



**MOTION PICTURE ASSOCIATION**

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**MPA Comments Regarding the 2020 National Trade Estimate  
Report on Foreign Trade Barriers**

October 31, 2019

**Filed via [www.regulations.gov](http://www.regulations.gov)**

Edward Gresser  
Chair, Trade Policy Staff Committee  
United States Trade Representative  
600 17th Street, NW  
Washington, D.C. 20508

Re: MPA Response to USTR's Request for Comments to Compile the National Trade Estimate Report on Foreign Trade Barriers (Docket: USTR-2019-0012)

Dear Mr. Gresser:

MPA proudly represents one of the country's most vibrant industries – the American motion picture and television sector. Here at home and around the world, our industry delivers enormous economic value, drives innovation, promotes free expression, and serves as a global ambassador for our nation's creativity and dynamism. To that end, please find in the enclosed submission our industry's observations on priority foreign trade barriers.

The American motion picture and television industry is a major U.S. employer that supported 2.6 million jobs and \$177 billion in total wages in 2017. Nearly 340,000 jobs were in the core business of producing, marketing, and manufacturing of motion pictures and television shows. Another nearly 587,000 jobs were engaged in the distribution of motion pictures and television shows to consumers, including people employed at movie theaters, video retail and rental operations, television broadcasters, cable companies, and online video services. The industry also supports indirect jobs in the thousands of companies that do business with the industry, such as caterers, dry cleaners, florists, hardware and lumber suppliers, and retailers.

The U.S. film and television production industry remains one of the most highly competitive in the world. In 2017, the enduring value and global appeal of U.S. entertainment earned \$17.2 billion in audiovisual exports. Moreover, this industry is one of the few that consistently generates a positive balance of trade. In 2017, that services trade surplus was \$10.3 billion, or four percent of the total U.S. private-sector trade surplus in services.

The U.S. motion picture industry distributes its films and television shows to over 130 countries. With well over half of MPA member companies' revenue earned outside the U.S. each year, MPA has a strong interest in the health and sustainability of these international markets. Accordingly, MPA greatly appreciates USTR's interest in identifying trade barriers that jeopardize the growth of legitimate commerce and impair U.S. global competitiveness.

The full potential of U.S. audiovisual exports is inhibited by a range of market access barriers. Countries around the world, developed and developing, continue to maintain restrictive content

quotas, advertising restrictions, and foreign investment limitations, traditionally targeting theatrical and pay-TV distribution channels. However, such restrictions are now starting to migrate into the online space, threatening the vitality of fast-growing business segments such as video on demand (VOD), and other over-the-top (OTT) services. Local content quotas, discriminatory or excessive taxes, and related measures have the effect of stifling business development, adding a burdensome barrier to market entry, and exacerbating online piracy. Such policies ultimately curb the ability of our industry to compete fairly and limit consumers' access to legitimate content.

MPA aims to expand the legitimate market and protect our member companies' content as it flows to consumers through a variety of traditional and new distribution channels. There are now at least 450 legitimate online platforms around the world, allowing global audiences to enjoy creative entertainment wherever, whenever, and on whatever device. Despite these efforts, in many important overseas markets, content thieves have a significant competitive advantage over MPA member companies and other legitimate businesses. By stealing and illegally disseminating the works of others, thieves deprive our content creators of the millions of dollars in remuneration that they would otherwise use to produce content and pay wages or marketing costs.

In tackling the scourge of content theft, a constantly evolving threat, MPA continues to forge partnerships with key stakeholders in the online ecosystem, pursuing voluntary agreements and public policies that make it easier for legitimate content to flourish on the internet. Online enforcement efforts are complicated when intermediaries fail to take adequate steps to ensure their services are not being used to facilitate copyright infringement. Meanwhile, we have in recent years seen emerging best practices, particularly in Asia-Pacific and European markets, as governments respond to online piracy through site blocking and notice-and-stay-down.

I hope you find the enclosed information helpful. The MPA offers its full assistance and cooperation toward combating the theft of intellectual property, securing effective copyright protection, and ensuring a competitive global marketplace.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. H. Rivkin', with a long horizontal flourish extending to the right.

Charles H. Rivkin  
Chairman and CEO  
Motion Picture Association

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# About the MPA

The Motion Picture Association (MPA) serves as the voice and advocate of the American motion picture, home video and television industries from its offices in Los Angeles and Washington, D.C. Our members are: Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Entertainment Inc.

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# Reporting Format

As with the last few years, the MPA has focused its trade barrier submission on those countries and issues where it and its member companies are most actively engaged. Therefore, the countries included in this year's filing are commercially significant markets or potentially commercially significant markets.

Each year, MPA works under the aegis of the International Intellectual Property Alliance (IIPA) to recommend to the U.S. government those countries' policies and practices that fail to provide adequate and effective protection of intellectual property rights. With this in mind, MPA's Trade Barriers submission highlights principal concerns with countries' intellectual property regimes and defers to the IIPA Special 301 filing for a comprehensive discussion of countries' adequate and effective protection of U.S. intellectual property.



