IT; Finance and Tax; and, Justice and the Constitution.
- **General Data Protection Law:** Lei 13,709 was enacted on August 15, 2018 and will be fully implemented in August 2020, pursuant to Executive Act 869/2018. Heavily inspired by the European General Data Protection Regulation (GDPR), this law places Brazil on par with similar data protection laws around the world. Unfortunately, this new law impairs copyright enforcement efforts because it limits access to Whois data and other official sources that are useful for rights holders to verify contact information of infringing sites. This issue is a priority for some creative industries. We urge Brazil to ensure this new law does not curtail any tools that are necessary or helpful for copyright enforcement.

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

**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 an incentive for the proliferation of 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. IIPA urges 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. In a positive development, in August 2019, Presidential Decree 9971 reduced the IPI (tax over manufactured imports) for consoles (from 50% to 40%), controllers and other accessories (from 40% to 32%), and portable devices (from 20% to 16%). We encourage government agencies to engage in a collaborative process to reduce the tax burden on the video game to stimulate the development of local talent and creativity.

**Television Content Quotas:** 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. It also requires that half of the content originate from independent local producers and that one-third of all qualified channels included in any pay-TV package must be Brazilian. Implementing regulations limit eligibility for these quotas to works in which local producers are the majority IP rights owners, even where such works are co-productions, and regardless of the amount invested by non-Brazilian parties. Lawsuits challenging the constitutionality of these local content quotas, and the powers granted to ANCINE are pending before Brazil's Supreme Court.

**Screen Quotas:** The most recent Presidential Decree on Screen Quotas, released in January 2020, imposed quotas for 2020 that are similar to prior years, requiring varying days of screening depending on the number of screens in an exhibitor group. For example, an exhibitor group with 201 or more screens is required to meet a 57 day quota, and all the screens in the exhibitor group's complexes must individually meet this quota. Brazil's screen quota is facing a constitutional challenge at the Supreme Court and competing legislative proposals have been introduced that would either loosen or tighten the restrictions. The MPA opposes local content quotas, which limit consumer choice and can push consumers toward illegitimate content sources.

**Video on Demand (VOD) Tax:** For six years, Brazilian leaders have contemplated how to capture tax revenues from the fast-growing VOD marketplace. Brazil's existing tax model for audiovisual works is the Condecine, which is levied per title every five years on theatrical, pay-TV and home entertainment releases, and levied annually on audiovisual ads. ANCINE sought to extend Condecine to VOD through a 2012 normative ruling, which ANCINE intends to start enforcing. Condecine would be burdensome if levied over VOD services, especially when charged on a per-title basis as prescribed in the current ANCINE regulation and would limit the choices available to Brazilian consumers in the online content market. A coalition of industry stakeholders has filed a request to annul the 2012 Normative Ruling and have warned against protectionist regulatory models that would impede local market development and investment. Currently, the Executive branch is developing a regulatory proposal through the Superior Council of Cinema, while two draft bills on VOD regulation are under discussion in the legislature.

**Media Cross-Ownership and OTT Regulation:** Brazil's regulators and legislators are examining two significant questions: 1) whether the 2011 Pay-TV Law should be interpreted to prohibit cross-ownership between programmers/producers and operators of pay-TV content, and 2) whether direct-to-consumer offers by OTT platforms of live and/or linear audiovisual content should be regulated under the Pay-TV Law. Lifting the current Pay-TV Law's restriction on media cross-ownership would enable market verticalization, which would boost investment and allow businesses to innovate and freely compete. On the other hand, if a programming company that distributes linear or live content on the Internet (OTT) is considered by ANATEL to be a telecom service, and then subjected to the Pay-TV Law, those OTT direct-to-consumer services would face severe regulatory burdens, including local content quotas, oversight by ANATEL, and additional tax that would be passed on to programmers. Final administrative decisions from ANATEL are expected in early 2020 on both topics, while numerous related legislative proposals are under consideration, addressing both media cross-ownership and OTT distribution.

**Collective Management Organizations (CMOs):** Brazil's then Ministry of Culture, which was moved from the Ministry of Citizenship to the Ministry of Tourism in 2019, 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 MPA 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 Special Secretary of Culture (now within the Ministry of Culture) clearly recognizes the absence of underlying legal rights to any collection claim, therefore revoking the accreditation.

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada remain on the Watch List in 2020.<sup>1</sup>

**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; Subscription Piracy services (infringing paid Internet Protocol Television (IPTV) and Video-on-Demand (VOD) services) and the ever-increasing Canadian re-sellers of these 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 VOD services. The country has made some progress in shedding its reputation as an online piracy haven, but too many Canadian Internet businesses allow their services to be abused by pirate operators, and inter-industry cooperation remains insufficient. Government at all levels accords insufficient resources and strategic priority to enforcement of copyright laws, especially online, and significant market access barriers impede U.S. film and TV producers and distributors.

The mandated parliamentary review of Canada's Copyright Act should have been a vehicle for addressing many of these problems. However, due to the suspension of Parliament in advance of the October 2019 federal election, the Government of Canada did not act upon the recommendations of the Parliament's Standing Committee on Canadian Heritage (Heritage Committee), which was responsible for reviewing matters regarding remuneration of creators. As a result, the shortcomings in Canada's current copyright regime remain unaddressed. Prior IIPA submissions have detailed the many urgent problems, including the decline of the educational publishing market as a result of an overbroad interpretation of the education as fair dealing exception, lack of effective remedies and legal incentives to combat growing online piracy, statutory discrimination against producers of U.S. recorded music, an unjustified radio royalty exemption, an unprecedented exception for user-generated content, inadequate duration of copyright protection, and weak enforcement. The Heritage Committee's recommendations address many of these concerns, and IIPA urges the Government of Canada to swiftly implement the recommendations to improve both the law and enforcement.

IIPA is encouraged that in the absence of legislation, Canada's courts have issued injunctive relief against intermediaries whose services are used to infringe copyright. In addition, IIPA is hopeful that the reforms to Canada's Copyright Board 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. Implementation of the U.S.-Mexico-Canada Agreement (USMCA), which the U.S. has recently done, 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. Canada should meet its USMCA commitments and address pressing concerns, including Canada's deficient online copyright liability legal regime that lags behind global best practices. IIPA asks the U.S. Government to remain extensively engaged with Canada on these and other issues in 2020.

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<sup>1</sup>For 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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2020**

Implement recommended reforms of the Copyright Act and achieve USMCA objectives, including by:

- Addressing the crisis in the educational publishing market, by clarifying that fair dealing should not apply to educational institutions when the work is commercially available; harmonizing remedies for collecting societies under the Copyright Act; clarifying that a tariff approved by the Copyright Board of Canada is mandatory in nature and its enforceability is not dependent upon a person's assent to or agreement with its terms;
- 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: introducing 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, and following through on parliamentary recommendations to consider providing injunctive relief for deliberate online copyright infringement and narrowing the scope of safe harbor exceptions available to online service providers;
- 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
- 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, the operation and sale of Subscription Piracy services, 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
- Make progress on easing long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada's USMCA commitments.

## **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 almost three-quarters of Canadians spend three to four hours a day online, and two-thirds of the population spends at least one hour a day watching TV or movies online.<sup>2</sup> A 2019 study found that half the time Internet users in Canada listen to music is spent listening online through streaming services.<sup>3</sup> The growth of legitimate digital distribution of creative content remains robust. At the end of 2018, the total recorded music market stood 44% higher than in 2014, while revenue from licensed music streaming services had increased more than tenfold, from US\$26 million in 2014 to US\$265 million in 2018.<sup>4</sup> Streaming's share of total music industry revenues increased from just 8.6% in 2014 to 60% in 2018, and, digital consumption methods overall are now three-quarters of all recorded industry revenues.<sup>5</sup> The legitimate online video market is growing in Canada, with studios and producers continuing to work with multiple partners and platforms. Canadians subscribe to a wide variety of

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<sup>2</sup>Canadian Internet Registration Authority (CIRA) *Internet Factbook 2019*, available at <https://cira.ca/factbook/the-state-of-canadas-internet>.

<sup>3</sup>IFPI Music Listening 2019, available at <https://www.ifpi.org/downloads/Music-Listening-2019.pdf>.

<sup>4</sup>IFPI *Global Music Report 2019*, p. 89, available at <http://www.ifpi.org/resources-and-reports.php#recording-industry-in-numbers.php>.

<sup>5</sup>Id.

services offering movies, TV programming, or both, online.<sup>6</sup> Almost 60% of all Canadians report they subscribe to Netflix.<sup>7</sup>

Evidence persists, however, that the digital marketplace for copyright content in Canada continues to underperform, and that the competition from illicit online sources is a key reason.<sup>8</sup> “Stream-ripping” services, now the leading form of music piracy in Canada, are a major contributor to this problem.<sup>9</sup> Stream-ripping enables users of streaming services like YouTube to convert streams into unauthorized audio downloads that can be stored and replayed at will, with no royalty payment to rights holders.<sup>10</sup> By circumventing the technological measures employed by most legitimate music streaming services to prevent copying and redistribution of streamed recordings, stream-ripping services undermine the legitimate markets both for streaming and for licensed music downloads. Dozens of websites, software programs, and apps offering stream-ripping services find an eager marketplace in Canada, with 28% of surveyed Canadians engaging in this form of piracy in the past month. Use of peer-to-peer (P2P) remains high with BitTorrent indexing sites including *Rarbg*, *ThePirateBay*, and *1337x* popular in Canada. Cyberlocker sites, such as *Uptobox*, *1fichier*, and *Rapidgator*, are also a common way to access recorded music.<sup>11</sup>

As noted in last year’s IIPA Special 301 submission, Canada has made progress in recent years rectifying its long-standing reputation as a safe haven for some of the world’s most massive and flagrant Internet sites dedicated to the online theft of copyright material.<sup>12</sup> However, sites and intermediaries associated with Canada still play a leading role in facilitating such theft. Examples include the BitTorrent site *Monova.org* and the cyberlocker *Zippyshare.com*.<sup>13</sup> Canada is also home to various intermediaries that are popular with unlicensed services. For example, while the true location of *Monova.org* is obscured through the use of a reverse proxy service, both sites referenced above are registered by Canadian domain name registrars (*Zippyshare.com* by Tucows, and *Monova.org* by easyDNS Technologies), and these sites employ Canadian proxy registration services (Contact Privacy, Inc. for the Tucows sites, and MyPrivacy.net for the easyDNS sites).

As with music piracy, online movie and TV piracy remains a formidable challenge in Canada, inflicting major financial harm. Frontier Economics estimates the commercial value of digital piracy alone is US\$160 billion worldwide, and the displacement of legitimate economic activity by counterfeiting and piracy has a negative impact on economic growth.<sup>14</sup> Research by Carnegie Mellon University found that if pre-release piracy could be eliminated from the theatrical window, U.S. and Canada box office revenue would increase by 14-15% (equivalent to approximately US\$1.5 billion per year).<sup>15</sup> It is nearly impossible to overstate the magnitude of the piracy problem in Canada. According to the Government of Canada’s own study published in May 2018, more than one-quarter (26%) of content consumers reported having “consumed” (downloaded or streamed or accessed) illegal online content in the previous three-months, and movies (36%) and TV shows (34%) were among the forms of content most likely to be illegally “consumed.”<sup>16</sup> Canadians made a total of 2.6 billion visits to piracy sites in 2018, and the nature of this piracy continues to evolve.<sup>17</sup>

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<sup>6</sup>CIRA *Internet Factbook 2019*, supra 2.

<sup>7</sup>Id.

<sup>8</sup>As 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>.

<sup>9</sup>Stream-ripping provided the special “Issue Focus” for the 2016 USTR Notorious Markets Report, which called it “an emerging trend in digital copyright infringement that is increasingly causing substantial economic harm to music creators and undermining legitimate services.” USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016) (“2016 USTR NM”), at p. 5, available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

<sup>10</sup>The music industry reports that some 87% of Canadians who visited YouTube used the site to access music in 2018.

<sup>11</sup>2018 IFPI Music Consumer Insight Report Study, at <https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf>.

<sup>12</sup>See IIPA’s 2019 Special 301 country survey on Canada, at <https://www.iipa.org/files/uploads/2019/02/2019SPEC301CANADA.pdf> (“IIPA 2019”).

<sup>13</sup>This 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.

<sup>14</sup>Frontier Economics, *The Economic Impact of Counterfeiting and Piracy*, February 2017, available at [https://www.inta.org/Communications/Documents/2017\\_Frontier\\_Report.pdf](https://www.inta.org/Communications/Documents/2017_Frontier_Report.pdf).

<sup>15</sup>Carnegie Mellon University, *The Dual Impact of Movie Piracy on Box-office Revenue: Cannibalization and Promotion*, February 2016, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2736946](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946).

<sup>16</sup>See 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/vwapj/07648-eng.pdf/\\$file/07648-eng.pdf](https://www.ic.gc.ca/eic/site/112.nsf/vwapj/07648-eng.pdf/$file/07648-eng.pdf).

<sup>17</sup>Id.

In 2018, 74% of Canadians' visits to sites used for online piracy were to non-P2P sites, including streaming sites and cyberlocker (host) sites, up from 49% in 2015; while, conversely, 26% of these visits were to P2P sites in 2018, down from 51% in 2015.<sup>18</sup> In addition, Canada has seen an influx of sellers and resellers of infringing paid Subscription Piracy services. These services, which have become widely marketed and widely available, steal legitimate signals through circumvention of technological protection measures (TPMs) and other means. Sandvine reported in April 2018 that: (1) 10% of Canadian households now have at least one set-top box, computer, smartphone or tablet running Kodi software, a higher proportion than in the U.S. (6%); (2) 71% of these households with devices running Kodi software have unofficial add-ons configured to access unlicensed content; and (3) 8% of Canadian households are using known Subscription Piracy services.<sup>19</sup>

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. Canadians remain 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, including computers, mobile devices, and smart televisions, with illegal add-ons, enable users to access unauthorized Subscription Piracy services. Canadians are also increasingly involved in the illegal theft of telecommunication signals that ultimately feed and provide content to these Subscription Piracy services for the benefit of infringing services available inside and outside of Canada. 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 *Ca.sky3ds.plus*, *gamersection.ca*, *r4dscanada.com*, and *flashcarda.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 for hosting, thus evading enforcement action under U.S. law. Many of these Canadian ISPs continue to ignore the multiple notices regarding these websites, which are violating the ISP's own policies and terms of service.<sup>20</sup> 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 *Browze.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* and *eBay Canada*, continue to rise.

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<sup>18</sup>Id.

<sup>19</sup>Sandvine, Video Piracy in Canada, April 2018, available at <https://www.sandvine.com/hubfs/downloads/reports/internet-phenomena/sandvine-spotlight-video-piracy-in-canada.pdf>.

<sup>20</sup>The video game industry reports that Canada is ranked 8th globally for illegal file sharing of video game content.

## **KEY TOPICS FOR COPYRIGHT REFORM LEGISLATION**

In December 2017, Canada's Parliament launched the copyright law review mandated by the 2012 Copyright Modernization Act (CMA).<sup>21</sup> The review provided an invaluable opportunity for Canada to assess whether the Copyright Act 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 correcting deficiencies in the CMA.

### **Parliamentary Reports**

The review concluded with the release of reports from the two parliamentary committees responsible for the review. In May 2019, the Standing Committee on Canadian Heritage presented its Report ("Shifting Paradigms") to Parliament on "remuneration models for artists and creative industries" (Heritage Report).<sup>22</sup> Importantly, the Heritage Report recognized the negative impacts the 2012 amendments to the fair dealing exception have had on the publishing industry, and the "disparity between the value of creative content enjoyed by consumers and the revenues that are received by artists and creative industries" (known as the "value gap"). The Heritage Report included a number of positive recommendations intended to address these concerns as well as other significant shortcomings of Canada's legal framework. Among other things, the Heritage Report recommended that the Government of Canada:

- clarify that fair dealing should not apply to educational institutions when the work is commercially available;
- increase its efforts to combat piracy and enforce copyright;
- review the safe harbor exceptions and laws to ensure that ISPs are accountable for their role in the distribution of content;
- harmonize remedies for collecting societies under the Copyright Act;
- narrow the radio royalty exemption so that it applies only to "independent and/or community-based radio stations";
- extend the term of copyright for works;
- increase support for creators and creative industries in adapting to new digital markets;
- create educational materials to raise awareness of copyright provisions and artist remuneration for consumers;
- review, clarify and/or remove exceptions contained in the Copyright Act, ensuring that any exception respects section 9 of the Berne Convention for the Protection of Literary and Artistic Works;
- limit Copyright Board rate setting criteria to marketplace-based criteria; and
- meet international treaty obligations (including Berne Convention for the Protection of Literary and Artistic Works, the Trade-Related Aspects of Intellectual Property Rights Agreement, and World Intellectual Property Organization Copyright Treaty).

In June 2019, the Parliament's Standing Committee on Industry, Science and Technology presented its Report on the Statutory Review of the Copyright Act (Industry Report).<sup>23</sup> The Industry Report also included some notable recommendations, including that the Government of Canada should: consider evaluating tools to provide injunctive relief in a court of law for deliberate online copyright infringement; monitor the implementation, in other jurisdictions, of legislation making safe harbor exceptions available to online service providers conditional on measures taken against copyright infringement on their platforms; and narrow the radio royalty exemption so it is available to only "small, independent broadcasters." Unfortunately, in preparing its report, the Industry Committee did not consult the Heritage Committee, which was tasked with examining the specific issue of artist and creative sector remuneration. This lack of

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<sup>21</sup>The Copyright Modernization Act (CMA), adopted in 2012, was fully brought into force in January 2015. Section 92 of the Copyright Act mandated that a parliamentary review of Canadian copyright law begin in 2017.