# NATIONAL TRADE ESTIMATE



# AFRICA



## MARKET ACCESS ISSUES

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 results of the latest review are still pending, MPA maintains that market forces, rather than discriminatory quota regimes, should determine programming allocation.

Online Value Added Tax (VAT) – In May 2014, South Africa published regulations relating to registration and payment of VAT on all online transactions conducted in, from, or through South Africa. Currently levied at 15 percent, the tax includes online selling of content such as films, series, games, and e-books. As of April 2019, income on B2B services provided to South African businesses by foreign providers is also subject to VAT.

## INTELLECTUAL PROPERTY PROTECTION

### Legislation

Copyright Amendments – Following the publication of a Copyright Amendment bill in July 2015, South Africa’s Department of Trade and Industry (DTI) invited stakeholders to submit comments with a very short deadline over the summer of 2017. While the draft bill contains some marginally helpful provisions including introduction of the right of communication to the public, it also includes a number of damaging proposals that are likely to curb incentives for movie production in South Africa and place the country out of compliance with international copyright norms. First, the bill includes new exceptions to copyright, including an additional fair use provision. Second, the bill contains a range of limitations on contractual freedom, including a limitation to assignments and a provision concerning ownership of works by the state. The bill also contains inadequate provisions on technological protection measures (TPMs) necessary for the licensing of legitimate

content, and overbroad exceptions to prohibitions on the circumvention of such measures. Further, the proposal provides inadequate criminal and civil remedies for infringement, including online piracy, that will deny rights holders the ability to effectively enforce their rights against infringers, thus thwarting the development of legitimate markets for copyrighted works. The Council of Provinces and the Parliament have subsequently approved the bill, which is currently pending before the President for his signature into law. Helpfully, the President recently appointed a legal advisor and economist to examine the constitutionality and economic impact of the bill.

The Cybercrimes and Cybersecurity Bill – The draft bill aims to put in place a coherent and integrated cybersecurity legislative framework. However, the bill overreaches and grants a concerning level of discretion to the government’s security cluster. For instance, the bill grants the South African Police Service and the State Security Agency far-reaching powers to investigate, search, and seize literally any electronic device, with verbally granted search warrants deemed sufficient to take action. Such a provision could invite abuse. The motion picture industry filed comments on this bill, recommending that South Africa introduce a site-blocking provision similar to provisions successfully implemented across the European Union.

The bill also defines an Electronic Communication and Service Provider (ECSP) very broadly. An ECSP includes a person who provides an electronic communications service with an electronic communications service license; a financial institution; or anyone (including an entity) who processes or stores data for someone else – an ECSP is, thus, essentially “everyone.” The bill mandates that ECSPs keep their customers updated about cybercrime trends but does not specify the frequency of these updates nor the mode of communication that should be employed. This section also requires that companies preserve any information that may be of assistance to law enforcement agencies, including origin, destination, route, time, date,





# South Africa

size, duration and type of service. MPA urges policymakers to revise the bill to offer more clarity, more specificity, and less onerous requirements for online stakeholders.

The Performers Protection Bill (PPAB) – The draft bill was first issued by DTI in July 2016. The perceived need for PPAB was framed as legal redress of the abuse of individual author and performers' rights and the suppression of their income. Similar to the Copyright bill, this bill is currently before the President for his signature into law. While MPA is committed to the principle that performers be fairly remunerated, we are concerned that the bill's proposal to make the compensation subject to collective management would add an additional layer of transaction costs that would affect both producer and performer.



# NATIONAL TRADE ESTIMATE



# ASIA-PACIFIC

# Asia Pacific Overview

The diversity of the Asia-Pacific region continues to offer significant global growth opportunity for MPA members. Yet, too often, the full potential of these markets is constrained by market access restrictions and/or inadequate protection of intellectual property.

Market access barriers take several forms in the region, including content quotas, foreign investment limitations, and advertising restrictions. Local content quotas applied to theatrical and/or pay-TV businesses in Australia, China, Indonesia, Malaysia, Philippines, South Korea, Taiwan and Vietnam, limit consumer choice and often contribute to piracy by restricting licensed supply of content. Further, foreign ownership and investment restrictions, including those in effect in China, India, Malaysia, New Zealand, Taiwan, Thailand and Vietnam, limit U.S. industry's contribution to the growth of local creative economies. In addition, advertising restrictions throughout the region make it more difficult for U.S. companies to monetize and distribute content.

While such restrictions have targeted traditional distribution channels for decades, governments are increasingly proposing or implementing content quotas and other regulations for the online/over-the-top (OTT) marketplace, which would limit consumer choices, stifle business development, and add a burdensome barrier to market entry in a fast-growing segment.

Tax issues also pose challenges in the region. For example, the entertainment tax in Malaysia and local body tax in India, collected by local governments on theatre admissions, have resulted in higher ticket prices, limiting the growth of the theatrical industry in those markets.

Censorship regimes of some Asia-Pacific economies, such as China, remain opaque, unpredictable and slow, often resulting in de facto discrimination against foreign content. MPA encourages countries utilizing censorship regimes to shift to industry self-regulation and

classification based on international best practices. Countries should provide clear content guidelines for industry to follow during self-classification, and these guidelines should be transparent, consistent, and expeditious and ensure equal treatment of all content regardless of origin.

In addition to market access issues, intellectual property theft is a constantly evolving threat to MPA's member companies in the Asia-Pacific region, particularly given the rapid proliferation of online streaming. Infringing services make it difficult for legitimate services to compete and stand as the greatest threat to the film and television industry throughout the Asia-Pacific region.

Piracy devices and apps, sold by resellers in physical marketplaces and online through e-commerce platforms, often mislead consumers into thinking their offerings are legitimate. Piracy devices and apps offer access to dozens of pay-TV channels, large volumes of on-demand movies and television series, and/or live streaming events. Because the media boxes themselves may not be illegal, rights holders and governments are often left without a clear remedy, and must often look to other criteria to determine the illegality of these platforms. China is a significant exporter of devices and media boxes to Asia-Pacific and global markets. Collaboration among rights holders, governments, and other stakeholders in the online ecosystem will be necessary to address this growing problem. To this end, MPA appreciates recent reforms in Taiwan that impose criminal penalties for the provision of software/apps that enable access to unauthorized audiovisual content, or importation of devices with such pre-loaded software/apps.

MPA urges governments in the region to enact effective laws and regulations to protect copyrighted content on the internet. This includes provisions designed to encourage meaningful removal of piracy listings and content by internet service providers (ISPs) and other intermediaries participating in, and profiting from, the use of their online services to locate pirate materials. Other participants in the



# Asia Pacific

internet ecosystem, such as payment processors and advertising networks, should do their part by restricting money flows and advertising revenues to piracy services, essentially eliminating their sources of income. Piracy services are almost always in business to make a profit. Thus, laws, regulations and enforcement tools must be directed at eliminating such opportunities.

Site blocking, often through no-fault injunctive relief, an established best practice in Europe and the Asia-Pacific region, allows countries to disable access to primarily infringing websites. Such enforcement tools are critical to fostering a healthy and sustainable online marketplace.

The 1996 World Intellectual Property Organization (WIPO) Internet Treaties contain the building blocks for protection of copyright in the digital age, including a robust “communication to the public” and “making available” right for online transmissions, as well as prohibitions against the act of trafficking in devices for the circumvention of tools used to protect works in the online market. Countries such as Vietnam, Brunei, and Thailand, should join the WIPO Internet Treaties and implement these important protections for copyrighted works. Helpfully, India joined the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in 2018.

The global norm for the term of copyright is now at least 70 years after the death of the last surviving author, and at least 70 years for subject matter in which term is determined from date of publication. More than 90 countries throughout the world have adopted terms of protection in this range. As countries throughout the Asia-Pacific region look to bolster their creative industries, attract foreign direct investment, and avoid discriminatory treatment of their own works, they should extend their terms of protection in line with international best practice. In particular, India, Indonesia, Malaysia, New Zealand, Philippines, Taiwan, Thailand and Vietnam should extend their terms of protection in accordance with global norms.

Recognizing the strong linkages between organized crime and copyright infringement throughout the Asia-Pacific region, MPA appreciates U.S. Government efforts to secure copyright infringement as a predicate offense under organized crime laws or money laundering laws. The now well-worn Budapest Cybercrime Convention should be ratified throughout the Asia-Pacific region, offering tools such as asset forfeiture as well as information sharing to assist civil case preparation. Helpfully, Australia, Japan, Philippines and Sri Lanka have ratified the convention.

Illicit camcording remains a serious problem in the Asia-Pacific region, worsening so far this year after having improved slightly last year. From January through September 2019, 119 illicit audio and video recordings of MPA member films were forensically sourced to Asia-Pacific movie theaters, up from 64 during the same period in 2018. In 2011, Asia-Pacific Economic Cooperation (APEC) Members agreed on Best Practices that encourage the enactment of effective policies and laws to address camcorder piracy, including legislation that criminalizes unauthorized camcording in theaters, and cooperation among cinema owners to detect and interdict those engaged in this highly damaging activity. Implementation of these APEC recommendations would help many of these markets curb illicit camcording.

Pay-TV piracy is a significant problem throughout Asia. In many markets, pay-TV channels are wholly or partially based on the unlicensed transmittal of copyrighted works, operating openly and notoriously. Regulators and enforcement officials regularly ignore, or in some cases implicitly condone, these practices. Enforcement authorities should take action against pay-TV operators engaged in piracy and regulators should revoke licenses from illegitimate services.