<sup>22</sup>See "Shifting Paradigms: Report of the Standing Committee on Canadian Heritage," [https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc\\_cid=d88779154e&mc\\_eid=0183856a67](https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc_cid=d88779154e&mc_eid=0183856a67).

<sup>23</sup>See Statutory Review of the Copyright Act, <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/>.

consultation created inconsistencies with the Industry Committee’s analysis, resulting in certain recommendations (often on those overlapping issues) that lack an evidentiary basis.

IIPA urges the Government of Canada to swiftly take up these recommendations, and adopt needed reforms. In May 2019, a bill was introduced in Parliament intended to implement Canada’s USMCA commitments (2019 USMCA Bill), but as discussed below, it left many key commitments unaddressed. The October federal election pushed consideration of the 2019 USMCA Bill and copyright reform legislation until 2020. We encourage the Government of Canada to implement the parliamentary recommendations as well as its USMCA commitments in a timely manner so that substantive reform is effectively achieved. 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 drafting legislation to reform the Copyright Act and implement Canada’s USMCA commitments.

## **1. Strengths of the Canadian Regime—Recent Positive Developments**

Several recent decisions from Canadian courts reflect positive trends that legislation implementing the copyright review recommendations should affirm and build upon. Some directly involve provisions of the CMA. In addition, IIPA remains hopeful that reforms of the Copyright Board will 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*,<sup>24</sup> 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.<sup>25</sup> 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 Distributors of Set-top Boxes and Enabling Apps**

As previously reported, two recent decisions indicate that effective remedies against set-top boxes and their enabling apps are available under current law. In February 2018, the Federal Court of Appeal upheld orders to shut down and seize piracy websites that made available illegal add-ons enabling set-top boxes to access streaming video without authorization.<sup>26</sup> 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 pre-loaded with applications that allow consumers to access TV programs and movies without authorization or subscription.<sup>27</sup> 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. The Heritage and Industry Reports recommend that the Government of Canada should “increase its efforts to combat piracy and enforce copyright,” and consider providing injunctive relief for deliberate online copyright infringement and narrowing the scope of safe harbor

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<sup>24</sup>2017 FC 246, available at <https://www.ippractice.ca/files/2017FC246.pdf>.

<sup>25</sup>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.

<sup>26</sup>*Bell Canada v. Lackman*, 2018 FCA 42.

<sup>27</sup>*Wesley dba MTLFreeTV.com v. Bell Canada*, 2017 FCA 55, affirming *Bell Canada v. 1326030 Ontario Inc. dba ITVBox.net*, 2016 FC 612.

exceptions available to online service providers. Such legislative enhancements are needed to disrupt this growing illicit marketplace, especially in light of the alarming growth of Subscription Piracy services.

### **C. Injunctions Against Intermediaries to Block Access to and De-Index Sites Dedicated to Intellectual Property Infringement**

In November 2019, the Federal Court in *Bell Media Inc. v. GoldTV.Biz*<sup>28</sup> granted an injunction to order a group of ISPs to block access to an illegal IPTV service. The Court rejected arguments that the injunction was improper due to the absence of an express site blocking provision in the Copyright Act and the ongoing debate about the role of site blocking in Canada's telecommunications regulatory regime (discussed below). This landmark ruling, the first site blocking order to be issued by a Canadian Court, is an important step in Canada's progress towards cleaning up its digital marketplace. The decision, however, has been appealed to the Court of Appeal.

The Court in *Bell Media* based its authority to issue the injunction on the ground breaking June 2017 decision of the Supreme Court of Canada (SCC) in *Google v. Equustek Inc.*<sup>29</sup> That case 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.<sup>30</sup> 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”—have laid the groundwork for Canadian courts to issue effective injunctive relief to combat sites dedicated to copyright infringement. Nevertheless, as discussed below, such a remedy should be explicitly provided in the Copyright Act.

### **D. Copyright Board Reform**

Sweeping reforms to Canada's Copyright Board took effect in April 2019. As reported last year, those changes included an overhaul of the legislative framework governing tariff-setting proceedings before the Copyright Board, which should improve the timeliness, clarity, and efficacy of the proceedings. 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 have made 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. The government has released draft regulations requiring the Copyright Board to issue its decisions within 12 months following the close of hearings, which is a positive development.

Importantly, the amendments 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 Board may consider other factors, including “any other criterion that the Board considers appropriate,” if implemented properly, the new criteria should be a welcome improvement.<sup>31</sup> It will be very important to ensure that the Board applies the willing buyer/willing seller criterion properly, and that it is not undermined by other criteria, such as taking into account the “public interest.” This “public interest” criterion, which the Heritage Report recommends revisiting in a future review of the new rules, is unclear and does not have a basis in economics.

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<sup>28</sup>2019 FC 1432.

<sup>29</sup>2017 SCC 34.

<sup>30</sup>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.” 2018 BCSC 610.

<sup>31</sup>Under the old framework, the Board's assertion of unlimited discretion to set tariff rates leads to results that are not only unpredictable, but often wildly out of step with the evidence presented at hearings, including rates agreed to in freely negotiated agreements and in comparable markets.

The amendments broaden enforcement prohibitions to cover users who have offered to pay proposed tariffs in addition to users who have paid or offered to pay tariffs that have been approved. It is critical that, in implementation, this broadened enforcement prohibition does not delay or undermine the ability of CMOs to collect royalties from active users.

The Copyright Board is currently drafting regulations to implement these reforms. IIPA applauds Canada's commitment to reforming its tariff-setting process, and is hopeful that the implementing measures 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. The main goal of any amendments to the Copyright Act should be to correct these issues.

### **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 "education," undefined and unlimited in application, to the list of purposes (such as research and private study) that qualify for the fair dealing exception.

Previous IIPA submissions have extensively analyzed how the CMA amendments, in combination with broad judicial interpretations of the pre-CMA fair dealing provisions, led to the 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.<sup>32</sup> 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 new content and in innovative means to deliver textual materials to consumers. A detailed study by PricewaterhouseCoopers (PwC) in June 2015 documented and quantified 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.<sup>33</sup>

USTR's 2019 Special 301 Report noted the U.S. Government's continuing concerns with "the ambiguous education-related exception added to the copyright law in 2012, which has significantly damaged the market for educational publishers and authors."<sup>34</sup> Unfortunately, there has been little progress in rectifying the current situation, despite the CMA 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 issues in the case were whether the university could copy materials within the limits of its "fair dealing guidelines" and whether the university could disregard the Copyright Board-approved tariff issued by

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<sup>32</sup>See IIPA's 2017 Special 301 country survey on *Canada* ("IIPA 2017"), available at <https://www.iipa.org/files/uploads/2017/12/2017SPEC301CANADA.pdf>, at 97-100.

<sup>33</sup>PricewaterhouseCoopers, *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines* (June 2015), available at [http://accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](http://accesscopyright.ca/media/94983/access_copyright_report.pdf) (hereafter "PwC"). The PwC study noted that "[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." 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." See Access Copyright Annual Report 2017 at 7, [https://www.accesscopyright.ca/media/1289/access\\_2017ar.pdf](https://www.accesscopyright.ca/media/1289/access_2017ar.pdf). 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.

<sup>34</sup>See USTR, 2019 Special 301 Report at 80, <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>.

Access Copyright for post-secondary institutions. The court's answer on both issues 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," 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," and that the approved tariff was mandatory and enforceable against any person or entity, such as York University, that carried out acts covered by the tariff.<sup>35</sup> York University has appealed the decision.

The sense of impunity from copyright responsibility that Canada's educational establishment 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,<sup>36</sup> a fresh example emerged in 2017, when it was revealed that Concordia University's Center for Expanded Poetics was creating high-quality scans of entire books by at least a dozen contemporary Canadian and U.S. poets and making them available for free download, rather than purchasing them for use by students.<sup>37</sup> Although Canadian publishers and authors are the most profoundly impacted, the fallout has reverberated in the U.S. creative sector, because U.S. authors and publishers have always accounted for a significant share of the textbooks, supplementary materials, and other texts used in the Canadian educational sector.

The Heritage Report provided recommendations to address this problem, most importantly that the Government of Canada should clarify that the fair dealing exception should not apply to educational institutions when the work is commercially available.<sup>38</sup> This would bring needed clarity to Canada's law regarding which works should or should not be subject to a license. Until the legal framework is clarified, the crisis in the educational publishing sector will continue to worsen. Because "education" is not defined in the statute, and given the expansive interpretation of fair dealing articulated 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. Even the flawed Industry Report acknowledged a problem, although it stopped short of recommending an adequate solution and instead took a wait-and-see approach. Canadian federal authorities, and its Parliament, should be encouraged to address this crisis by expeditiously implementing the recommendations in the Heritage Report intended to address this crisis, including clarifying the scope of the education as fair dealing exception. In addition, to prevent educational institutions from circumventing the tariff system, the Copyright Act should be amended to confirm that an approved tariff by the Copyright Board is mandatory in nature, and its enforceability is not dependent upon a person's assent to, or agreement with its terms. The goal must be an appropriate balance under which educational publishers and authors are once again compensated for their works, thus ensuring a viable domestic marketplace for commercially-published educational materials.

**Non-Commercial User-Generated Content Exception:** In addition to those impacting the educational publishing sector, one exception in particular that merits close scrutiny is the exception in Section 29.21, entitled "Non-commercial User-generated Content." This provision allows any published work to be used to create a new work, and

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<sup>35</sup>Canadian Copyright Licensing Agency ("Access Canada") v. York University, 2017 FC 669.

<sup>36</sup>See 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/>.

<sup>37</sup>Kate 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/>.

<sup>38</sup>Other helpful recommendations in the Heritage Report include that the Government of Canada: review Canada's exceptions to ensure they meet its international obligations; promote a return to licensing through collecting societies; review, harmonize and improve the enforcement of statutory damages for infringement for non-commercial use in section 38.1(1) of the Copyright Act; and harmonize remedies for collective societies under the Copyright Act.

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 TRIPS Agreement and the Berne Convention, and its breadth raises serious questions of compliance with the three-step test for permissible limitations and exceptions.<sup>39</sup> 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 clarifying and/or removing the user-generated content (UGC) exception as part of revisions to the Copyright Act, in accordance with recommendations in the Heritage Report.<sup>40</sup>

## **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.<sup>41</sup> The statute lacks important tools that leading copyright regimes now routinely provide to incentivize intermediaries to address infringement of copyright committed with the aid of their services, and the tools it does provide fall demonstrably short of addressing the problem. As a whole, Canadian law lacks 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, such services, including those offered in Canada, are all too often abused to facilitate online copyright theft.

The enablement provision in Section 27(2.3) establishing civil liability for providing online services primarily for the purposes of enabling acts of copyright infringement was an important step forward, but it is unduly limited. For example, because it applies only to the provision of services, it is a far less optimal tool for distributors of goods used primarily for infringing purposes. Thus, trafficking in 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 online enforcement regime 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 mitigation of infringing activity of consumers. 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. Furthermore, 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.<sup>42</sup> 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.<sup>43</sup>

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 hosted materials, even after it is

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<sup>39</sup>See, 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.

<sup>40</sup>A key recommendation in the Heritage Report is that the Canadian Government review, clarify, and/or remove broad exceptions to ensure that exceptions in Canada’s law are consistent with its obligations under the TRIPS Agreement and the Berne Convention.

<sup>41</sup>The 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.

<sup>42</sup>See IIPA 2017 at p. 96 for a summary of concerns.

<sup>43</sup>See Section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

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 community, and substantially diminishes both the utility of the legislative mechanisms in place, and the efforts and interests of rights owners and stakeholders impacted by widespread online infringement. The law lacks necessary 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 user<sup>44</sup> is unworkable in practice, particularly regarding valuable, time-sensitive pre-release content, and creates a disincentive for hosting providers to cooperate or take any effective action in the case of content they know or ought to know is infringing. The consistent absence of any criminal enforcement in Canada against even the most blatant forms of online theft completes the picture of a system that is still not up to the challenge.

Canada should revise its law to introduce incentives for intermediary cooperation, 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. Effective action should include 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 2019 USMCA Bill did not address these deficiencies.<sup>45</sup> The amendments of Bill C-86 were another missed opportunity. While they further clarified the content to be included in notices of claimed infringement issued to ISPs, the amendments failed to include any meaningful incentives for intermediaries to cooperate with rights holders.

Taken as a whole, the deficiencies in Canada's online liability regime significantly disadvantage licensed services, and continue to send the wrong signals to consumers about whether infringing activities are tolerated. The Heritage and Industry Reports recommend that Canada's government review the current law to ensure ISPs are accountable for their role in the distribution of content, and that the government monitor the implementation of safe harbor legislation in other jurisdictions, a clear acknowledgement of Canada's status as a global outlier on this issue. Canada should follow through on these parliamentary recommendations and 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**

In accordance with recent case law, Canada should provide tools to effectively address the problem of flagrantly infringing online content, particularly content hosted outside of Canada, including providing effective injunctive relief to disable access to such infringing content. A growing list of countries around the world have adopted such a framework to address the serious problem of illegal marketplaces hosted in one country that target consumers in another. This is necessary because of the failure of the services' host countries 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 blocking access to these foreign pirate sites from within their borders. As noted last year, in response to a 2018 proposal to create a website-blocking mechanism, the Canadian Radio-television and Telecommunications Commission (CRTC) acknowledged the harm caused by piracy, but declined to consider the merits of the proposal, holding that copyright enforcement falls solely within the statutory scheme of the Copyright Act. In granting the website blocking order, the Court in *Bell Media* (discussed above) cited this decision to reject the argument that disabling access to infringing websites will interfere with the CRTC's regulatory role. The Industry Report recommended that the Government of Canada evaluate tools to expressly provide injunctive relief in a court of law for deliberate online copyright infringement. In accordance with the recommendation, the Canadian Government should

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<sup>44</sup>See Section 31.1 of the Copyright Act.

<sup>45</sup>It is unfortunate that the USMCA exempted Canada's flawed system and does not even obligate 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).

revise the Copyright Act to provide express injunctive relief to effectively disable access to infringing content in line with recent case law.

#### **D. Discrimination and Duration**

Other issues should be addressed in the implementation of Canada's Copyright Act review recommendations and USMCA obligations.

##### ***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, as well as for use as background music in commercial establishments, and in fitness studios and dance clubs. 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). 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 immediately with the implementation of the USMCA.

##### ***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.<sup>46</sup> The Copyright Board concluded that there is no economic rationale for this provision, which it called a "thinly veiled subsidy" to "large, profitable broadcasters."<sup>47</sup> 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 are subject to such an exemption from paying royalties to sound recording producers and performers. Since 1997, when the radio royalty exemption was enacted, record labels have been deprived of over C\$160 million (US\$121 million) that they would have received in the absence of the exemption. Nor, arguably, does the Canadian system guarantee the "equitable" remuneration that Canada is obligated to provide by Article 15 of the WIPO Performances and Phonograms Treaty (WPPT) and that Canada committed to provide under the USMCA.<sup>48</sup> Both the Heritage Report and the Industry Report called for narrowing this exemption so that it does not apply to the vast majority of commercial radio stations. The C\$1.25 million commercial radio royalty exemption should be eliminated as part of implementation of the USMCA or the Copyright Act review, or otherwise.

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<sup>46</sup>See Section 68.1(1) of the Copyright Act. As previously reported, each of Canada's nearly 700 commercial radio stations, regardless of its size, revenues, profitability, or co-ownership, is statutorily exempted from communications royalties for sound recording broadcasts on its first C\$1.25 million (US\$951,000) of annual advertising revenue. 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.

<sup>47</sup>See Copyright Board, Public Performance of Music Works 2003-2007 and Public Performance of Sound Recordings 2003-2007, October 14, 2005, p. 32, 37-38.

<sup>48</sup>See USMCA Article 20.62.

### **iii. Term of Protection**

A notable example of a needed modernization of Canadian copyright law that 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. Although Canada extended the term of protection for sound recordings in 2015, Canada should 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. Canada should not delay bringing its law into line with this global norm, particularly in light of the Heritage Report's recommendation to do so. While the 2019 USMCA Bill included provisions extending copyright term of protection to USMCA-required minimums for sound recordings and certain other works, it did not propose extending the term of protection for all works measured by the life of the author, as Canada is obligated to do under USMCA Art. 20.62(a). This omission should be corrected when Canada implements its USMCA obligations in 2020. Furthermore, any extension of the term of copyright protection should not be accompanied by Berne-prohibited formalities or measures that undermine contractual certainty.

## **GOVERNMENT ACTIONS ON 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 more (with the notable exception of the denial of *ex officio* authority with regard to in-transit infringing goods).<sup>49</sup> 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 Canadian law enforcement 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.<sup>50</sup>

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.<sup>51</sup> The weak

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<sup>49</sup>In 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).

<sup>50</sup>For 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](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>.

<sup>51</sup>This 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.

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.<sup>52</sup>

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, particularly in light of the Heritage Report's recommendation to increase enforcement efforts. Since the availability of pirated products (and of Piracy 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. 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.<sup>53</sup> 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.

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<sup>52</sup>As 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. In addition, the video game industry notes good cooperation with Canada Border Services Agency (CBSA) on seizures of counterfeit video game products in 2019.

<sup>53</sup>Unfortunately, these issues were not addressed in the 2019 USMCA Bill. IIPA 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.