U.S. free trade agreements with Singapore, Australia, and South Korea have provided an important means to enhance intellectual property rights protection with key Asia-Pacific trading partners. These agreements have also eliminated burdensome market access barriers, benefitting both U.S. industry and the local creative economy. MPA supports the negotiation of trade agreements



# Asia Pacific

that improve the protection and enforcement of copyright, augment market access, and foster a healthy online marketplace. To this end, MPA appreciates recent engagement on the U.S.-Japan Trade Agreement, and we encourage parties to continue with a second stage of talks that will address remaining tariff and non-tariff barriers and provide strong copyright protection and enforcement.







## MARKET ACCESS ISSUES

Broadcast Quota – Under Section 9 of the Australian Broadcasting Authority’s Content Standards, and as reaffirmed in the March 2016 Broadcasting Services Standard, 55 percent of all free- to-air television programming broadcast between 6:00 a.m. and midnight must be of Australian origin. In addition, under Section 102 of the Broadcasting Services Amendment Act, pay television channels which include more than 50 percent drama programs in their schedules are required to spend 10 percent of their total drama programming expenditures on new Australian/New Zealand programs. Although the U.S.-Australia Free Trade Agreement (FTA) capped broadcast quotas for analog TV at the existing 55 percent level, and capped sub-quotas at existing levels, these limitations still pose a barrier to market entry. Moreover, Australia reserved the right to extend these quotas to digital broadcast TV, though the obligation can apply to no more than three multiplexed channels of any current broadcaster.

Potential Internet Obligations – With respect to internet-based services, Australia reserved the right under the FTA to impose new measures, if preceded by a finding that Australian content is not readily available to subscribers. There have been a number of reviews in the past three years regarding the availability of Australian content, and the current asymmetry between local content obligations for free-to-air broadcast versus the absence of these obligations on digital platforms. A 2017 review conducted by the House of Representatives Standing Committee on Communications and the Arts, recommended a mandatory minimum investment requirement in Australian content. A 2018 review by the Senate Standing Committee on Environment and Communications into Australian content could not agree on recommendations. Most

recently, in 2019, the Australian Competition and Consumer Commission (ACCC), through its Digital Platforms Inquiry Final Report, recommended “harmonisation” of content regulation across broadcast and video on demand, which introduces the possibility of expanded local content obligations on OTT services. To ensure continued production of Australian content, Australia should maintain competitive schemes for attracting international film and TV productions. Doing so would boost the quantity and quality of local Australian content, rendering unnecessary any consideration of quotas for digital delivery.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – According to Creative Content Australia, in 2014, 29 percent of Australians between the ages of 18 and 64 were actively engaged in pirating videos; by 2018, that share had fallen to 18 percent, attributed at least partially to the rise in popularity of legitimate VOD subscription services. Copyright Modernization Recommendations – In March 2018, Australia commenced the Copyright Modernization consultation, which is considering further exceptions to copyright, either in the form of newly defined fair dealings or fair use, as well as restrictions on contracting out of exceptions, and orphan works. This consultation risks undermining the current balance of IP protection in Australia that has fueled the country’s creative industries, and could create significant market uncertainty and effectively weaken Australia’s infrastructure for intellectual property protection. Australia has yet to issue any policy conclusions on the consultation.

ACCC Digital Platforms Inquiry – In August 2019, the Australian government launched a public consultation on the Australian Competition and Consumer Commission (ACCC)’s Digital Platforms Inquiry Final Report, which addressed competition,



# Australia

consumer protection, media regulation and privacy law related to search engines, social media platforms and digital content aggregation platforms. Government is expected to respond formally to the consultation by the end of 2019.

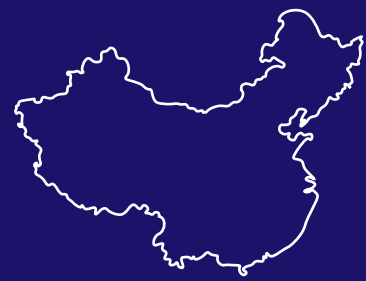
The copyright industries support the recommendation for the development of a mandatory take-down code to deal with copyright enforcement on digital platforms in a timely and efficient manner. This would include procedures for urgent take downs (extending to pre-release or new-release films and TV shows as well as live entertainment content), as well as “stay down” obligations to ensure that content already identified as infringing does not quickly re-appear. Further, breaches of the mandatory standard should carry meaningful civil penalties.

Enforcement – Australia has developed excellent tools to fight online piracy, including effective laws allowing for no-fault injunctive relief against ISPs and “search engine service providers.” While Australia’s laws provide both civil and criminal penalties for copyright infringement, the complex nature of online piracy means that identification of the operators and their infrastructure is challenging and police may be reluctant to investigate. Difficulties remain in obtaining police assistance for intellectual property enforcement. These challenges are magnified by undue delays by some State Police when referring matters to the Australian Federal Police and Commonwealth Director of Public Prosecutions.

## **Legislation**

Anti-Camcording Legislation – While local incidents of illicit camcording have trended downward in recent years, Australia should adopt anti-camcording legislation. While illegal copying is a violation of the Copyright Act, current penalties are insufficient to deter the crime.