- *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 C\$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 List if it changes formats and thereby becomes competitive with a Canadian pay or specialty service; if it solicits advertising in Canada; or if it does not conduct its negotiations and enter into agreements with BDUs in a manner that is “consistent with the intent and spirit of the Wholesale Code.” A principal purpose of the Wholesale Code is to prohibit contractual terms that discourage or penalize the offering of services on a stand-alone basis.
- *Broadcasting Investment Limitations*—The Broadcasting Act provides that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay and specialty television) and distribution undertakings (cable 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.
- *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 (MPA) 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 MPA 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 with the U.S. most relevant to copyright obligations include TRIPS and the North American Free Trade Agreement (NAFTA).<sup>54</sup> Canada recently made further commitments regarding copyright in the USMCA, as discussed above, although that agreement has not yet entered into force. In accordance with U.S. law, the President should ensure Canada has fully met its USMCA commitments before the agreement enters

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<sup>54</sup>IIPA commends Canada’s accession to the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WPPT), which were enabled by bringing the CMA into force.

into force with respect to Canada.<sup>55</sup> As noted above, some aspects of Canada's current copyright regime may raise significant issues of compliance with these agreements (for example, whether Canada's copyright exceptions, as applied, comply with the well-established "three-step test"),<sup>56</sup> and with Canada's commitments under the USMCA.

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<sup>55</sup>See 19 USC § 4205(a)(1)(G).

<sup>56</sup>See TRIPS Article 13.

# COLOMBIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** In 2019, Colombia adopted law 1995/2019, known as the National Development Plan, which created a set of regulations for copyright and neighboring rights contracts. Colombia also amended its copyright law in 2018. 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, physical notorious markets, street markets, and illegal fairs are still prevalent. At the same time, there is a growing problem with the commercialization of unauthorized digital goods (UDGs) for video games among Colombian gamers. 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. Colombia's enforcement problems are compounded by the new government's failure to adopt a national anti-piracy campaign, which has prevented the development of training initiatives for enforcement officers, public prosecutors, and judges on the techniques to investigate and prosecute online piracy, and has resulted in a failure to investigate and prosecute online piracy cases.

### PRIORITY ACTIONS REQUESTED IN 2020

- 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.

### THE COPYRIGHT MARKETPLACE IN COLOMBIA

Online piracy is a growing problem in Colombia. Internet penetration in Colombia has grown to over 65.8%, and the broadband speed rate has increased by 48% on fixed lines and 14% on mobile lines; yet, the problem of piracy 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. 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 (e.g., *y2mate.com*, *savefrom.net* and *flvto.biz*) are popular (the top three most popular sites in the country are driving over 72 million visits yearly). Additionally, linking sites and cyberlockers (e.g., *1fichier.com* and

<sup>1</sup>For more details on Colombia's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Colombia's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



*zippyshare.com*) are also popular. Repeat infringers are also becoming a major problem to be addressed, as many physical notorious markets vendors have 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 60 million visits yearly. There has also been an increase in the offer of live content online, IPTV streaming, and piracy apps. 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*. In addition to digital account resales, *MercadoLibre.co* and *Linio.co* offer circumvention devices and modified consoles. Unfortunately, compliance with takedown requests is low. Digital account resales 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. On a positive note, in 2019, no video or audio camcords of MPA member films were traced to Colombian theaters, down from seven in 2018.

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**

**National Development Plan:** In May, 2019, Colombia adopted law No. 1995-2019, which created the National Development Plan. This complex legislation is intended, among many other goals, to facilitate administrative processes and streamline bureaucracy in the Colombian Government. This law contains many reasonable and potentially useful provisions for the creative economy, including production incentives. However, Article 181 of the law amended article 183 of the copyright law and created a set of regulations for copyright and neighboring rights contracts that appear to limit the freedom of foreign rights holders to contract with local parties for future forms of commercialization, which could result in a restriction of foreign investment in Colombia. These new legal provisions could also have a negative impact on the ability of phonogram producers to manage their business and produce new local talent, and will require further analysis to determine if they violate Colombia's obligations under international treaties.

**Copyright Act Amendment:** In early July 2018, Colombia's legislature amended the copyright law that updates Colombia's copyright framework as part of the implementation process of the U.S.–Colombia Trade Promotion Agreement (TPA) with the U.S. The amendment 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. Colombia should clarify that new permanent exemptions to TPM protection are subject to review, allowing proponents to offer substantial evidence of actual or likely adverse impact on

non-infringing uses. In addition, Colombia should make clear that circumvention of a TPM is not permissible for any exception or limitation under the copyright law because that would be inconsistent with the provision agreed to in the TPA with the United States, which requires that a violation of TPM protections “is a separate civil or criminal offense, independent of any infringement that might occur under the Party’s law on copyright and related rights.” Further, while it criminalizes the retransmission or reception of illegally decrypted satellite signals, a profit requirement may complicate enforcement. Also, the law introduced an annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress, making them subject to possible change each year. This has created uncertainty over the stability of copyright exceptions and limitations, and has negatively impacted both criminal enforcement efforts and impeded private investment.

**Performance Rights Licensing Roundtable:** In June 2019, an Executive Directive was issued implementing roundtable negotiations between the Colombian Government and stakeholders’ organizations in order to establish a legal framework for a single national organization for public performance rights licensing. Although interested parties held roundtable meetings in 2019, and there is a general consensus that one single national organization for public performance licensing is necessary, no agreement has been reached and more consultation will take place in 2020.

## **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 54% increase in the volume of online frauds last year and indicate that 15% of all online crimes reported to the police by citizens are related to problems with e-commerce. 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.

Colombia’s lack of a national anti-piracy campaign to address piracy, and the belief by the Government of Colombia that online piracy is either not a problem or is one that only affects foreign interests, contribute to the country’s poor enforcement. 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. Just the establishment of the National Unit will not make any difference on the piracy problem unless resources and proper training are allocated. The Copyright Office (“Dirección Nacional del Derecho de Autor” (DNDA)) should play a coordination role in the education and training activities for enforcement officials 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 through the National Development Plan needs to have a powerful component to engage authorities to more actively protect IP and the digital economy in Colombia. But again, the DNDA should assume the leadership in the creative sector ecosystem and develop a conscious coordination effort.

**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 facilitate a cross-industry agreement. 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. The U.S. Government should seek high standard remedies that support today's business models of the creative industries, including remedies that effectively respond to current challenges and reflect international best practices.

## **MARKET ACCESS**

**Potential Prominence Obligation for VOD Platforms:** Article 154 of the 2019 National Development Plan mandates that Video-on-Demand (VOD) platforms include a section easily visible to the user that features audiovisual works of Colombian origin, which appears to run counter to Colombia's obligations under the TPA related to interactive audio-visual services. The Government of Colombia has indicated that it will engage in stakeholder consultation and issue implementing regulations in the first quarter of 2020.

**Actors Law:** On July 24, 2019, Colombian President Ivan Duque signed Law 1975, known as the Actors Law. The law regulates labor rights of actors in Colombia and promotes employment opportunities for those who work in the field. The text of the law constitutes a new regulatory framework for the work of artists, providing guarantees around social security; incorporating the right to constitute trade unions and professional organizations and/or associations; establishing the professionalization of the acting career; and ordering the creation of the National Registry of Actors and Actresses. However, depending on how they are implemented, some of the Actors Law provisions could have the effect of increasing production costs for film and television made in Colombia, which could potentially make Colombia less competitive as a location for audiovisual production. Although the law does not apply to performers of sound recordings; it is unclear if it will apply to music videos.

**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.

**Technical Assistance and Cooperation:** The U.S. Department of Justice and U.S. Patent and Trademark Office conducted a training session for law enforcement authorities in Bogota in May 2019 with over 50 attendees, mostly from local law enforcement agencies, including the cyber police (DIJIN), special prosecutors, and forensic police experts. The creative industry was present at the event with various educational panels about online piracy and investigations.

# ECUADOR

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR retain Ecuador on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** With the 2016 enactment of the Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación (Code of the Social Economy of Knowledge, Creativity, and Innovation, COESCI), Ecuador dramatically weakened its IPR protection. After efforts by the creative industries have yielded no adequate results, IIPA urges USTR to encourage Ecuador to restore legal protection for copyright holders either through regulations or amendments to COESCI.

In sum, COESCI upends the copyright framework, asserting that public domain is the norm and copyright is the exception. COESCI features 30 copyright exceptions and limitations (up from 11 in the prior law), including a five-factor “fair use” clause, which is an unwelcome first for a Latin American country and is broader than the fair use provision found in U.S. law. Ecuador, unlike the United States, has a civil law system and does not follow judicial precedent. Additionally, Ecuadorian judges have no experience or training on the doctrine of fair use. These realities impair the proper application of the fair use doctrine and cause unacceptable legal uncertainty for both rights holders and users.

Many of COESCI’s exceptions clearly exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement. Some may provide a basis for potential challenges in the near future, but mostly, Ecuador’s weakened copyright system is already preventing the growth of many businesses related to the production and distribution of protected content. The recording industry is particularly concerned with expansive exceptions to the exclusive public performance and broadcasting rights attached to sound recordings which exempt “community radios” (operating as commercial radios), medium and small businesses and public transportation vehicles from authorization or remuneration requirements. COESCI also enables libraries to reproduce and lend protected works in ways that conflict with the legitimate economic interests of publishers and other rights holders. The law also allows linking, reproduction, and storage by search engines where such actions are necessary for their operation and where no “protected content” is violated. These exceptions have significantly reduced the market for licensing royalties, especially for the music industry. Other troubling provisions interfere with rights holders’ ability to contract and freely transfer rights, and normalize the circumvention of technical protection measures wherever users assert the right to benefit from any of COESCI’s exceptions.

After the creative community in Ecuador and abroad expressed their deep concerns regarding COESCI, the government promised to correct or minimize the impact of its exceptions through implementing regulations by 2017. Unfortunately, the changes announced by the *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) in November 2019 fail to adequately correct COESCI’s most egregious deficiencies and do not bring Ecuador into compliance with its international obligations.

The Ecuadorian Government should also direct considerable attention and resources to its enforcement efforts to combat piracy and foster a vibrant legitimate creative marketplace. Ecuador continues to rank third in the region for camcording, behind Mexico and Brazil. 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

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<sup>1</sup>For more details on Ecuador’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Ecuador’s Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



in Ecuador's market, Ecuador must take the appropriate steps to strengthen copyright protection and enable rights holders to exercise and protect their rights in practice.

## **PRIORITY ACTIONS REQUESTED IN 2020**

- Urgently modify COESCI to reverse this rollback of protection and to update copyright protection and enforcement in Ecuador in line with international best practices.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theatres, without requiring proof of commercial intent.
- Ensure that broadcasters and cable operators are not above the law and pay royalties for the music and sound recordings that they use.

## **THE COPYRIGHT MARKETPLACE IN ECUADOR**

Internet penetration remained steady during 2019, with approximately 13.5 million Internet users in Ecuador, representing about 78% of the population.<sup>2</sup> Mobile broadband penetration is growing significantly and smartphone penetration is over 38%.<sup>3</sup> Internet daily usage is growing fast and in 2019, the active users population surpassed 84%. According to the International Federation of the Phonographic Industry's (IFPI's) 2019 Global Music Report, in Ecuador, digital revenues amount to 85.4% of total music revenues and streaming sales make up 94% of total music sales. There are nine legitimate online music services.<sup>4</sup>

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, such as *y2mate.com*, *flvto.biz* and *mp3-youtube.download*. At the same time, regional Latin Mp3 download sites are popular among local users. For example, in December 2019, *uTorrent* and the stream-ripping sites *2CONV* and *y2mate* recorded an average growth rate of over 30%, and *uTorrent*, a growth rate of over 10%.

Camcording is a persistent problem in Ecuadorian movie theatres. In 2019, the MPA reported 16 camcords sourced from Ecuador, unchanged from 2018. Ecuador is currently the third largest source of movie theater piracy in Latin America behind Mexico and Brazil.

## **COPYRIGHT LAW IN ECUADOR**

Ecuador's 2016 COESCI establishes numerous exceptions and limitations to copyright, enumerated in Article 211 ("Fair Use") and Article 212 ("Acts that do not require authorization for use"). These exceptions are overbroad and undermine important protections for rights holders. They are also inconsistent with the three-step test governing exceptions and limitations under Article 9(2) of the Berne Convention, Article 13 of TRIPS and the WIPO Internet Treaties (in force in Ecuador since 2002). COESCI also fails to meet Ecuador's other copyright protection obligations pursuant to its free trade agreements with the European Union (EU), Peru, and Colombia, which went into force January 1, 2017.

SENADI's November 2019 statements on planned changes to COESCI did not address the creative industries' most serious concerns. Although the government is conducting consultation meetings and workshops with stakeholder organizations and academia, it has not delivered a concrete initiative to amend COESCI. It is necessary for SENADI to fulfill the promise made by President Lenin Moreno's administration to reverse at least the most damaging provisions in COESCI. In the three years since COESCI entered into force, copyright industries in Ecuador have declined, mainly

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<sup>2</sup>See [www.Internetworldstats.com](http://www.Internetworldstats.com).

<sup>3</sup>Instituto Nacional de Estadística Y Censo (Ecuador), Tecnologías de la Información y Comunicación Encuesta Multipropósito, 23 (2018) - [https://www.ecuadorencifras.gob.ec/documentos/web-inec/Estadisticas\\_Sociales/TIC/2018/201812\\_Principales\\_resultados\\_TIC\\_Multiproposito.pdf](https://www.ecuadorencifras.gob.ec/documentos/web-inec/Estadisticas_Sociales/TIC/2018/201812_Principales_resultados_TIC_Multiproposito.pdf).

<sup>4</sup><https://www.pro-music.org/legal-music-services-latin-america.php>.

as a result of erroneous regulations, conceived under the bizarre idea that protection of intellectual property rights is no longer a fundamental right. We urge the Government of Ecuador to make the appropriate changes to bring COESCI into compliance with its international obligations.

**Fair Use:** Transplanting U.S. fair use law alone to COESCI creates an unacceptable level of uncertainty and risk in the copyright ecosystem. While decades of case law and the principle of *stare decisis* enable U.S. courts to appropriately interpret Section 107 of the Copyright Act, a similar environment does not exist in Ecuador. As a civil law country, its courts are not bound by judicial precedent. Furthermore, there is no body of case law to which a judge may refer in evaluating whether the contested use is indeed fair. To make matters worse, COESCI's Article 211 is broader and more uncertain than the U.S. provision on which it is based because it adds a fifth factor, i.e. "use and enjoyment of other fundamental rights." Finally, although Article 211 indicates it is to be applied in accordance with international treaties to which Ecuador is a party, the very letter of the provision and the absence of binding judicial precedent, make such application virtually impossible.

**Other Exceptions:** COESCI's list of exceptions and limitations is extensive. In addition, COESCI's exceptions and limitations, including fair use, can be enforced without prejudice to the others. This adds to the breadth of the exceptions because a use that does not meet the requirements of a specific exception may still be considered a fair use, and a use that is not deemed to be fair might otherwise qualify as an exception. The following exceptions allow widespread uses that conflict with the normal exploitation of works and unreasonably prejudice rights holders' legitimate interests, in clear contravention of internationally accepted standards for exceptions and limitations:<sup>5</sup>

Exception 9 for libraries and archives is broader than U.S. law in important respects. It allows libraries and archives to freely reproduce a copyrighted work to: (1) deliver to another library or archive that may, in turn, make its own additional copy for purposes of lending and preserving the copy received; and (2) substitute a missing or unusable copy in another library's collection. It also allows libraries to make eight additional uses without authorization or payment, including text and data mining, as well as translating works for research purposes if they have not been translated into Spanish or other local languages after three years from publication. These library exceptions can harm the legitimate market of publishers and copyright owners. Exception 10<sup>6</sup> similarly cuts into various potential markets for audiovisual rights holders because it allows public lending of audiovisual works by a video library.

Exception 11 allows broadcasters to make ephemeral copies for their own transmissions and keep them for a period of five years. This long period makes this a *de facto* statutory license to make permanent copies, instead of an exception for ephemeral copy use. This exception prevents music right holders in Ecuador from licensing the reproduction rights in their contents and unreasonably interferes with right holders' normal business.

Exception 24 allows websites to freely reference, link, reproduce and store protected content when necessary for the operation of a search site and provided that there is no "violation" of the protected content. This exception enables search engines to exploit copyrighted content to the detriment of rights holders and is unclear because any "use" of copyrighted content in ways restricted by copyright, unless authorized by rights holders, is a "violation" of copyright.

Exception 26 allows small businesses to freely communicate works to the public. Given that the majority of businesses in Ecuador qualify as "small businesses," this is one of the most damaging exceptions in COESCI. It conflicts with the normal licensing of sound recordings in numerous venues across the country and fundamentally undermines rights holders' legitimate economic interests in 95% of the Ecuadorian market.

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<sup>5</sup>"Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder." TRIPS, Article 13, Berne Convention Art. 9, WCT/WPPT.

<sup>6</sup>This 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.

Exception 27 removes 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 non-negligible market for music rights holders.

Exception 30 allows "community radios" to communicate works to the public. Radios covered by this exception account for about 30% of the radio broadcasts in the country, operate as commercial businesses, sell advertising, and compete with other broadcasters. This exception is, therefore, prejudicial not only to the music sector as content producers, but also to the competitive position of the various broadcasters and other licensors. Moreover, the exemption allows for "public communication," which can encompass any means by which works are made accessible to the public, including through digital media.

In addition to the foregoing exceptions, other COESCI provisions provide for various rights and 'default' clauses that govern contracts within the creative sectors unless expressly excluded and sometimes even despite such an exclusion. Such provisions frustrate the freedom of contract in the creative industries, significantly increase legal uncertainty, and complicate rights transfers.

## **COPYRIGHT ENFORCEMENT IN ECUADOR**

Despite the attempts to advance copyright legislation in the country, enforcement of IPR in Ecuador remains weak and underfunded. Rights holders struggle to enforce their copyrights in practice, and attempts to do so through administrative authorities can linger for procedural reasons. A lack of deterrent sentencing and *ex officio* actions continue to hamper effective enforcement and protection against infringing acts. IIPA recommends Ecuador develop an official enforcement plan for the National Police formal agenda. Ecuador is the only country in the region where serious piracy is treated as a misdemeanor with fines instead of prison terms, which is yet another violation of Ecuador's obligations under the TRIPS Agreement.

In a positive development, in 2019, SENADI issued a blocking order against notorious pirate site *Roja Directa* for transmitting, without authorization, football matches from the Premier League on the Internet. This order was based on SENADI's administrative power to stop copyright violations. SENADI should continue this type of action to increase the chances of growth for Ecuador's creative industries.

**Performance Royalties:** The recording industry continues to report significant difficulty in the collection of performance royalties for music and sound recordings, although there was progress in late 2019 with regards to a state-owned broadcaster.

In 2015, phonogram producers and members of the collective management organization (CMO) Soprofon filed numerous administrative actions before SENADI's predecessor against DirecTV for the unauthorized communication to the public of vast music catalogs. DirecTV lost in all cases and was fined three years ago for more than a 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's copyright committee is responsible for resolving these appeals.

In a similar case, Soprofon submitted a claim against state-owned CNT, the biggest cable operator in the country, for its refusal to license performance rights from every rights holder group or organization in Ecuador. The case was submitted to SENADI, which is pending to deliver a technical opinion. In late 2019, the Government of Ecuador paid licensing fees for past uses. Negotiations are ongoing for the licensing of future uses.

# PERU

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Peru remain on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** 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 has yet to implement the necessary high standards of copyright protection to meet its international trade obligations and develop further the country’s digital and creative economy. 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. Peru, one of the main sources of camcordered materials in the region, continues to lack a specific law dealing with camcording. To facilitate enforcement against this form of piracy, criminal penalties without a need to prove a profit intent should be enacted.

Peruvian authorities, especially the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI) and the courts, have made evident efforts to improve enforcement against more than 18 major local sites infringing music and film copyrights. Online and physical piracy continue to be serious problems in Peru that undermine the market for legitimate content in the country and across the region. Individuals based in Peru operate many websites, which profit from selling advertising and user data, offering vast movie and music catalogs to stream and/or download. These sites are highly popular in places such as Argentina, Mexico, and Chile, where they attract hundreds of thousands, and for some countries millions, of visitors. For example, the website *MusicaQ.info* had more than 900,000 visitors from across the region in December 2019. Urgent action is required from the government to tackle this piracy problem.

In addition to necessary legal reforms, IIPA urges Peru to make more use of its existing judicial and administrative powers to address its evolving piracy problem and properly protect the legal digital market. For instance, Peru should increase the funding for the INDECOPI, the agency charged with promoting and defending intellectual property rights, so that it can conduct better administrative enforcement operations against online infringing sites. Finally, Lima’s *Fiscalía Especializada en Delitos Aduaneros y Contra la Propiedad Intelectual*, the specialized IP prosecution offices, should have national jurisdiction to pursue criminal action against copyright infringers.

### PRIORITY ACTIONS REQUESTED FOR PERU IN 2020

- Devote significantly more resources and political support to combat digital piracy.
- INDECOPI should work to consistently build upon the recent positive examples of IPR enforcement against piracy website operators in the country. 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. These rights are not transferred to movie producers when a recording is synched to a movie and it is the music collective management organizations (CMOs) that are typically mandated by music rights holders to carry out relevant public performance licensing activities.
- Repeal Decreto Legislativo No. 1391 of 4 September 2018 or, at a minimum, amend the law to remove the “one member, one vote” governance system from CMOs which prevents more equitable voting systems based on the amount of distributions to members.
- Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.

<sup>1</sup>For more details on Peru’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Peru’s Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



- Pass legislation to introduce clear secondary liability principles for online copyright infringement, establish obligations for Internet Service Providers (ISPs) to apply preventive technical measures to combat digital piracy, and provide for statutory damages for copyright infringement.
- Improve the efficiency and effectiveness of the judicial system, including through raising greater awareness among judges about international best practices on copyright protection and online enforcement.
- Grant country-wide jurisdiction to Lima's *Fiscalía Especializada en Delitos Aduaneros y Contra la Propiedad Intelectual*, the specialized IP prosecution offices in the capital.

## **THE COPYRIGHT MARKETPLACE 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 67% of the population.<sup>2</sup> Mobile broadband penetration is growing rapidly. In 2017, there were 64 active mobile broadband subscriptions per 100 inhabitants, up from 62 the previous year.<sup>3</sup> Fixed broadband is not nearly as prevalent, with only 7.2 fixed broadband subscriptions per 100 inhabitants (up from 6.7 in 2016).<sup>4</sup>

In 2019, the piracy landscape in Peru remained unchanged. Streaming of pirated audiovisual content continues to be prevalent in Peru, with 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 MPA 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, undermine the legitimate market in the entire region and must be addressed with urgency. Peru's 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 an increase in digital sales of recorded music in 2018 (up by 20%), 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 revenue which has gone down from US\$0.6 million to US\$0.1 million in just three years.<sup>5</sup> However, unfair competition created by pirate websites that operate openly in Peru and offer 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. Digital piracy businesses, including streaming and stream-ripping, download, and linking websites, have flourished by selling advertising placements and user data. Although many of them have numerous domain names registered abroad, they often were created, and are administered by, individuals operating within Peru. In 2019, there were more than 120 million visits to illegal stream-ripping sites from Peru such as *y2mate.com*, *flvto.biz* and *mp3-youtube.download*. According to SimilarWeb data, in the last quarter of 2019, there were over five million visits to *y2mate.com* and *flvto.biz*, and over two million visits to *mp3-youtube.download*. Beyond Peru, the following download websites have over 75% of their audiences in Argentina, Mexico, and Chile: *Foxmusica*, *FullTono*, *BuenTema*, *BateriaFina*, *GentleFlow* and *Musica*. If the legitimate music market is to develop to its full potential and to the benefit of Peruvian and international composers, artists, performers, publishers, and producers, IIPA urges the Peruvian Government to take substantive and sustained action to tackle these endemic piracy problems.

<sup>2</sup>See [www.Internetworldstats.com](http://www.Internetworldstats.com).

<sup>3</sup>Data from International Telecommunication Union, *Measuring the Information Society Report 2018*, p. 141, <https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2018/MISR-2018-Vol-2-E.pdf>.

<sup>4</sup>Id.

<sup>5</sup>IFPI, *Global Music Report* (April 2019), at p. 117, available at <http://www.ifpi.org/recording-industry-in-numbers.php> ("GMR 2019").

**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 is a persistent challenge for rights holders in Latin America. With the developments in camcorder technology, 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. Fifteen illicit audio and/or video recordings of MPA member films were sourced from Peruvian theaters in 2019, up from ten in 2018. Professional cammers feel safe to conduct this activity in Peru because criminal convictions require proof that the recording was made with an economic intent, which makes it virtually impossible to obtain a conviction. Peru needs to enact legislation that would effectively criminalize unauthorized camcording of films.

## **COPYRIGHT LAW AND RELATED ISSUES IN PERU**

**Bill on Camcording:** In a positive development that would address a longstanding piracy issue in Peru, INDECOPI, Peru’s agency charged with promoting and defending intellectual property rights, developed draft legislation to criminalize camcording, regardless of profit intent. The proposal, Bill 4423, was submitted to the legislature in June. However, President Vizcarra dissolved the legislature during political clashes in September. Legislative activity will resume when a new Congress is elected in January. IIPA urges lawmakers to prioritize this bill in 2020.

**Peru’s Compliance with Existing Obligations to the United States:** The U.S.–Peru TPA entered into force on February 1, 2009.<sup>6</sup> Peru 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.

**Copyright Levies:** Peru is one of the few markets in the region that has implemented a private copy levy to compensate rights holders for the private use exception applicable to blank media and recording devices. Unfortunately, the provision has become seriously outdated in that the levies are limited to blank media and recording devices 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: (1) update the list of media subject to the levy to accurately reflect the current consumption habits; and (2) issue new regulations that empower customs to enforce the levy.

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<sup>6</sup>The 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>.

**Copyright Law Amendments:** An unexpected amendment was passed in September 2018 (Decreto Legislativo No. 1391). The partial amendment to the Copyright Law, sponsored by INDECOPi and approved at Congress without consultation with any Peruvian rights holders' groups or copyright organizations, included provisions intended to modify the legal regime for CMOs. Among other modifications, the law imposed artificial and discriminatory rule that any one member of a CMO would be entitled to one vote only. This rule is completely inappropriate for CMOs of music producers. Before these amendments passed, votes at general meetings were assigned to members in proportion to the distributions received from the CMO. The prior system allowed members with commercially significant catalogs, such as international rights holders, to secure direct participation in governing bodies.

**Music in audiovisual works:** In 2019, the Peruvian Association of Authors and Composers (APDAYC) continued its appeal against two INDECOPi 2017 administrative decisions<sup>7</sup> that held that, once a musical work is synched for a film, the owner of the musical work forfeits its remaining right to license the public performance of the work in cinemas in other countries. The decisions are misinformed as to the operation of sync contracts and the practices in the music and film industries. They also depart as a matter of law from the correct interpretation of the existing Peruvian law, including INDECOPi's own prior guidance on the application of the public performance rights. As a result of these rulings, APDAYC cannot license, enforce, or collect royalties for musical works used in films from either cinemas or the largest cable operator in the country, *Telefonica*. 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. The music industry is concerned that these erroneous administrative decisions might impact the market more broadly and is closely monitoring ADPAYC's cases which are currently pending before the Civil Court.

## **COPYRIGHT ENFORCEMENT IN PERU**

On balance, enforcement has improved in the past three years, though criminal and administrative enforcement against piracy, especially online, is hampered by a distinct lack of resources. Industry sectors generally report good cooperation with the criminal enforcement authorities (prosecutors, police, administrative, and tax authorities) on hard goods piracy, but continuing difficulties exist in obtaining prosecutions and administrative measures that result in effective, deterrent sanctions. On a positive note, IIPA acknowledges the significant efforts by INDECOPi on the matter of administrative site-blocking procedures and the longstanding commitment of this entity to fight piracy in Peru. It is very important to increase INDECOPi's funding to enable its practices to have a meaningful effect on piracy in scale.

The Peruvian Government should encourage engagement between rights holders, ISPs and other key Internet intermediaries to address online 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."<sup>8</sup> This commission should focus on establishing priority enforcement targets from each affected industry to make combatting piracy a governmental priority. The U.S. Secret Service agency deployed to Lima and the UK Intellectual Property Office (UKIPO) have conducted trainings in coordination with the recording industry and assisted local police efforts against organized crime, which is usually related to the large and organized distributors of pirated media content. These training activities should result in more effective enforcement actions against copyright piracy and counterfeiting activity in Peru in the long term. Additionally,

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<sup>7</sup>Asociacion 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).

<sup>8</sup>The 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).

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 continues to limit its effectiveness. Cases outside of Lima are prosecuted by local prosecutors who lack knowledge of IPR. In addition to national jurisdiction for the specialized prosecutors, there is 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.

**Problems with the judiciary—non-deterrent results and delays:** Few criminal IPR cases reach the Peruvian judiciary, and if they do, many judges do not impose deterrent sentences because they do not appear to perceive IPR crimes as dangerous or important. Furthermore, the Peruvian Criminal Procedure Code allows sentences of four years or less to be suspended. This has continued even after several positive amendments to the criminal code increased the minimum sentencing for copyright infringement to four years (2004), and the penalties for repeat offenders and other crimes (2006).

Criminal sentences generally take three to five years to be issued, and many cases remain “pending” and languish in the courts—in some instances, for over nine years 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.

### **INDECOPi and Administrative Enforcement**

INDECOPi serves as an administrative enforcement agency for the copyright sector. It is also active in public awareness and educational campaigns. INDECOPi is supposed to be self-funded through its income from patent and trademark registrations and from the fines imposed by its administrative bodies. To maintain consistent enforcement and strengthen INDECOPi’s commitment towards the digital piracy problem, Peru should dedicate additional resources to support INDECOPi’s *ex officio* enforcement efforts.

INDECOPi’s continued interest in, and attention to, digital piracy will be crucial for tackling pirate sites and services. The music industry has 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. In 2017, INDECOPi issued its first suspension order to a significant pirate service operating under the domain name *Foxmusica.me*, and 2018 saw the implementation of INDECOPi’s first site-blocking decision in an administrative case against *Roja Directa*, a site dedicated to the illegal streaming of soccer matches. In 2019, the music industry worked closely with INDECOPi to suspend several local and foreign domain names. The music and film industries are pleased with INDECOPi’s continued issuance of site blocking orders and will continue to assist the entity on antipiracy operations in 2020.

**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 served with an injunction from INDECOPi fails to comply, it will be fined the maximum allowable amount. If non-compliance persists after five days, INDECOPi can double the fine at established intervals and has the option of filing a criminal complaint with the Public Prosecutor. IIPA members report that, despite these provisions, few

administrative decisions from INDECOPI are followed up by criminal prosecution and cases often remain in “payment pending” status when defendants simply fail to pay their fines. To support greater enforcement against piracy and help fund INDECOPI’s actions, IIPA suggests improved coordination between INDECOPI and Peruvian Prosecutors, as well as regulations to establish, increase and effectively collect fines.

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendations:** IIPA recommends that Switzerland remain on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** For the past decade, rights holders in Switzerland have been deprived of the ability to enforce their copyrights in civil and criminal cases involving the online environment. In 2013, the Government of Switzerland embarked upon a legislative process to revise the Copyright Act, ostensibly to provide more effective enforcement mechanisms and bring Swiss copyright law closer in line with international norms. That process resulted in the adoption of a Copyright Act in September 2019, expected to come into force in March 2020.

Despite some modest positive changes, the new Copyright Act as adopted largely maintains the status quo and does not address the most glaring enforcement problems in Switzerland. Perhaps most importantly, the Copyright Act maintains the “private use” exception that severely limits rights holders’ access to remedies against acts of online infringement.<sup>2</sup> Specifically, unlike the U.S., European Union, and most other countries, in Switzerland, individuals who download from illegal sources are not themselves liable for copyright infringement. Besides the private use exception, other troubling provisions of the Copyright Act include: the inability to use IP address evidence to bring civil claims, absence of a provision allowing site blocking where the site provides unauthorized access to copyrighted content, “stay down” provisions that create legal uncertainty by applying only to hosting providers that create a “particular danger” of copyright infringement, and no change to the availability of “catch-up” TV viewing or the remuneration caps and collective licensing regime for payments to rights holders for such performances. The positive aspects of the Copyright Act include an increased term of protection that conforms to the emerging international standard, revisions that allow the use of IP address evidence in criminal claims, a carve out for U.S. rights holders to collective management remuneration right for Video-on-Demand (VOD), and the elimination of the “hotel exception” whereby hotels and related establishments would have become exempt from the collective licensing regime for retransmission of copyrighted works.

IIPA urges the U.S. Government to convey to the Government of Switzerland that the Copyright Act does not sufficiently comply with Switzerland’s obligations to provide for effective and deterrent remedies against any act of copyright infringement, especially with respect to civil claims. The enforcement deficit remains deeply problematic, particularly within the context of our otherwise strong bilateral trade relationship with Switzerland. IIPA further urges the Government of Switzerland to consider amendments to the Copyright Act to bring it in line with its international treaty obligations, current best practices in Europe and international norms. The Government of Switzerland has expressed interest in a possible Free Trade Agreement (FTA) with the United States. Any negotiations of such an agreement should address the deficiencies in copyright protection and enforcement outlined in this report.

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<sup>1</sup>For more details on Switzerland’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Switzerland’s Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>The Copyright Act fulfills the reassurance announced in the parliament press release presenting the results of the December 2018 vote: “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.” (Avec 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)).



## **PRIORITY ACTIONS REQUESTED IN 2020**

- Amend to the Copyright Act to provide sufficient tools to combat all types of piracy, regardless of technical details and including cross-border piracy. This should include the ability of rights holders to use IP address evidence in connection with civil claims, and effective remedies with regard to intermediaries or Internet Service Providers (ISPs).
- Amend the Copyright Act to affirm that Switzerland's private use exception permits single copies for private use only if they derive from a legal (authorized) source. Further, limit catch-up TV services that are not authorized by content owners, a problem resulting from an overly-broad interpretation of the private use exception. In the alternative, do away with the remuneration caps for catch-up TV, which interfere with the contractual licensing and remuneration practices for film and television series.
- Amend the new exception introduced in Article 19 of the Copyright Act, which exempts 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 WIPO Performances and Phonograms Treaty (WPPT) Article 15.
- Remove the extended collective licensing (ECL) regime for audiovisual works. Or, at a minimum, establish a simplified process of notification of a planned ECL and opt-out.
- Require datacenters and ISPs to implement better "know-your-customer" policies and enforce that requirement.
- Clarify those areas of the Swiss Film Act that currently negatively affect the distribution of audio-visual works in Switzerland, including limiting the requirement (under Article 19 par. 2) that rights holders must exclusively control all language versions exploited in Switzerland (and the accompanying reporting obligations), 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 Copyright Act, which remains below other European countries.

## **THE NATURE OF PIRACY IN SWITZERLAND**

Switzerland suffers from high domestic piracy rates for music, film, and video games. Moreover, the country is turning 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. The shortcomings of the new Copyright Act will likely hinder the objective of reducing piracy.