## MARKET ACCESS ISSUES

Import Quotas/Revenue Share – Notwithstanding China’s commitment under the U.S.-China Film MOU to permit an additional 14 “enhanced format” foreign revenue-sharing films into its market annually, China still maintains an official quota of 20 foreign revenue sharing films per year. Furthermore, China committed that in 2017 they would make a meaningful increase to compensation, as the current 25 percent U.S. share of revenue is far below comparable markets.

Government Film Importation and Distribution Monopoly – The newly-formed China Film Administration (CFA), which replaced the State Administration of Press, Publication, Radio, Film and TV (SAPPRFT), still permits only one film importer and two distributors of foreign films, which are both state owned companies: China Film Group and HuaXia Film Distribution Company Ltd. While China affirmed in the Film MOU that any properly licensed Chinese enterprise may distribute imported films, CFA has yet to approve any new private distributors. China Film Group also dictates the release dates and length of theatrical runs of foreign films, often restricting the ability of the U.S. producer to obtain the full value of the film.

Blackout Periods During Peak Seasons – The Chinese Government has historically implemented blackout during peak periods, during which no new foreign imported films may be released, to prevent competition against Chinese films released during the same period. Such blackouts typically occur during Lunar New Year, school and summer holidays or coincide with political events. Restricting the release of new foreign imported titles during peak season and day-and-date releases not only drives down theatrical revenues, but also

contributes to increased unauthorized consumption, as piracy websites and services meet consumer demand for foreign blockbuster titles.

Screen Quota – 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 on March 1, 2017.

Film Development Fund – In March 2016, the former SAPPRFT issued a notice allowing the refund of a certain percentage from the Film Development Fund collection to cinemas that report favorable annual box office receipts from the screening of Chinese films. Under the notice, if 66 percent of a cinema’s total annual gross box office comes from Chinese films, that cinema will receive a 50 percent refund of the money generated from Chinese films within the five percent of box office that the cinema contributed to the Film Fund. This incentivizes cinemas to screen more Chinese domestic films, further disadvantaging foreign films’ ability to compete in the Chinese market.

Online Video Restrictions – In recent years, the Chinese Government has issued a number of regulations that further restrict the online media space. In September 2014, the former SAPPRFT issued regulations requiring that websites obtain permits, limit online distribution of foreign content to 30 percent, and modified the content review process. The content review process allows only two windows for approval of content and prohibits provincial authorities from being used for content review. Further, it requires the submission of full seasons of foreign TV series, compared to the previous practice of submitting TV shows on a per-episode basis, which was consistent with international market practice. These rules have substantially cut down on the number of U.S.





# China

TV programs licensed in China and resulted in delays in the availability of TV series, effectively curtailing day-and-date releases. The range of policies has undoubtedly led to increased online piracy. Furthermore, in 2016, the government instructed video websites to allow state-owned media enterprises to own “Special Management Stakes,” including voting powers in decision making; thus far, platforms have not complied.

In addition, in October 2018, the new National Radio and Television Administration (NRTA) solicited public opinion on two administrative rules. The Administrative Rules on the “Introduction and Dissemination of Foreign Audio-Visual Programs” propose not only a generic 30 percent cap on foreign content, but also stipulate that the quota be further applied on a category-by-category basis to genres of film, TV, animation and documentaries and “other” programs, such as education, science and technology, culture, variety and sports. Further, the Administration Rules on the “Overseas Personnel participation in the Production of Radio and Television Programs” propose to restrict the participation of foreigners in the local production of radio and TV programs. In sum, China’s online video policies create uncertainties and barriers, and have disrupted the growth of China’s online video market.

Censorship – The China Film Administration (CFA) and the State Administration of Radio and Television (SART), their local branches at the provincial level, and Chinese Central Television, perform various censorship functions related to film, video, television and online content. Piracy websites and services freely and easily move unauthorized content into the market with no censorship concerns or delays. China should adopt a voluntary, age-based classification system that would help eliminate this disparity, or ensure that its content review process is transparent, predictable, and expeditious.

Foreign Investment Restrictions – China limits foreign investment in cinemas, film production companies and in-home video distribution companies. China prohibits foreign investment in television, including in television production companies. Foreign investments are also prohibited in pay-TV and online video platforms. In June 2019, China had the opportunity to lift investment restrictions when revising its Negative Investment List. Except for the restrictions pertaining to construction and operation of cinemas, the restrictions remain unchanged. Such discriminatory foreign investment restrictions limit U.S. content creators’ and distributors’ ability to compete in large swaths of China’s audiovisual market, and inhibit growth in these sectors.

Television Quotas – If the proposed September 2018 administrative provision on the importation and dissemination of foreign audiovisual programs is passed, it will replace the 2004 regulations and raise the limits on foreign TV and film programming from 25 percent to 30 percent of total airtime, and maintain the ban on foreign programming during prime time between 7:00 pm and 10:00 pm. Currently, foreign TV series and movies are limited to 50 episodes. China restricts foreign animation to no more than 40 percent of total airtime, and importers of foreign animation must produce a like amount of domestic animation. Furthermore, foreign content on pay-TV cannot exceed 30 percent of daily programming on a domestic pay-TV channel. China further prohibits the retransmission of the entirety of a foreign channel on pay-TV other than in hotels with a three-star or higher rating.