Piracy continues to undermine and disrupt 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 enforces 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 cycles. This is facilitated by a general understanding (supported by the government and Supreme Court decisions) that private use of copyrighted works from illegal sources is legally permitted. Peer-to-Peer (P2P) BitTorrent activity for sharing infringing material remains popular. Stream-ripping sites and applications, which permit users to create an unauthorized local copy of streamed content, are still widely used. Downloading and streaming of unauthorized content for private use are likewise viewed by many, including the government and supreme court, 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. Though reports indicated that the site would be deactivated for business reasons, it remains active. 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. Despite being apparently based in Panama with no known operation in Switzerland, Private Layer appears to use P.O. box services and 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 places high value on privacy protection. Amendments to the Copyright Act or other legislation 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 rely on the .ch domain, such as *eztv.ch*, *1channel.ch*, *arenabg.ch*, *couchtuner.ch*, *levidia.ch*, and *project-free-tv.ch*. IIPA recommends that the Government of Switzerland expand its enforcement actions, as its jurisdiction is not necessarily limited to sites with a .ch domain in Switzerland.

## **COPYRIGHT ENFORCEMENT IN SWITZERLAND**

Overall, enforcement showed no improvement in 2019 and unfavorable outcomes generated in enforcement cases, as well as implementation of the Copyright Act as adopted, may well cement a low level of protection. Copyright industries in Switzerland have made efforts to resume criminal and civil actions against online infringement under Swiss law, which almost entirely ceased in the aftermath of the 2010 *Logistep* decision of the Swiss Federal Supreme Court. Prosecutors—who voiced their own frustration with the situation—interpreted the *Logistep* precedent broadly as a *de-facto* ban barring the collection and use of any IP address data identifying defendants in criminal copyright cases. The Copyright Act reverses that decision and confirms that IP address data is now available in connection with criminal claims. However, prosecutors have historically tended to consider copyright enforcement cases as low priority, and the extent to which they take advantage of this development remains to be seen. The use of IP addresses in civil procedure (e.g., to obtain injunctions) remains unlawful in many cases.

Two major copyright cases that concluded in 2019 do not encourage confidence in the government’s ability or will to engage in effective copyright enforcement. A criminal trial against the notorious cyberlocker *Cyando/Uploaded*, which facilitates rampant infringement, ended in March 2019 with the government’s announcement that it found “no real ties” to Switzerland, despite the parent company Cyando AG’s apparently blatant ties with Switzerland. And, in February 2019, the Swiss Federal Supreme Court found, in a case that had been pending since 2015, that Swisscom, a major hosting provider, could not be liable because it did not participate in copyright infringement, in the absence of any provision of law specifically dealing with access providers’ responsibilities. The court explained that Swiss citizens who download infringing content are not liable under the private use exception, and that Swisscom is not responsible for infringement that occurs on its system. Rather, according to the court, the direct infringers are the pirate site operators, and those pirate sites, it should be noted, cannot be blocked under Swiss law. Further, while the Copyright Act allows IP address data for criminal copyright cases, as explained later in this submission, it does not change the status of IP address collection for civil cases. Barring any amendments, rights holders therefore remain proscribed from collecting and analyzing the IP addresses of suspected infringers (individuals or website operators) for purposes of establishing the existence of an underlying direct infringement, or as part of a secondary liability claim.

Proceedings were also filed by a number of broadcasters challenging the collective licensing/remuneration practice for catch-up TV recording and making available services. These services currently have seven-day full recordings of TV programs from several hundred channels, amounting to several tens of thousands of hours of content that is available to the public at any given moment. The proceedings are currently pending before the Federal Court

on a procedural issue and are expected to be concluded during 2020. Unfortunately, the Copyright Act contains no provisions limiting time-shifting and catch-up TV, and Parliament expressed strong support for this practice during its debates.

A distributor of a device commonly pre-loaded with piracy software, called the Kodi Box, operating in the French part of Switzerland, continues to be in business despite a criminal investigation that has been ongoing since 2015. IIPA is informed that prosecuting authorities seemed to be taking the case seriously. The future of that prosecution remains uncertain given the unclear legal status of linking as infringement, and the law that private use of works from illegal sources is not actionable. Notwithstanding investigations, criminal proceedings continue to lag and distribution of this and other piracy devices continues.

As explained in more detail below, the Copyright Act includes a “stay down” provision, which will hopefully improve upon ISPs’ previous self-regulation. For the past several years, hosting providers have purported to take down infringing content subject to notification, while “sharehosters,” such as sites like *Uploaded.net*, practiced takedown but have not prevented (and have even supported) quick re-upload. It remains to be seen how these new provisions in the Copyright Act will be implemented and enforced.

“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 amend the Copyright Act or pass other implementing legislation to require or encourage host and data centers to adopt and enforce such policies, which reflect the basic duty of care applicable to businesses operating in this area.

## **COPYRIGHT ACT AND RELATED LAWS IN SWITZERLAND**

One glaring flaw in the Copyright Act threatens to undermine the entire effort of effective copyright enforcement in Switzerland: downloading by individuals from illegal sources is still considered legal if it is a “private copy.” There are therefore still no effective options for tackling this problem under current Swiss law.

### **Copyright Act Adopted September 2019**

In September 2019, Parliament adopted the Copyright Act amendment bill. The bill was prepared by the Working Group on Copyright (AGUR12) in 2013,<sup>3</sup> but fell short of implementing the full AGUR12 compromise recommendations agreed to by rights holders. As expected, the version of the Copyright Act adopted in September 2019 falls short of addressing several major concerns regarding copyright protection and enforcement. As explained herein, amendments or other legislation are needed to adequately address rights holders’ concerns and to raise the level of copyright enforcement in Switzerland to that available elsewhere. Most importantly, the law’s affirmation that private use of illegal sources is permitted is a blow to rights holders, inconsistent with Switzerland’s international obligations and impairing cooperation with intermediaries.

Revisions to Article 77i were meant to address the *de-facto* ban on the use of IP address evidence in civil and criminal copyright actions arising out of the 2010 *Logistep* case. However, while the Copyright Act allows rights holders to use personal information (including IP addresses) for filing criminal complaints, it does not allow for collection or processing of this information solely to bring civil claims. This needlessly limits right holders’ ability to pursue their rights. To properly address the privacy concerns raised in the *Logistep* case, the provision should be amended or modified in implementing legislation or regulation to simply limit data collection to that which is reasonably necessary

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<sup>3</sup>For a full description of the AGUR12 process, see prior years’ IIPA Special 301 reports, at <https://iipa.org/reports/reports-by-country/>.

for the pursuit of violations of law (this would mirror the standing opinion of the Federal Data Protection and Information Commissioner (FDPIC),<sup>4</sup> as well as the recommendation of the AGUR12).

The Copyright Act provides a limited “stay down” obligation that applies to certain hosting providers that create a “particular danger” for copyright infringement, such as those that incentivize illicit uploads and undermine take down efforts (Article 39d). 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 Copyright Act includes a compulsory collective right to remuneration for authors and performers for exploitation of their audiovisual works on VOD online platforms. This mandatory collective remuneration scheme only applies if a film is of Swiss origin, or produced in a country that provides a similar collectively enforced right of remuneration.<sup>5</sup> The provision expressly exempts the use of music (e.g., in concert films and music videos) and U.S. works. This provision presents two problems. First, Swiss artists and those from the covered countries may earn substantially less money from the online exploitation of their work under this provision. Second, the provision arguably conflicts with the three-step test in Berne and the WTO TRIPS Agreement.

Other potentially problematic provisions in the Copyright Act as adopted include:

- (i) **Extended collective licensing (ECL), i.e. collective licensing schemes including non-affiliated rights owners, with a case-by-case opting-out option (Article 43a).** Although the provision was purportedly motivated by the desire to make difficult-to-license content, such as large archive stock, more accessible, the provision’s scope is overbroad. This creates a risk that extended collective licenses could be applied in areas where they undermine individual licensing, such as online services, where individual licensing is the norm. The opt-out provision 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. There is therefore substantial risk that extended collective licenses applied in the online space would depress the value for creative works, setting a tariff “norm” that could undermine licensing terms for rights 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, even with opt-out rights, are wholly inappropriate with respect to services that are already licensed directly around the world.
- (ii) **An orphan works provision (Article 22b), including compulsory licensing of extended orphan works.** This provision allows works to be considered “orphan” after “research performed with appropriate thoroughness.” The dispatch on this article produced during the legislative process troublingly noted that “this responsibility is considered fulfilled if [the users] have consulted the relevant databanks for the corresponding work category.” A better standard would be the requirement for “diligent search” set out in the Orphan Works Directive.<sup>6</sup> A recordation requirement for rights holders to protect their works 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 is created, copied or made available in Switzerland,

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<sup>4</sup>A standing opinion of the Federal Data Protection and Information Commissioner (FDPIC) made in the wake of the *Logistep* decision—even as it stood by the Federal Court’s opinion—underscored, in the context of online piracy cases, that “we still believe that there is an overriding interest involved which would justify a violation of privacy rights as a result of the data processing.”

<sup>5</sup>The Memorandum accompanying the adopted Copyright Act states that the Government of Switzerland anticipates to “grant” reciprocal rights to foreign authors of audiovisual works from: Argentina, Belgium, Bulgaria, France, French-speaking Canada, Italy, Luxembourg, Monaco, Poland, and Spain.

<sup>6</sup>Directive 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.”).

including, potentially, copies made available from foreign sources, thus opening the provision to content hosted outside of Switzerland.

- (iii) **A free reproduction license for scientific research (Article 24d), meant to cover “text-and-data mining.”** There is a potential for this license to exceed its intended purpose. For example, if combined with other exceptions such as the existing, unusually broad private use exception, which can apply even to commercial organizations.
- (iv) **Protection of photographs regardless of their “individual character” or level of creativity (Article 2, paragraph 3bis).** In keeping with international norms, all types of photographs should be protected under the same standard generally applicable to other copyrightable works (e.g., music, film, literature). Under Swiss law, photographs that “do not necessarily have an individual character” are only protected for 50 years after their publication (or production). This dual-standard for photographs should be eliminated and the term of protection for all copyrighted photographs should be 70 years.

One positive change in the Act is the extension of the term of protection for performances and recordings, including audiovisual content, from 50 years to 70 years. This will provide greater incentives for the production of (*inter alia*) audiovisual and recorded content, and will provide a stronger incentive to invest in the local recording industry, spurring economic growth, as well as tax revenues. This would also bring Switzerland in line with the EU term of protection.

#### **Additional Concerns Under the Copyright Act and Related Laws**

IIPA continues to have other long-standing concerns with certain aspects of Swiss copyright law. None of these concerns have been remedied by the Copyright Act, and 2019 otherwise 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 Swiss Federal Supreme Court confirmed as much in the recent Swisscom decision. The Copyright Act does 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 imposes 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 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 rights 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 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.<sup>7</sup> This appears to be in service of assessing the possibility of legislating the portability of

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<sup>7</sup>See <https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office-otm.html>.

audiovisual content similar to and inspired by the European Union's Portability Regulation.<sup>8</sup> This consultation is particularly troubling in light of the broader "Digital Switzerland" Strategy, also currently underway.<sup>9</sup>

**Discrimination Against Neighboring Rights:** Article 60(2) of the Copyright Act caps the remuneration payable to rights holders (collected via collecting societies) at 10% of the licensees' income for authors and 3% for neighboring rights owners. The unjustified 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 these caps. 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 is 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. The Swiss legislature has declined this reform and, with the Copyright Act, again codified the remuneration caps. 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.<sup>10</sup> IIPA notes that there are no independent broadcasting and public performance rights for sound recording producers under current Swiss law, as producers merely have an entitlement to receive a share of artists' remuneration.

**Criminal Sanctions Needed for Distribution that Prejudices the Public Performance Right:** Article 12 Section 1*bis* of the Copyright Act states that copies of audiovisual works may not be distributed or rented if the distribution or rental prejudices the rights holder's public performance right—e.g., if a motion picture audiovisual work is still in the theaters. An explicit criminal sanction for the violation of this principle is needed to deal effectively with an influx of French-language DVDs imported from Canada and freely distributed while those motion pictures are still playing in Swiss cinemas.

**Amendments to the Swiss Film Act:** Amendments to Switzerland's Federal Act on Film Production and Film Culture (Film Act) have been in effect since 2016.<sup>11</sup> 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 up to seven days) may be undertaken only by an organization that controls the rights for all available language versions and regions exploited in Switzerland. Despite some pronouncements, this provision remains opaque. Specifically, it is still not fully clear whether the provision means that if a company acquires any rights for Switzerland it needs to acquire all forms of VOD rights (i.e., Subscription Video-on-Demand (SVOD), Transactional Video-on-Demand (TVOD) and other), as an exclusive right, and for all languages spoken in Switzerland, or whether it just means that the entity that acquires certain rights (e.g. video) 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, 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 in 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

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<sup>8</sup>Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

<sup>9</sup>See <https://www.bakom.admin.ch/bakom/en/homepage/digital-switzerland-and-internet/strategie-digitale-schweiz.html>.

<sup>10</sup>Moreover, as discussed above, it is inappropriate and detrimental that the government has created additional collectively managed rights in the Copyright Act without addressing first the fundamental unfairness in Switzerland's collective management system—namely, the discrimination against neighboring rights holders. This discrimination is fundamentally contrary to the standard U.S. policy of not establishing a hierarchy of rights, and should be amended.

<sup>11</sup>See <https://www.admin.ch/opc/en/classified-compilation/20001389/index.html#a19>.

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, the Film Act's provisions interfere with internationally established licensing practices and should be amended.

## **SWITZERLAND'S COMPLIANCE WITH EXISTING INTERNATIONAL OBLIGATIONS**

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." Switzerland is not currently doing so and, as explained in this report, the newly-adopted Copyright Act does not bring Switzerland in line with its existing obligations.

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** Thailand has historically struggled with combatting physical and digital piracy, but the IPR situation there has improved somewhat in recent years. In 2018, Thailand was 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. Discussions about reform proposals continued in 2019. Unfortunately, the most recent draft amendments to the Copyright Act do not contain needed improvements, including key provisions related to online intermediary liability and enforcement and technical protection measures (TPMs). Moreover, certain 2019 amendments to the copyright law in the name of Marrakesh Treaty implementation created new problems by the unwarranted and erroneous inclusion of sound recordings in the scope of certain exceptions.

Thailand continues to struggle mightily with online piracy, including non-compliance by Internet service providers (ISPs) with copyright website blocking orders as well as the failure to use the existing remedies and procedures to act against streaming sites, torrent sites, stream-ripping sites and apps and cyberlocker-related services. In a key positive development in 2019, the Department of Special Investigations (DSI) took enforcement action resulting in the cessation of operations of *movie2free.com*, and in the arrest of the site administrator. In the meantime, there remain a large number of Thai-language sites offering pirate content, 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 Computer Crime Act (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 and it appears that ISPs do not comply with them and no fines are issued to ISPs in such situations (these situations contrast markedly with compliance in cases of blocking on *lèse majesté* grounds, for example). Further, Thailand continues to represent a risk for illicit camcording in the region.

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. Proposed amendments to the Copyright Act also do not address the CMO issue. Thailand should introduce a measure addressing the establishment and governance of CMOs to bring order to music collecting societies that are distorting the market.

Reform efforts to the Copyright Act are largely not promising, and the IIPA would strongly encourage the government to revert to the draft published in 2018 on both TPMs and intermediary accountability issues, and make other modernizing changes (such as extending copyright term). The National Assembly has approved accession to the WIPO Copyright Treaty (WCT) and reverting to the 2018 draft Copyright Act amendments would ensure that Thailand immediately meets its obligations under the WCT. It is also critical for Thailand to further update its laws to be compatible with the WIPO Performances and Phonograms Treaty (WPPT) as soon as possible, while recognizing that sound recordings are protected as copyright works in Thailand.

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<sup>1</sup>For more details on Thailand's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Thailand's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2020**

### **Enforcement**

- Successfully address large-scale pirate operators in Thailand; ensure that these services stay offline and that deterrent sentences are imposed.
- Take action against rogue CMOs and combine this enforcement action with regulatory reforms to change the criteria for CMO registration (see below).
- 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.
- Bring effective enforcement actions against illegal distribution of copyright materials over social media platforms, including live streaming; piracy devices and apps which riddle the marketplace and make it impossible for legitimate services to compete; and, against illegal camcording activities.

### **Legislative**

- Address shortfalls to the Copyright Act:
  - Reintroduce the proposed provisions on intermediary liability to provide adequate incentives for neutral online intermediaries to cooperate with rights holders and implement international best practices to combat infringement, such as disabling access to infringing content.
  - Reintroduce the proposed TPM provisions to include protection against the act of circumvention, prohibit trafficking in circumvention technologies, devices, components, and services, and ensure that the TPM and Rights Management Information (RMI) provisions do not permit overly broad exceptions.
  - Revise the existing camcording provisions to effectively prohibit possession of an audiovisual recording device in an exhibition facility with the intent to make or transmit an audiovisual work and provide that exhibition facilities have standing to bring complaints.
  - Ensure that any exception is consistent with the “three-step test.”
  - Ensure copyright offenses are non-compoundable.
  - Extend the term of copyright protection consistent with international best practices to 70 years from the death of the author, or for sound recordings (and performances) 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:
  - Deleting Section 9(5) (and the related Section 68) of the 2008 Motion Picture and Video Act (MPVA) which on paper allows the Film Board to establish ratios and quotas against foreign films, and amending the MPVA to avoid onerous film censorship and classification provisions.
  - Removing the Office of the National Broadcasting and Telecommunications Commission (NBTC) approved “must carry” provisions, since they could, if improperly interpreted or misunderstood, restrict the companies’ contractual freedom to license.
  - Avoiding onerous OTT regulations, e.g., that could require streaming operators to set up a local presence or to require foreign e-commerce services to register for VAT payments.
  - Easing foreign ownership and television advertising restrictions that impede legitimate distribution channels.

## 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.<sup>2</sup> Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2019. Rights holders continued to have good cooperation with Thai authorities, who assisted with rights protection

**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.<sup>3</sup> Access to the Internet 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, motion pictures and television content, video games, published materials, and broadcasts. Legitimate services find it difficult or impossible to compete with often free-to-end-user pirate offers. The use of social media continues to rise, and is a popular platform for distributing and accessing pirated content. Streaming unauthorized content is the most popular form of piracy, whether through social media, streaming websites, apps, and/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 pay-per-view (PPV) events and concerts. BitTorrent index and tracker sites, cyberlockers, and BBS/forums also remain problematic. The popularity of peer-to-peer (P2P) networks, including BitTorrent (e.g. *thepiratebay.org*), has declined for piracy of music but has been replaced by a considerable increase in stream-ripping. Popular stream-ripping services include *savefrom.net*, *y2mate.com* and *ytmp3.cc*. 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 of the top 500 most accessed sites in Thailand are piracy sites, according to Alexa rankings. These sites specifically target Thai Internet users, and include Thai as well as foreign motion picture and television content. These include *037HDD.com*, *Mastermovie-HD.com*, *MovieHD-Free.com*, *imovie-hd.com*, *Siambit.me*, *movie2z.com*, *TT-Torrent*, *Nanamovies.com*, *onlinemini-hd*, *duckload*, *nungnew-hd*, and *Kod-HD*. In November 2019, the Department of Special Investigations (DSI) took enforcement action resulting in the notorious Thailand piracy site *movie2free.com*, which was ranked the 20th most accessed website in Thailand, ceasing operations and the site administrator being placed under arrest. *Movie2free.com* was launched in 2014 and was reported to have had 10 million page views per day with up to a million different IP addresses connected daily to the site, and was globally ranked at 1,700 with 27 million monthly visits. This action was possible due to industry efforts working with the DSI. The DSI is continuing its investigation into a network of individuals associated with the operation of the site. Industry has informed the government of the severity of piracy on all of the other 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. 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. This said, 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 Video-on-Demand (VOD) to Thai users. The case was handled by DSI. The site unfortunately remains up and the case is ongoing. Other referrals include some of the most popular infringing websites in Thailand,

<sup>2</sup>See, e.g., IIPA, *Thailand*, 2019 Special 301 Report, February 7, 2019, at <https://iipa.org/files/uploads/2019/02/2019SPEC301THAILAND.pdf>; 2018 Special 301 Report, February 8, 2018, at <https://iipa.org/files/uploads/2018/02/2018SPEC301THAILAND.pdf>.

<sup>3</sup>Legitimate services in Thailand for content include iTunes, Google Play Store, Hollywood HDTV, Prime Time, iFlix, HOOQ, Doonung, ZABMOVIE, Deezer, KKBox, Spotify, YouTube, AIS, GTH Movie Store, AIS Movie Store, HTV (from True Visions), and Clickplay TV, among others.

such as *Movie2free.com* which was finally closed in 2019 as noted above, and *037hd*. Most of the criminal investigations launched out of these cases remain pending

IIPA is encouraged by actions the government has taken in an effort to improve the copyright ecosystem in the online and mobile environments to support legitimate entertainment services. In particular, the amended CCA, which entered into force in July 2017, permits disabling of access to infringing websites. 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*, and succeeding in getting the first variant blocked as well, although the Thai system does not have a dynamic blocking mechanism. 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*, however they noted bureaucratic problems in the process, and as of January 2020, that site is redirecting to new domains. Similarly, court orders to block pirate sites *kakzmuzik.com*, *hdprime.tv*, and *hd2liveplus.com* (all using https protocol) were obtained, but the blocks were either not implemented or the sites began redirecting to new domains. As of January 2020, the Thai Entertainment Content Trade Association (TECA) has filed about 40 blocking cases and 23 of those cases have resulted in court orders to block access to infringing material. However, only six of the 23 sites ordered blocked are actually unable to be accessed in Thailand as of January 2020. There remain substantial issues with the lack of transparency in the procedure, the slow process, the re-opening of blocked sites, and the costs charged to some industries by the government/police for site blocking applications. Proper training for 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 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.

Notwithstanding the above, many enforcement deficiencies remain. While the Royal Thai Government appears to be making intellectual property rights protection more of a priority, much more needs to be done to improve the efficiency and capability of law enforcement, and to increase the awareness and understanding of intellectual property rights in general. While both the DSI and Royal Thai Police are able to investigate IP related crimes, enforcement against piracy operators remains very challenging given the scale of the problem, officers' general lack of familiarity in investigating and handling digital forensic evidence, and the ease with which pirates use anonymizing software and infrastructure to continually evade detection. Deterrent level punishment for online piracy operators remains lacking.<sup>4</sup>

The Center of Operational Policing for Thailand against Intellectual Property Violations and Crimes on the Internet Suppression (COPTICS), which had been established in 2018 to provide an alternative to site blocking under the CCA, was dissolved after having been in operation for only eight months. While it was operational, it had not proven particularly effective at blocking notorious pirate sites, including those providing live streaming of sports.

**Camcorder Piracy Traced to Thailand Continues to Harm Motion Picture Market:** Thailand continues to represent a risk for illicit camcording in the region. In 2019, three new video sources and 16 audio sources were forensically matched to theatre locations in Thailand (up from zero video matches and 14 audio matches in 2018). Local Thai films are camcordered within days of their release in movie theaters. Increasing broadband Internet and 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

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<sup>4</sup>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. IIPA hopes 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. We understand that DIP, in 2020, has begun to play a helpful role in coordinating various governmental bodies to ensure that criminal court orders are enforced to protect music holders rights.

strongly implemented (and ultimately improved), the Copyright Act provision that deems camcording an infringement of copyright could help.

**Television/Public Performance Piracy:** Cable piracy, predominantly the illegal retransmission of broadcast signals, remains a notable problem outside Thailand's main cities. In addition, "public performance" piracy continues to be a problem. Many hotels outside Bangkok retransmit unauthorized videos over in-house movie systems.

**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. The Royal Thai Government has 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. Further, there are indications that infringers have moved to newly emerged Sunday and night markets, such as Silom Walking Street on Sunday. To address hard goods piracy, the Royal Thai Government should follow raids by upstream investigations to target criminal organizations at the root of this piracy. 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.

**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 pre-load 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. The Royal Thai Government has taken some action against an Internet Protocol Television (IPTV)/Piracy Device service called *ThaiExpat.tv*, and in December 2019, the Central Intellectual Property and International Trade (IP&IT) Court ordered damages of THB 15 million (US\$480,000) and suspended sentences against two key operators in Thailand.

**Book Piracy Problems Remain:** Unauthorized commercial photocopying in and around university campuses remains a significant concern. 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.

**Television/Public Performance Piracy:** Cable piracy, predominantly the illegal retransmission of broadcast signals, remains a notable problem outside Thailand's main cities. In addition, "public performance" piracy continues to be a problem. Many hotels outside Bangkok retransmit unauthorized videos over in-house movie systems.

**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 in the first place, DIP’s regulatory action such as requiring CMOs to register their songs in the government database and, in the long-run, amendments to the Copyright Act to reduce the number of CMOs permitted to operate in the market by reference to internationally accepted criteria (such as the volume of rights in active use and the backing of all major, including international, rights holders) and setting out certain principal conditions for CMOs to operate in Thailand, such as complying with a code of conduct of an international body that requires good governance, transparency, fair and accurate distribution, and, of course, actually representing the rights holders they claim to 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 IP&IT 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:** On September 10, 2019, DIP issued revised draft amendments for public comment. As of January 2020, those amendments now sit with the State Council. The amendments, like those seen in previous drafts, focus mainly on online intermediary liability and TPMs. Thailand’s National Assembly has already approved WCT accession which now depends on appropriate Copyright Act amendments also being promulgated, with accession to the WPPT planned thereafter within the next five years. However, IIPA is very concerned that the government has deleted a number of comprehensive amendments it had proposed in 2018.<sup>5</sup> The following are critical issues with the Copyright Act and the draft amendments that should be addressed to ensure that the Royal Thai Government achieves its stated goals of modernizing its copyright law, complying with its international obligations, and implementing and adhering to the WCT and WPPT.

- **Infringement a Non-Compoundable Offense:** IIPA urges the Royal Thai Government to amend the Copyright Act to ensure that intellectual property infringement becomes a non-compoundable state offense, thus enabling the police to act on their own initiative without any requirement of a formal complaint from rights holders. In the age of online piracy, this ability for authorities to take ownership of investigations and cases is critically important.
- **Service Provider Liability Amendments:** The current draft amendments have retained from previous drafts the four types of online intermediaries that may be eligible for the copyright infringement liability limitation privileges (Section 43/1), but the provisions in relation to the conditions and eligibility, as well as the notice procedures, have been substantially cut down. It appears from the current draft that these details will be moved to the administrative

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<sup>5</sup>In those amendments, the government had made a number of constructive proposals, including proposed strong protections against the act of circumventing, and the trafficking in, devices and technologies (including hacking code/software and false authentication code) intended to circumvent technological protection measures used by rights holders in the digital and online environment to protect their content from unauthorized access, copying and distribution. Those amendments, put forward in 2018, would have immediately prepared Thailand to join the WIPO Copyright Treaty. We would strongly encourage the government to revert to the draft published in 2018 and enact provisions that grant safe harbor exemptions that are in keeping with international norms, i.e., that service providers would be excluded from liability for monetary relief only, and not exemption of all liability for copyright infringement.

regulations, which are to be promulgated after the amendments of the Copyright Act have been passed—a move which is concerning to rights holders. In particular, there are scant stipulations regarding the eligibility of liability limitation privileges (as the so-called “safe harbors”). The notice and takedown procedures in Sections 43/2 to 43/4, which apply to hosting and location services intermediaries, would also not effectively curb online infringement. Although the details are to be supplemented in the regulations, the Copyright Act should at least contain the following:

- 1) Any limitation of liability of online intermediaries must be premised on there being a clear basis for the liability of such services absent the application of such liability privileges; if there is no clear basis for liability, there is no justification for having liability privileges at all. However, the basis for liability is not clear in the Copyright Act or the proposed amendments, and the liability of such “intermediaries” needs to be clarified.
  - 2) In respect of services that do qualify for the safe harbor, section 43/2 of the draft amendments only requires such services to remove infringing content or suspend the access to such content upon receiving a notice from the copyright owner. IIPA urges the Government of Thailand to adopt 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.
- **Technological Protection Measures:** TPMs are critical for the success of services that are providing legal content to users in Thailand today, and they need to be protected. The amendments will improve the law to cover access controls and prohibit trafficking. Specifically, Section 53/6 explicitly outlaws the provision of services to circumvent TPMs and trafficking in circumvention devices, technologies, components, and services (including hacking code/software and false authentication code). IIPA understands that Thailand intends to join the WCT once the bill has received Royal Assent, which would be a positive step. However, certain exceptions are overly broad and should be narrowed. Most critically, the TPM provisions should close the loophole of permitting circumvention of a TPM for the purpose of benefiting from a specified copyright exception (Section 53/5(1)). In addition, the blanket exclusion in Section 53/3(2) and (3) of educational institutes, archives, libraries and non-profit sound and video broadcasting organizations is inappropriate and unjustified. Similarly, Section 53/5(7) broadly exempts these entities, instead of certain specific and narrow acts, from liability for TPM infringement. This is inconsistent with treaty requirements.
  - **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 because it restates 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 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 CMOs 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 set out an action plan of the measures it intends to take to ensure the accuracy of its CMO registration system, such as by developing an effective Copyright Registration Database to allow 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:** Copyright Act Number 4 B.E.2561 (2018) was published in November 2018 and went 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 has issued a Ministerial Regulation on the details of authorized or recognized entities and how such copies may be distributed. The Thai exception goes well beyond the mandate of *The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* which creates a limitation and exception for the benefit of the blind, visually impaired and otherwise print disabled. That exception will be mandatory for individual WIPO members that ratify the Treaty. From the music industry's perspective, 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. This exception should be amended or implemented in such a way that it does not conflict with the Berne Convention and WTO 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, including the provision of Piracy Devices or the after-sale provision of infringing apps or content to purchasers. 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. Unfortunately the amendment to section 21 in the current draft of proposed amendments does not change the term of protection, which remains at 50 years. There are now 67 countries worldwide providing for a term of protection of 70 years or more. Further, if the term of protection is not extended in time, some Thai classics from the 1970s—the classics of Soontaraporn, Suraphol Sombatcharorn and Paiboon

Buth—will soon fall out of copyright protection, despite the fact that they are still widely consumed by the public. This will have a negative effect on local artists' income, especially those who have retired and rely on the royalties for a living.

- **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.
- **Organized Crime:** 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 burdens, 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
- **Section 32 and Fair Use Guidelines:** IIPA also continues to call for a narrowing or clarification of Articles 32(6) and (7) of the Copyright Act, and to ensure administrative guidance on fair use is kept within the legal bounds of existing exceptions and that affected publishers and stakeholders are afforded the opportunity to provide input into the guidelines.

## **MARKET ACCESS ISSUE UPDATES IN THAILAND**

**Screen Quota and Film Classification:** Section 9(5) of the 2008 Motion Picture and Video Act (MPVA) allows the Film Board to establish ratios and quotas against foreign films. If implemented, such restrictions would create new barriers to foreign films distribution, discourage cinema infrastructure investments and reduce consumer choice. Since 2017, the Ministry of Culture has been in the process of considering amendments to the MPVA. The motion picture industry continues to urge the Ministry to delete Section 9(5) and the related Section 68, as such limitations, if implemented, could adversely affect Thai distributors and exhibitors, impede the development of the local film industry, limit the variety of entertainment available to Thai consumers, and exacerbate piracy.

The MPVA also imposes onerous classification (ratings) requirements on films, music videos and live performances as well as censorship requirements on films, audiovisual products and video games. Thailand should remove onerous ratings requirements, including the 15-day period for obtaining ratings and censorship approval, the associated high costs for film ratings and the severe penalties for failure to comply. As countries today are moving towards self-classification for audiovisual products across all distribution formats, IIPA encourages Thailand to do the same. In a positive development in 2019, the film industry was encouraged when the Film Ratings Office (FRO) removed the requirement for submissions of Digital Cinema Packages (DCPs) with open encryption keys (KDMs) which would have otherwise raised significant content security risks.

**Must Carry Requirements:** In 2012, the NBTC hastily approved “must carry” provisions requiring all platforms to carry public and commercial free-to-air television channels nationally, on an equal basis, by all platforms. The regulations, which have not been clearly drafted, raise important intellectual property rights issues, i.e., they call into question the ability of rights holders to enter into exclusive distribution arrangements in Thailand.

**OTT Regulations:** The NBTC is in the process of considering policies on OTT services, including requiring streaming operators to set up a local presence to respond to government requests around content that the government finds objectionable (a form of mandatory content filtering). Thailand is also proposing amendments to its Revenue Code that will require foreign e-commerce services to register for VAT payment. A tax rate of 10% 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 in 1992, any person or entity supplying goods or providing services in Thailand with an annual turnover exceeding 1.8 million baht (US\$55,000) is subject to VAT. Such content control and taxation proposals, if extended to OTT services, would impose burdensome requirements on foreign

content providers, stifle innovation and raise costs, particularly in the absence of a robust content protection regime to protect digital delivery of content.

**Ban on Investment/Ownership in Terrestrial Broadcast Networks:** Foreign ownership of terrestrial broadcast networks is prohibited in Thailand. In January 2015, the NBTC issued rules governing media mergers, acquisitions and cross-media ownership. The rules require prior NBTC approval when a television license holder seeks to invest more than 25% directly or more than 50% indirectly in another licensed company. This rule severely limits investment and creates unnecessary barriers to entry for U.S. companies.

**Television Advertising Restrictions:** Advertising is permitted under the Act on Broadcasting and Television Operation Business (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.

## **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, including Articles 41, 42, 45, and 61.

# UNITED ARAB EMIRATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 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 2020, and that the U.S. Government should commence an out-of-cycle review (OCR) as well.<sup>1</sup>

**Executive Summary:** Despite one of the top-ten highest GDP per capita levels worldwide, the copyright sector in UAE struggles as the result of crippling market access barriers, sub-par copyright protection in its laws, and weak enforcement that allows diverse methods of piracy to persist. The UAE has seen some positive movements in IPR protection education, but does not allow the exercise of the long-implemented music performance rights, has yet to fully implement the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)—and does not protect copyrighted content for a term consistent with international practices. The obstacles to the exercise of existing rights are particularly troubling. It has been 17 years since the UAE passed federal legislation providing for the possibility of collective management of certain rights which seems to be the only permissible form of exercise of these rights in the UAE (rights holders’ attempts to directly license broadcasting and public performance rights have been blocked by the Government of the UAE). The UAE Ministry of Economy has failed to issue an operating license to any such collective management entity, or to rights holders themselves, leaving no legal means to exercise these rights. The UAE is a major hub for tourism and retail and is a regional hub 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 American and other foreign 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 entertainment sector. The government needs to end its delay and immediately issue an operating license to a collecting society to enable music rights holders to start licensing and collecting royalties. Alternatively, the government could confirm in writing that rights holders are free to license their broadcasting and public performance rights directly. The government’s inaction constitutes a direct market access barrier for international music rights holders. These ongoing impediments to the establishment of a collective management organization in the UAE may warrant a possible OCR in 2020. Two other concerns for the copyright industries are: (1) the Dubai Department of Economic Development’s (DED) requirement for a UAE copyright registration certificate as a prerequisite to initiate a copyright infringement case applicable to both domestic and foreign authors in contravention of the treaty prohibitions on formalities; and (2) the DED’s and Custom Authorities’ failures to take action against infringement and inspect markets without first receiving a complaint from a rights holder. There should be *ex officio* authority to commence these actions.

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. 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 treatment of unauthorized uses in the country. The reduction of the official fees for registration of IPRs and other associated IPR service has had a modest positive impact on copyright protection in the UAE.