Retransmission of Foreign Satellite Signals – The U.S. motion picture and television industry is almost totally excluded from China’s pay-TV market. Local cable networks are prohibited from carrying foreign satellite channels without government approval or landing permits, which are limited to Guangdong province and a handful of foreign



channels. Furthermore, foreign satellite channels beaming into China are required to downlink from a government-owned encrypted satellite platform, and these channels, as noted above, may only be shown in three-star hotels and above, and in foreign expatriate compounds. The annual fee for each channel remains excessively high at \$100,000.

#### Regulations on Home Video Licensing Agreements

– The government requires that copyright owners enter into home-video license agreements of not less than three years’ duration with their licensees in China – an unnecessary intrusion into copyright owners’ contractual rights.

Local Printing/Duplication Requirement – China continues to require that digital film prints be replicated in local laboratories. This scenario impedes U.S. rights holders’ ability to control the print quality or to trace the source of camcording piracy.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Illegal downloading and streaming of MPA member company films remains a serious concern in China. The National Copyright Administration of China (NCAC) has initiated Special Enforcement Campaigns every year since 2005. These campaigns have resulted in some positive results in the video-hosting landscape and helped pave the way for a growing legitimate digital economy in China. However, the NCAC’s administrative sanctions have done little to deter the growth of piracy websites, apps and related services. Given this reality, China must continue shifting its focus toward infringing websites, P2P networks, and piracy devices and apps, including the facilitation of infringing content being distributed on social media platforms, all of which combine to pose the greatest threat to the continued growth of legitimate business.

In July 2018, the National Copyright Administration of China (NCAC), the Cyberspace Administration of China (CAC), the Ministry of Public Security (MPS) and the Ministry of Industry and Information Technology (MIIT) launched the Annual Campaign against Internet Piracy. The four-month campaign focused on unauthorized online republication of news and articles and pirated short videos and animations. The 2019 campaign, reinforcing these themes, is currently underway.

Enforcement – In November 2018, NCAC officials stated that China would place greater focus on online infringement and piracy. Local copyright law enforcement agencies planned to strengthen administrative punishment for copyright infringement. However, penalties for infringement remain low and difficult to obtain unless the operator and host or source of the piracy can be definitively established in China.

To address its internet piracy problem, China must provide adequate protection in the digital environment by 1) not 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, (i.e., not applying the “server principle”), but instead setting up new rules that can address the massive piracy caused by video aggregation websites and apps, 2) enumerating the exclusive rights under copyright, 3) criminalizing violations of the anti-circumvention provisions for technological protection measures (TPMs) and rights-management information, 4) criminalizing internet offenses that may lack a demonstrable profit motive but that impact rights holders on a commercial scale, and revising the 500 copies/50,000 click criminal threshold (including clarifying that a single episode of a television program counts as one copy toward the threshold), 5) eliminating distinctions between crimes of entities and individuals, 6) providing deterrent-level civil and criminal penalties for infringement,



# China

and 7) establishing an adequate liability regime for e-commerce platform operators, and satisfactory measures for notice and takedown of websites central to the piracy ecosystem.

Camcord Piracy – China remains a significant source of illicit camcording in the region. Between January and September 2019, a total of 24 illicit audio and video camcorders were forensically matched to cinemas in China, up from 17 during the same period in 2018. The quality of camcorded films from China has improved and is threatening the legitimate theatrical and home entertainment markets. China must impose sufficient criminal penalties for camcording in order to deter this crime.

Piracy Devices and Apps – China is a leading manufacturer of blank media boxes which can be modified to support the installation of third-party, pre-loaded or post-purchase infringing applications, allowing consumers access to pirated content. Because of the adherence by some key judges to the above-described “server principle,” rights holders have been left without a remedy, or at best, with an uncertain remedy. Given that the Google Play Store is not officially available in China, a host of third-party Android app stores have proliferated with a multitude of pirate apps, which are generally not subject to enforcement action.

Mini-VOD Cinemas and Chains – Despite China’s regulations on mini-VOD cinemas and chains coming into effect in March 2018, an estimated 14,000 mini-VOD cinemas and chains are operating in different cities across the country without proper licenses and are routinely screening U.S. content without authorization. In early 2019, a Chinese government crackdown uncovered four illegal camcording syndicates, and subsequent criminal investigations revealed that most illegal camcorded copies were destined for mini-VOD theaters. In August 2019, the China Film Administration

clarified that mini-VOD cinemas and chains are classified as entertainment premises and licensing is based on screening rights (not online VOD rights). Rather than trying to legitimize the operations of these facilities, China should severely penalize or shut down these businesses if they are found to have violated the copyright law.

Furthermore, when Chinese entities contract for the rights to distribute film and television titles in various home video formats, the differentiation between rights for home use or public use are often ignored. As a result, U.S. content is frequently used for unauthorized public performance. For example, some Chinese pay-TV operators or digital licensees distribute U.S. content to hotels for public viewing, without permission.

## Legislation

Copyright Amendment – China’s Copyright Amendment Bill remains pending since the State Council’s Legislative Affairs Office (SCLAO) solicited public comments in June 2014. China should prioritize the legislative process to amend its Copyright Law. For example, China should increase infringers’ compensation to copyright owners, ease copyright owners’ burden of proof, lower the high threshold of commercial piracy necessary to trigger a criminal prosecution, and establish stronger, more deterrent penalties. The government should also make the act of illegal camcording in cinemas subject to civil, administrative, and criminal remedies.

E-Commerce Law – On August 31, 2018, the Standing Committee of the National People’s Congress passed the final version of the China E-Commerce Law that took effect on January 1, 2019, providing a broad legal framework to regulate China’s fast-growing e-commerce sector. The new Law appears to apply to online transactions of physical infringing goods. The required standard of



# China

knowledge for a platform operator to take action is that the platform “knows or should know” that the good is infringing. High-quality Chinese counterfeit goods remain a problem for U.S. creative industries internationally, and effective enforcement action is required to prevent the supply of such goods to online marketplaces. Likewise, piracy devices and circumvention devices, both used primarily to access pirated content, remain a significant problem in China which is a hub for the manufacture of these devices. The devices may be promoted and/or advertised to enable infringement of copyright or other illegal activities. The devices are loaded with apps that facilitate infringement, and these apps may be pre-installed, either prior to shipment, prior to sale by the vendor, or as an after-sale service. It is critical that the new E-Commerce Law support rights holder action to prevent the illegal trafficking of these devices on e-commerce platforms.





## MARKET ACCESS ISSUES

Broadcast Regulations – 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.

“Must Provide” Requirements – The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation prohibits broadcasters from granting exclusive contracts with any distributors. The regulation also imposes “must provide” channel programming requirements to all requesting distributors on a non-discriminatory basis. Combined, the exclusive contract prohibition and the “must provide” requirements eliminate all potential for competition among distributors, effectively chilling any incentive to develop exclusive programming.

Direct to Home (DTH) Guidelines – These guidelines prohibit DTH operators from entering into exclusive contracts with any broadcaster. The rules also prohibit DTH operators from carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium,

and/or against whom any litigation is pending in such regard. These regulations limit choice and undermine competition laws.

Foreign Ownership Restrictions – Although India in recent years has raised the foreign direct investment cap for Indian news channels (television services) from 26 percent to 49 percent, foreign investments above 49 percent for news channels require government approval. Further, FDI in digital news sites (internet services) is restricted to the earlier limit of 26 percent.

Taxes – India rolled out a national Goods and Services Tax (GST) in 2017. Currently, cinema tickets are subject to 12 percent and 18 percent GST rates depending on ticket price. However, Local Body Taxes 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. India should subsume all taxes into the national GST system.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – 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.

Enforcement – In a move helpful to rights holders, a seminal April 2019 Delhi High Court decision firmly established permanent site blocking as a viable remedy to curtail online infringement in



India. The orders were made dynamic, meaning additional domains accessing the site already blocked can be easily added to the orders. A further decision in July 2019 creates a “doubly dynamic” system since domains can be added mid-stream while a case is still being adjudicated. Further, the establishment of the IPR Crime Units in Maharashtra (MCDCU) and Telangana (TIPCU), in addition to the copyright issues move under the purview of the Department for Promotion of Industry and Internal Trade (DPIIT), represent two positive changes, which may provide more resources and opportunities for more effective IP protection and enforcement. Nevertheless, enforcement of intellectual property rights remains a significant coordination challenge across 29 Indian states with the absence of a nationally led enforcement agency. India should maintain the recent positive momentum by committing greater resources in support of effective and centrally coordinated IP enforcement.

The voluntary arrangement begun in 2017 with the National Internet Exchange of India (NIXI), the agency in charge of “.in” domain registrations, to suspend the use of domains if based on false or fraudulent Whois information, has proven helpful and should continue. Further, officials should ensure that India’s pending personal data protection bill does not restrict the availability of the Whois information.

Camcording Piracy – Camcording is an ongoing challenge for rights holders in India. From January to September 2019, 42 illicit audio and video recordings were traced to Indian theaters, up from 17 during the same period in 2017. In particular, this growth is driven by a major shift to audio cams. Arrests resulting from enforcement operations in 2013, 2015, 2016 and 2017, show some willingness on the part of state authorities to tackle this pervasive problem. However, camcorded copies of new releases sourced from Indian theaters

continue to leak online during the films’ opening weekend, most notably from the notorious syndicate Tamilrockers, resulting in heavy losses for content owners.

## Legislation

Anti-Camcording Legislation – 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. India should swiftly enact legislative amendments to outlaw unauthorized recording of all or part of an audiovisual work in a cinema.