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<sup>1</sup>For more details on UAE’s Special 301 history, see previous years’ reports at <https://iipa.org/reports/reports-by-country/>. For the history of UAE’s Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2020**

- Take immediate action to approve a collecting society application so that music rights holders can finally begin collecting royalties under the UAE copyright law.
- Modernize the copyright law to implement the WIPO Internet Treaties and harmonize the copyright term with the emergent international norm of life plus 70 years pma, and 70 years for sound recordings.
- 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. In some instances, the proposed online enforcement remedies are outdated. The U.S. Government should seek high standard remedies that support today's business models of the creative industries, including remedies that effectively respond to current challenges and reflect international best practices.
- 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.
- 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.

## **THE COPYRIGHT MARKETPLACE IN UAE**

As of 2019, roughly 9.68 million people in the UAE use the Internet, which is about 98.5% of the UAE population.<sup>2</sup> The UAE leads the world in mobile penetration, with well over 200 mobile subscriptions per 100 inhabitants.<sup>3</sup> 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 the fourth quarter of 2019, there were over 1.68 million visits to *Thepiratebay.org*, and over 1.4 million visits to the stream-ripping site *Savefrom.com* 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 17 year hold out 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. SimilarWeb also reports movie piracy websites *3movierulz.vc* (streaming) and *yts.lt* (torrents) within the top 100 most popular websites in the UAE. In 2017, the TRA reported that it had blocked approximately 83,900 websites, which includes 473 websites for IP violations. However, the TRA stopped publishing the number of the blocked websites

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<sup>2</sup>See <http://www.internetworldstats.com/stats5.htm>.

<sup>3</sup>See <http://www.arabianbusiness.com/uae-s-mobile-phone-penetration-rises-228-676115.html>.

thereafter. The Dubai DED blocked more than 15,050 accounts on social media in 2017, while in 2018, Dubai DED slowed to block infringing accounts on social media, and did not publish the total number of blocked accounts. In 2019, the blocking process was stopped completely. Popular pirate music sites in the UAE include the BitTorrent indexing sites *The Pirate Bay* and *1337x.to* and stream-ripping sites *savefrom.net*, *y2mate.com*, and *ytmp3.cc*. 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.

**Pirate Free-To-Air Channels:** Pirate Free-To-Air (FTA) channels constitute one of the major problems in the motion picture and television 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. 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. The MENA Broadcast Satellite Anti-Piracy Coalition, a group of stakeholders in the Middle East satellite television industry, has a goal of preventing FTA channel piracy. Voluntary collaboration among rights holders and satellite operators in this anti-piracy coalition has been effective at helping to control FTA channel piracy in the UAE.

**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, producers and creators, and other legitimate content providers that invest significant sums to license content and develop business models in the region. These legitimate efforts contribute to the economic development of the country, fund production of local content, create jobs, and generate revenue for advertising and auxiliary industries. Dubai is a commercial hub for the region and may affect legitimate markets in surrounding countries—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 become very slow in the past year, and that the UAE police and economic departments are hesitant in considering serious actions against infringers. For example, the electronic crime department in Dubai Police received a criminal complaint against an identified person in December 2018 for conducting piracy acts for paid TV channels and offering those channels to an increasing group

of people for free over the Internet. Despite the specific complaint, the Dubai Police took no action until the Emirates IP Association (EIPA) interfered to accelerate enforcement, and more than a year later the offender has yet to be presented to the court for prosecution. However, the Dubai DED did conduct several raids in 2019 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.

**Legal Reforms:** On July 4, 2019, the UAE issued Cabinet Resolution No. (51) on the official fees for the Ministry of Economy (in force, July 7, 2019). This resolution reduced many of the official fees for registering IP rights in the UAE. For example, the trademark registration fee has been reduced from 10,000 AED (US\$2,723) to 6,700 AED (US\$1,824).

**Judicial and Case Law Developments:** The judicial system has 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 against hard copy piracy remain in malls outside the main cities and in Free Zone areas. Authorities continue to detect high levels of pirated (and counterfeit) products in Dragon Mart 1, Dragon Mart 2, the Global Village, Karama in Dubai, the China Mall, and Ajman Dragoon Mart. For example, in 2019, the Dubai Economic Department received an administrative complaint against counterfeit products (“LOL” doll toys) in the Dragoon Mart/China Mall. The officials responded to the complaint and seized the counterfeit products from the shops of the respondents, but did not seize similar counterfeit products in neighboring shops because there was no complaint filed against those shops, despite the Dubai Economic Department’s legal authority to seize counterfeit products absent a complaint. 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 the raw material is thereafter used in various industries. Previously, Dubai Customs would re-export the counterfeit products to the country of origin instead of destroying or recycling such counterfeit goods. 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 rights holders.

**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 21 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, 2018, and 2019, 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 combatting 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%. IP rights holders would like to see this reduction applied to complainants (the brand owners) instead of infringers. Additionally, the Dubai DED's failure to inspect markets absent a complaint from copyright holders encouraged infringers to trade in illicit products including 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 the government inaction already noted, to accredit a collecting society, no monies are being collected currently, 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.

As noted, for 17 years, no collecting society has been accredited so rights holders have no means to commence services or collect monies. In 2015, there was some optimism for progress when Twofour54—an Abu Dhabi Media Zone entity supported by a rights holder coalition—submitted an application to the Ministry of Economy for an operating license as a music rights CMO. However, the Ministry of Economy never responded. Another application (the most recent) was submitted in 2016, with the same result—no response. The UAE should move swiftly to approve the application, which is supported by the music industry across the board. Unfortunately, recent requests by IFPI for a government intervention with the UAE Ministry of Economy and the Department of Economic Development have not been answered. The continuing government inaction may warrant a possible OCR for UAE in 2020.

**Challenges with Internet Service Providers (ISPs):** ISPs in the UAE, namely Etisalat and Du, cooperate with rights holders to a limited degree by responding to notice and take down requests. 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 the above-mentioned platforms for reporting IP violations, they act slowly on complaints.

**Amendments to the UAE Copyright Law:** The current Copyright Law falls short of the obligations in the WIPO Internet Treaties and modern standards of protection. It contains only rudimentary protections against the unauthorized act of circumvention of TPMs and against some activities relating to trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs. The law needs to be amended to more broadly include prohibitions against: 1) the act of circumvention of a TPM that effectively controls access to copyright-protected materials<sup>4</sup> 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 recommended changes include: 1) removal of unreasonable restrictions on the ability to freely contract;<sup>5</sup> 2) ensuring compulsory license provisions are in conformity with the Berne Convention (the Appendix);<sup>6</sup> 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.

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<sup>4</sup>It 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).

<sup>5</sup>For 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.

<sup>6</sup>Article 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.

**Cyber Crime Law Should Include IP:** The Cyber Crime Law was recently updated to include, among other things, a specific provision on ISP liability. The Cyber Crime Law should be further updated to include criminal offenses relating to copyright infringement. 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 Internet Treaties (the WIPO Copyright Treaty, (WCT) and the WIPO Performances and Phonograms Treaty, (WPPT)). 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.

## **MARKET ACCESS**

**Music Licensing:** The failure to implement a music licensing regime in the country effectively prevents producers and performers from licensing in the market, which serves as a market access barrier. 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. 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 delay.

**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 (and as applied to Berne member authors and producers is a violation of Article 5(2) of Berne and equivalent provisions such as Article 20 WPPT). Such restrictions limit the power of rights holders to protect themselves from infringement and hinder their ability to thrive in the UAE market.

# ANNEX

# ANNEX: SHORT COUNTRY SUMMARIES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

This Annex Report provides short Country Reports for the following seven countries: **Barbados; Costa Rica; Egypt; Guatemala; Jamaica; Turkey and Venezuela.**

These short Country Reports are brief summaries that address a few key issues in each country, sometimes pertaining to only one or two IIPA members, regarding legal reforms, enforcement issues, and/or market access barriers. There was not enough new information to warrant a longer Country Report. Since the same issues previously reported on remain unresolved, IIPA recommends that in bilateral engagements in 2020, the U.S. Government should prioritize these issues. Each of these seven countries has been the subject of prior IIPA submissions, which included detailed analyses of legal and enforcement regimes in these countries. The country placement recommendations for these seven countries made in our prior Special 301 filings are the same for 2020, namely:

- Priority Watch List: **Costa Rica; Venezuela**
- Watch List: **Barbados; Egypt; Guatemala; Jamaica; Turkey**

There are an additional 11 countries for which IIPA is not submitting a Country Report. These countries were identified on USTR's 2019 Special 301 Report, and have been the subject of prior IIPA filings. They are: **Bolivia; Dominican Republic; Greece; Kuwait; Lebanon; Pakistan; Romania; Saudi Arabia; Tajikistan; Turkmenistan; and Uzbekistan.**

In each of these countries, there has been no overall improvement in the IPR protection and/or enforcement framework. Thus, for 2020, IIPA recommends placement or retention on the Watch List for these 11 countries. This is the same recommendation IIPA made on each of these countries the last time IIPA filed a full report on them identifying particular issues of concern. The chart notes the year of that last IIPA report.<sup>1</sup>

<u>2020 Watch List Recommendation</u>	<u>Last Year IIPA Filed Full Country Report</u>
Bolivia	2006
Dominican Republic	2008
Greece	2014
Kuwait	2014 (and in 2017 Annex)
Lebanon	2013
Pakistan	2013
Romania	2014
Saudi Arabia	2014
Tajikistan	2014
Turkmenistan	2014
Uzbekistan	2014

<sup>1</sup>Algeria is also listed on USTR's 2019 Special 301 Priority Watch List but IIPA has neither filed a Country Report nor made a recommendation on this country in prior years, and we make no recommendation for 2020. Prior IIPA reports for each of the other countries can be found at: [www.iipa.org](http://www.iipa.org).



# ANNEX: BARBADOS

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Effective on December 13, 2019, Barbados acceded to the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). That is a major step forward for Barbados. But, it is just the first of several steps for Barbados to modernize its legal regime because Barbados has not yet incorporated the treaty obligations, or other needed improvements, into the Copyright Law of Barbados (1998), which was last revised in 2006. Significant legal reforms would help to encourage investment, deter piracy, and develop a market for the creative industries. Barbados needs to both modernize its law and undertake fundamental steps to require and enforce the licensing of rights and payment of royalties. The Government of Barbados also needs to demonstrate the political will to address the unauthorized use of music by broadcasting services administered by the state.

Incorporating the Internet Treaty obligations would provide fundamental digital copyright and neighboring rights protections, to create a favorable environment for the digital marketplace in Barbados, and for investment in local authors and creators. However, 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. Several years ago, the local collective management organization (CMO)—COSCAP—representing composers, producers and performers, commenced litigation against private and state-owned services. However, legal formalities and the lack of government cooperation have made it very difficult to enforce a 2007 Supreme Court ruling in favor of rights holders. In the meantime, radio and TV broadcasters, as well as cable and satellite operators, continue to use large music catalogs without licenses.

In some instances, such as traditional broadcasting and cable transmissions, the current Copyright Law unequivocally provides protection for rights holders. Yet, some broadcasters, including the state-owned Barbados Broadcasting Corporation, refuse to pay broadcast fees (as well as fees 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. If this cannot be corrected by applying current law, then the law should be amended to prohibit the abusive application of what was intended to be a very narrow public performance exception.

In its April 2019 Special 301 Report, the U.S. Government noted the failure of Barbados to accede to the Internet Treaties and to “protect works in both the physical and online environments is a major concern.” The U.S. Government then pointed to three major (longstanding) concerns: (i) the retransmission of U.S. broadcast and cable programming by local cable operators in Barbados (and throughout the Caribbean region) “without the consent of, and without adequately compensating” U.S. rights holders; (ii) the refusal of TV and radio broadcasters and cable and satellite operators to pay for public performances of music—which USTR said should be addressed “without undue delay” by administrative actions; 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.

The motion picture industry reported in 2019 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 Internet Protocol TV (IPTV) services and unauthorized streaming services are providing unlicensed access to U.S. broadcast programming services.

IIPA recommends that Barbados remain on the Watch List in 2020.



# ANNEX: COSTA RICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The Government of Costa Rica needs to take substantial measures to improve its copyright legal and enforcement regime to address the high levels of online piracy in Costa Rica, including piracy that is originating in Costa Rica and is being exported to other countries.

One positive note in 2019 was the withdrawal by Costa Rica of the 2009 reservation to the WIPO Performances and Phonograms Treaty (WPPT). The 2009 reservation to Article 15(1) of the WPPT, while permissible, violated Costa Rica's bilateral obligation to the United States (and the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA)) to consult before taking this action, and had actually lowered the level of copyright protection. The 2019 withdrawal is a welcome step and in line with global norms, and will have a beneficial impact on the music industry and rights holders in Costa Rica. However, a local broadcaster organization (CANARA) has filed a petition with the Ministry of Justice asking the Government of Costa Rica to refile the reservation; the government should show determination to improve the IPR regime in Costa Rica and resist this effort to help the music industry to grow.

One of the keys to improving online enforcement would be to implement rules on secondary copyright liability, as well as providing meaningful legal incentives for inter-industry cooperation to deal with online infringements. Improving enforcement online is an obligation of the DR-CAFTA, which has been in force for Costa Rica since January 1, 2009. Eight years after the expiry of the transition period to put it into force, Costa Rica still has not achieved the aims of the DR-CAFTA to improve copyright protection and enforcement.

Instead, Costa Rica's current law offers largely unconditional liability exceptions to Internet Service Providers (ISPs) and others, even allowing identified infringing activity to remain on their systems for a long time. To address the latter problem, in 2019, the Government of Costa Rica issued a decree to amend the then-existing 45-day period for taking down infringing material (the timetable for forwarding infringement notices to ISP subscribers). The decree replaced the long 45-day period with a requirement to respond to takedown notices and remove infringing content "expeditiously" but without a timetable for doing so. IIPA continues to recommend 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. The Government of Costa Rica has placed too much enforcement emphasis on notice and takedown rules. Notice and takedown is not itself an enforcement tool, but rather a small piece of a larger architecture regulating how passive and neutral intermediaries are expected to cooperate and address online piracy. Without secondary liability principles in place, ISPs have few incentives to cooperate other than by responding to notice and takedowns, which places all of the online enforcement burdens on rights holders.

Overall, online piracy of film and television material is rapidly increasing in Costa Rica, through a variety of sources, but mostly by the use of piracy devices and apps or by direct downloading. One type of piracy is via direct-to-home (DTH) boxes from the United States; sales of these boxes are on the rise in Costa Rica. These devices are used to access content, including broadcasts from the United States, as well as basic and premium movie and television channels. A second form of piracy is the rise in sales of illegal Internet Protocol TV (IPTV) boxes—these boxes allow users to access TV via the Internet. A related form of piracy is undertaken by local IPTV services that provide this access for a fee, and are gaining a foothold in Costa Rica. One form of this piracy occurs when a local ISP sells Internet bandwidth legally, but illegally supplements the sale with an IPTV service. A third form of piracy is by local cable operators that access and distribute unauthorized retransmissions of U.S. domestic channels. Alternatively, the cable operators may also be engaged in IPTV piracy when they use their own fiber optic network to establish and distribute an IPTV service that obtains film and television content and transmits it from the cable system headend (i.e., the main distribution point). Several of the American motion picture and television companies report that TV and sports programs



offered by cable or satellite systems have been downlinked and distributed in Costa Rica without any consent or payments.

Thus, while proper Internet 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. Additionally, the Costa Rican Top Level Domain (ccTLD) registry continues to provide a safe haven to notorious online enterprises dedicated to copyright infringement. For example, *thepiratebay.cr* domain is still online despite actions against it from the Internet Corporation for Assigned Names and Numbers (ICANN) and the U.S. Embassy in Costa Rica. Other notorious infringing sites are following the trend of using .cr domains as a safe haven (e.g., *kickasstorrents.cr*). Costa Rica's failure to deal effectively with its obligations regarding online infringement, more than eight years after they came into force under DR-CAFTA, is a serious concern.

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. IIPA continues to recommend that Costa Rica be placed on the Priority Watch List in 2020.



# ANNEX: EGYPT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 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 2019. In 2018, there were two positive legal reforms. 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. 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.

Copyright piracy in Egypt is widespread, including unauthorized streaming 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 users of mobile devices and other technological advances. Most Internet Service Providers (ISPs) do not respond to takedown notices. There were reports however, that some major infringing streaming sites including *EgyBest* and *Fushaar*, were blocked by ISPs in 2019. Although some of the sites managed to re-surface, further actions to disrupt or taken them down did occur in 2019, but no criminal charges were commenced against the owners or operators of the sites.

IIPA members report that there have been no changes in the levels of piracy, or enforcement against piracy in 2019 from prior years. An ongoing problem in Egypt is 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.

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 2019, the Ministry of Interior conducted a series of raids on unauthorized production companies and shops making hard copies of audiovisual works.

One other recommended legal reform, which has also long-been on the U.S. Government's list of improvements in Egypt, is 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 2020: (i) facilitate the establishment and operation of collecting societies for the music industry in Egypt; (ii) 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) augment enforcement against signal theft; and (iv) 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. IIPA recommends that Egypt remain on the Watch List in 2020.



# ANNEX: GUATEMALA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Licensed music services have launched in Guatemala in recent years to meet clear consumer demand for such services. At the start of 2020, there were nine 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) continues to try to collect monies. It has also 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 2017, AGINPRO won a case in the Constitutional Court against a group of television and radio broadcasters requiring that the broadcasters obtain licenses and make payments for broadcasting recorded music. AGINPRO fought for years to get broadcasters to actually comply with the ruling and pay licensing fees for the use of recordings on television stations. Finally, in 2019, AGINPRO signed an historic agreement with a local broadcasters' association to regulate the terms and conditions of licensing for commercial radio and television. Although the agreement requires implementation by each individual radio and television station, it indicates progress and an acknowledgement by the stations of their willingness to comply with copyright law. IIPA recommends that the Government of Guatemala clearly indicate that stations that do not comply with this agreement will be prosecuted and sanctioned. Unfortunately, compliance will remain difficult as some of the previously resistant broadcast stations are owned by local politicians. Also in 2019, AGINPRO was successful in getting some prominent cable operators (e.g., CLARO TV) to license materials. Others have, however, resisted licensing in part, because pending criminal cases against them have been delayed and are generally not deterrents to continued flagrant infringement. One such case against TIGO Guatemala (a large cable and mobile phone operator) has not proceeded because of prosecutorial mistakes in gathering evidence. The new Government of Guatemala should give clear indications of its willingness to properly enforce copyright laws, including against those who previously used political influence to delay or defeat prosecution.

In its April 2019 Special 301 Report, the U.S. Government noted that the number of enforcement raids and convictions had “declined significantly” in 2017 and 2018. There were no reports by the copyright industries of increased enforcement activity in 2019. The enforcement raids that do take place are undertaken by the National Police and Attorney General’s Office.

Overall, piracy of film and television material continues to rise in Guatemala. The main form of this piracy is cable piracy that takes two forms. First, and most prevalent, is the unauthorized retransmission of programming by local cable operators. Alternatively, some local cable operators have developed and created their own channels through which they distribute U.S.-created content such as telenovelas and sports events (e.g., soccer), financed by the sale of local advertisements. It is estimated that there are 150 channels of this type in Guatemala according to one local cable service. A third variety of piracy is where local cable operators use illegal Internet Protocol TV (IPTV) boxes—these boxes allow users to access TV via the Internet. In this instance, the cable operators provide their own local IPTV service for a fee to cable subscribers, offering programming that they do not pay for by accessing it using these boxes and delivering it (illegally) to their subscribers. As the Internet infrastructure in Guatemala expands, other forms of online video piracy are also on the rise. Most common is the use of Piracy Devices (PDs, also referred to as illicit streaming devices, ISDs), which allow individual users to access subscription-only programming without authorization or payment to rights holders. Another device commonly used and on the rise in Guatemala is direct-to-home (DTH) boxes. These devices are used to access content, including broadcasts from the United States, as well as basic and premium movie and television channels. In Guatemala, they are also commonly used in bars and hotels,



as well as by individual consumers in their homes. The PDs and DTH boxes are now for sale in Guatemala City (a recent phenomenon), and becoming more popular nationwide.

The motion picture industry remains concerned about enforcement against all of these forms of cable and signal piracy, and recommends that the Copyright Office and Guatemala's telecommunications regulator UNCOSU should have administrative authority to act without requiring a complaint from rights holders. Currently, UNCOSU sanctions are small fines and cease and desist letters, neither of which have any deterrent effect. Additionally, there is the need for legislative change to empower the Copyright Office to undertake administrative actions for all IP violations; currently, it serves only as an office of registrations. Both UNCOSU and the Copyright Office need enhanced legislative authority, but also support at the highest levels of government to undertake effective enforcement. At present, the only effective enforcement option for rights holders is to seek criminal referrals to enforcement authorities. While this can be effective, it is a slow process, and cannot properly handle the large volume of cases to effectively and efficiently address piracy in Guatemala.

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, but also for better and more effective administrative remedies, as identified above, to address certain forms of piracy.

IIPA last filed a country report on Guatemala in 2003. At that time, IIPA recommended that Guatemala be placed on the Watch List. IIPA recommends that Guatemala remain on the Watch List in 2020.



# ANNEX: JAMAICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

In July 2015, Jamaica amended the Copyright Law of Jamaica (1999) to fulfill Jamaica's obligations under the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The 2015 amendments included the adoption of technological protection measures (TPMs) to enforce against circumvention, and to provide for Rights Management Information (RMI); the 2015 amendments also extended all copyright terms for works and sound recordings.

While the 2015 legal reforms were a positive step forward, significant problems persist in Jamaica, most notably involving unauthorized transmissions of film and television materials via cable or satellite systems that deny payments to rights holders.

One of the long-standing problems for the motion picture and television industries are the numerous illegally transmitting (and cable retransmitting) broadcast channels in Jamaica. Three years ago, there was some hope of progress, but those efforts have mostly stalled. 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 of that year. 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. Then in 2018, the Broadcasting Commission of Jamaica initiated another audit of cable operators to ensure that cable systems would provide only licensed copyrighted materials to subscribers. However, even after these steps taking down some channels or materials, unauthorized materials are still widely available on broadcast and cable channels—in fact, there are dozens of channels, most by local operators, that continue to broadcast only unauthorized material. 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 for retransmissions.

In June 2017, a major summit was organized to address these problems in Jamaica and in the region. At that time, 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 that Jamaica (and the Caribbean 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 since slowed.

Other problems persist for the music industry, most notably the failure of music services to collect and pay royalties to rights holders.

There was a single case two years ago that awarded damages to rights holders for a local cable broadcaster's unauthorized use of materials, but more such cases are needed to be deterrents. While there were reports two years ago of enforcement operations and arrests that targeted transnational criminal organizations operating in Jamaica, there have been no such recent reports.

IIPA recommends that the Government of Jamaica should continue its focus on the large-scale operations, and also properly address the persistent problem of unlicensed broadcasts and cable systems, and the non-payment of royalties to the audiovisual producers. While the Government of Jamaica agreed to work to legalize its broadcast television ecosystem at the 2017 summit, rampant signal theft continues. The Government of Jamaica should enforce its current law and fully implement its promised reforms.

IIPA recommends that Jamaica remain on the Watch List in 2020.



# ANNEX: TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

For over a decade, the Government of Turkey has promised to modernize the Copyright Law (1951), last amended in 2014, to fully implement the obligations of the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Turkey acceded to the Internet Treaties in 2008, but has yet to fully implement the treaties, including by providing proper remedies against the circumvention of Technological Protection Measures (TPMs) and protecting Rights Management Information (RMI).

The law of Turkey does not currently provide proper incentives for cooperation between rights holders and ISPs. The current Copyright Law (Article 4*bis*) does have notice and takedown provisions. Turkish law (No. 5651) treats service providers as intermediaries who are only required to respond to rights holders' notices, or actions taken by rights holders in the courts to block access to infringing websites. Failure to comply with takedown notices or requests to block access to known infringing sites is punishable only by administrative fines imposed by the Ministry of Transportation. The ISPs do have responsibility to act if, after a court injunction, an infringing website fails to remove infringing content. The Internet Law does not include any criminal penalties for copyright violations.

Recent draft proposals, including one in 2018, would have revised the responsibilities of Internet access and hosting providers. 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 passive and neutral intermediaries, whose services are used for infringing activities, to cooperate with copyright owners to stop copyright infringements on their services. For services engaging in copyright infringement, or inducing or encouraging infringement, there should be no safe harbors. The 2017 and 2018 draft bills, if enacted, would not have met this objective. One proposal would only have required “content or hosting providers” to remove infringing content within 24 hours of a takedown notice. As in the past, IIPA recommends that any legislation include secondary liability principles and limit the takedown scheme only to passive and neutral online intermediaries. 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). In addition, penalties for noncompliance with takedown notices or court orders should include both administrative fines and civil law damages.

While efforts to draft new laws have stalled (including promised 2019 revisions), piracy issues continue to plague the Turkish marketplace, undermining economic opportunities for Turkish and American creators alike. Digital piracy—via stream-ripping, cyberlockers, BitTorrent and other peer to peer (P2P) linking sites, 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 2019.

One change that was made to the Civil Code in 2019 requires all copyright complainants seeking monetary damages to first try to settle disputes via mediation before court proceedings can commence. Proponents of the legislation hope that smaller infringement claims will be expedited, because of otherwise burdensome procedural issues and delays in the courts.

The motion picture industry reports that satellite TV channel infringement continues and that the Turkish laws need to be amended to explicitly address satellite piracy.

The Government of Turkey withdrew the 2018 draft Copyright Amendments Bill in 2019, and there are reports that no new legislation will likely be considered in 2020. Separately, an Act on Evaluation, Classification and Promotion of Cinema Films, after review by the Ministry of Culture and Tourism, was adopted by the Parliament in 2019. This legislation is intended to create investment incentives for foreign film producers to shoot their films in Turkey, including



by funding 30% of production costs for these foreign producers or for Turkish co-producers who work with them in Turkey.

The Copyright Bill (the 2018 draft) included provisions for the formation and operation of collective management organizations (CMOs), referred to as Collective Licensing Societies. The 2018 proposal would have created four such CMOs—one each for literary works; music; film; and works of the visual arts. There are reports that even though the larger Copyright Law amendments legislation might not be ready in 2020, the CMO legislation might move in separate legislation in 2020. It is not clear whether the legislation would address the long-standing discrimination against foreign members of CMOs. The other part of the CMO legislation would establish a Copyright Arbitration Committee to 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 governance and management of CMOs has been a long-standing problem in Turkey. Currently, foreign rights holders face discriminatory policies that prevent foreign producers from being fully participating members of Turkish CMOs (with full voting rights and management and decision-making authority). Because of this, the monetary distribution rules and practices are discriminatory to foreign rights holders, and there is no transparency for non-management rights holders. The prior drafts of CMO legislation (including the 2018 draft) would not have addressed the fundamental problem of banning non-Turkish producers from full participation in or management of the CMOs. The discriminatory treatment of foreign rights holders that is now prevalent in CMOs was an issue noted in the April 2019 Special 301 Report by the U.S. Government. It recommended, and rights holders agree, that any future CMO revisions should permit “fair, transparent and non-discriminatory procedures” for CMO governance of all rights holders’ rights.

One loophole in the 2018 draft law would have allowed Turkish collecting societies to license theaters to screen motion pictures without authorization from film producers, and subject them only to a collecting society-determined remuneration. This statutory license of the public performance right, if enacted, would be a violation of international treaties and norms, and should not be adopted in any CMO law (or Copyright Law) revision.

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 treat “indirect” performances of sound recordings—i.e., the public performance of a recording on radio, television, or by another indirect manner in a bar, hotel, or other public place—as a use not requiring a public performance license and exempt from collections. The “logic” of this interpretation, contrary to international law, is that these recordings have already been licensed to broadcasters. This fails to distinguish between the use and licensing of a sound recording to broadcasters for broadcasting, and the use and licensing of a sound recording 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.

One change that did occur in 2019 was the adoption of a formal registration and “sticker” (banderole) procedure for hard copy goods. These provisions are now being implemented by the Ministry of Culture and Tourism. Unfortunately, although well intended, experience in other countries has shown that banderole requirements have proven to be onerous and burdensome, especially for foreign rights holders. The 2018 legislative proposals would have also extended this requirement to musical recordings and tied them to CMO representation for digital music services. Banderoles are relics of physical copy distributions, not digital ones that now predominate, and should not be required for foreign rights holders.

Another piece of the 2018 draft Copyright Bill would have provided the Turkish National Police (TNP) with *ex officio* authority to commence IPR cases. It would also have included provisions to more fully implement the Internet Treaties’ TPM obligations regarding enforcement against the making, selling or trafficking in anti-circumvention devices or software. These reforms should be incorporated into any new draft law.

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. Separate from the Copyright Law reforms, Turkey has been considering amendments to the Civil Code to address online infringement and Internet Service Provider (ISP) liability. No legislation, however, was advanced in 2019.

There are other concerns with the 2018 Copyright Law Bill which should be corrected in any future draft legislation. The 2018 draft bill concerns include: (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 has yielded results. By one estimate, approximately 70% of takedown notices now are responded to with a removal of material. The copyright industries reported that there were many websites taken down in the past few years (over 2,500 sites between 2005 and 2018), but these actions slowed considerably in 2019.

One change in criminal cases in 2019 was the courts no longer accepting registration documents to prove ownership of rights. Instead, the courts (including the Criminal Supreme Court) require all documents showing a full chain of title and all assignments and transfers—this is very cumbersome for both local and foreign rights holders (in fact, a burden almost impossible for foreign rights holders to meet). In the past, copyright notices or registrations were sufficient for presumptions of ownership; this system should be reinstated in the courts.

Current law provides a legal basis for direct infringer injunctions to block infringing websites (and some major 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, whose services are used by direct infringers or those assisting them.

IIPA last filed a country report on Turkey in 2014. At that time, IIPA recommended that Turkey be placed on the Watch List. IIPA recommends that Turkey remain on the Watch List in 2020.

# ANNEX: VENEZUELA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Venezuela is not a member of the Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). It has not amended its Copyright Law since 1993. Thus, the legal regime is woefully out of date.

The motion picture industry reports that since 2016, 13 illicit audio or video camcords of MPA member films have been traced to theaters in Venezuela. These copies then migrate online, fueling international piracy.

In its April 2019 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. In addition, it noted that for the sixth straight year, Venezuela ranked last out of 140 countries in IP protection, according to the World Economic Forum's 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. IIPA recommends that Venezuela remain on the Priority Watch List in 2020.



# **APPENDIX B**

## **CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1998 – 2019) & IIPA'S 2020 SPECIAL 301 RECOMMENDATIONS**

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1998-2019)  
AND IIPA 2020 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																							
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
ALGERIA		PWL	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
ARMENIA																			WL	WL	WL		
AUSTRALIA																						WL	WL
AUSTRIA																							OO
AZERBAIJAN																WL	WL	WL	WL	WL	WL		
BAHAMAS															WL	WL	PWL	PWL	WL + OCR	OCR	OCR		
BAHRAIN																							WL
BARBADOS		WL	WL	WL	WL	WL	WL	WL															
BELARUS						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	WL	OO
BRAZIL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL
BRUNEI									WL	WL	WL	WL											
BULGARIA				WL	WL	WL	WL	WL							WL	WL	WL						PWL
CANADA	WL	WL	PWL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL
CHILE	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL
CHINA (PRC)	PWL	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
COLOMBIA	WL	WL	PWL	WL+OCR	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL
COSTA RICA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL
CROATIA															WL	WL	WL	WL					
CYPRUS																							
CZECH REPUBLIC											WL	WL	WL	OCR								WL	WL
DENMARK																						WL	WL
DOMINICAN REPUBLIC		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL
ECUADOR	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL			WL	WL	PWL
EGYPT		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL
EL SALVADOR								OCR															
ESTONIA																							OO
EUROPEAN UNION															WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL
FIJI												OCR											
FINLAND							WL	WL	WL	WL	WL	WL											
GEORGIA																				OCR			
GERMANY																							OO
GREECE		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL						WL	WL	PWL	PWL	PWL
GUATEMALA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL
HONDURAS						OCR																	WL
HONG KONG																						OCR	WL

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AND IIPA 2020 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																								
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	
HUNGARY												WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	
INDIA	PWL	PWL	PWL	PWL	PWL	PWL	PWL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	
INDONESIA	PWL	PWL	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	
IRELAND																					WL	WL	WL	
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	
ITALY								WL	WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR	PWL	PWL	
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	
JORDAN																						WL	WL	
KAZAKHSTAN																WL	WL	WL	WL	WL	WL		OO	
KUWAIT		PWL	PWL	PWL+OCR	PWL	PWL	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	PWL	PWL
KYRGYZ REPUBLIC																				OCR				
LATVIA															WL + OCR	WL	WL	WL	WL	WL	WL			
LEBANON		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	OO
LITHUANIA														WL	WL	WL	WL	WL	WL	WL	WL			
LUXEMBOURG																								
MACAU																					WL	WL	PWL	PWL
MALAYSIA										WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR		
MEXICO	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR			WL	OO	
MOLDOVA																					WL			
NETHERLANDS																							OO	
NEW ZEALAND																			WL	WL		WL		
NICARAGUA																							OO	
NORWAY									WL	WL	WL	WL	WL											
OMAN																					WL	WL	WL	
PAKISTAN		WL	WL	WL	WL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	
PALESTINIAN AUTHORITY																					OCR			
PANAMA																							OO	
PARAGUAY		WL				WL+OCR	WL+306 +OCR	WL	306	306	306	306	306	306	306	306	306	306	306	306	306	306	306	PFC
PERU	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL
PHILIPPINES								WL	WL	WL	WL + OCR	WL + OCR	WL + OCR	WL	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	
POLAND												WL + OCR	WL	WL	WL	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	
PORTUGAL																								
QATAR																			WL		WL	WL	WL	

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USTR 301 PLACEMENT (as of April/May of each year)																								
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	
ROMANIA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	
RUSSIAN FEDERATION	PWL	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	
SAN MARINO																								
SAUDI ARABIA		PWL	WL									WL + OCR	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	
SERBIA AND MONTENEGRO																								
SINGAPORE																						WL	WL	WL
SLOVAK REPUBLIC																	WL	WL	WL	WL	WL			
SLOVENIA																						OCR		
SOUTH AFRICA	PWL																						WL	WL
SOUTH KOREA													WL	WL	WL	WL	PWL	WL + OCR	WL	PWL	PWL	PWL	WL	WL
SPAIN					OCR	OCR	OCR	OCR		WL	WL	WL	WL									WL	WL	OO
SWEDEN																							WL	WL
SWITZERLAND	WL	WL	WL	WL	WL																			
TAIWAN	PWL												WL (then OFF due to OCR)	WL	WL	WL	PWL + OCR	PWL	PWL	PWL	WL	WL		
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	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL
TRINIDAD & TOBAGO						WL	WL	WL																
TUNISIA																								OO
TURKEY		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	PWL
TURKMENISTAN		WL	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																		WL	OCR	WL	WL
UKRAINE	PWL	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	
UZBEKISTAN		WL	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	PWL	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
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