Copyright Legislation – India acceded to the WCT and WPPT on September 25, 2018. The Department of Industrial Policy and Promotion (DPIIT) subsequently put forward draft amendments to the Copyright Rules 2013 proposing to extend compulsory licensing of literary and musical works and sound recordings to websites, portals and music streaming firms. U.S. motion picture studios are also affected by these 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.

Structurally Infringing Websites – India is considering further amendments to the Copyright Act, 1957 in order to obtain administrative suo moto action by the Ministry of Communication and Information Technology’s Computer Emergency Response Team (CERT). MPA supports this initiative, which would allow CERT to act without prompting by judicial orders to disable access to structurally infringing websites.







## MARKET ACCESS ISSUES

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 2015 statements regarding implementation raised concerns. Such a burdensome rule, if implemented, would likely result in consumers absorbing the additional associated costs. The timeline for revising the Broadcasting Law remains unclear.

Film Law—In 2019, the Indonesian government expressed its intention to amend the Film Law. Helpfully, the most recent version of draft regulations does not include the provision on the 60 percent screen quota for Indonesian films. However, the draft maintains the prohibition on dubbing of imported films. Content owners should be given the flexibility to dub films into a local language based on market demand. Furthermore, the Film Law contains ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct, such as restrictions on vertical integration. Indonesian authorities should remove these provisions, as 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, and according to market demand. Doing so will avoid creating new barriers that could undermine Indonesia’s plan to attract foreign direct investment in the film sector, following on its commendable removal of limitations on foreign direct investment in 2016.

Customs Duties and Valuation—Indonesia imposes a tariff on physical 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). Further, Indonesia has recently indicated that it may not agree to a two-year extension 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 SVOD and digital transmission of films. Such duties would likely raise prices for consumers, place Indonesia out of step with regional and international best practices, hamper economic growth, and hinder bilateral trade in digital products.

Censorship Restrictions—In October 2015, the Indonesian Broadcasting Commission (KPI) notified platform operators regarding pre-censorship and classification requirements for programs on all TV channels. KPI suggested that non-compliance may violate the Broadcasting Ethics and Broadcast Program Standard, thus subjecting operators to fines and imprisonment. If implemented, these requirements would negatively impact the pay-TV industry by raising costs, creating new barriers to entry, and reducing consumer choice. In August 2019, the KPI further suggested that it would subject SVOD (OTT) providers to its strict censorship 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 drafting 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. Such



# Indonesia

requirements, if implemented, would stifle business development and add a burdensome barrier to market entry.







## MARKET ACCESS ISSUES

Competition Policy – The dominant ratings service company in Japan has driven competitors out of the market and distorts the broadcast television market in favor of the largest market players. The dominant service refuses to allow all channels within a given industry subsector to use comparable ratings and fails to provide ratings data that is comparable across industry subsectors. In response to a 2013 ratings manipulation scandal, Japan’s Broadcasting Ethics and Program Improvement Organization expressed the need to establish a neutral ratings agency and introduce competition into the market. Unfortunately, the market remains unchanged.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The spread of internet-based film and television piracy, as well as rampant piracy of Japanese anime and manga content, continues to impede industry’s competitiveness in Japan. Primarily infringing websites have proliferated over the years, with no effective remedy, and with little cooperation from Japan’s ISPs or other intermediaries. Despite acknowledging the damage caused to anime producers and manga artists, the government has not enacted improvements to the law including establishing liability against link sites and continues to postpone discussion on injunctive relief to disable access to flagrantly infringing sites. The newly-elected Diet should consider legislative changes in the coming months. Meanwhile, other remedies, such as the voluntary establishment of an “infringing website list” (IWL) to choke ad revenues, has proven useful to rights holders. However, the IWL is no substitute for more stringent measures to deal with largely foreign-based piracy sites harming the audiovisual industry in Japan.

## Legislation

Copyright Legislation – The amendments to the Copyright Law which included the extension of copyright term to all authors to life plus 70 years (cinematographic works already enjoyed 70 years prior to this amendment) were passed by the Diet and took effect on January 1, 2019.

ISP Liability – Japan should amend its laws to require ISPs to act more expeditiously in response to rights holders’ requests to remove infringing content. Such amendments would be an effective response to the unfair advantage sellers of illegal content have over legitimate enterprises in the Japanese marketplace. Helpfully, the Prime Minister has called for a stronger enforcement response to protect Japan’s cultural industries and has requested a special council to explore possible measures.



# Malaysia



## MARKET ACCESS ISSUES

Broadcast Quota – Malaysia requires that broadcast stations, through broadcast licensing agreements, devote 80 percent of terrestrial airtime to local Malaysian programming. Broadcast stations are also banned from broadcasting foreign programming during prime time. Such quotas fail to incentivize investment in quality content and unfairly restrict U.S. exports of television programming.

Cinema Entertainment Tax – The entertainment tax for theater admissions imposed at the state government level, at 25 percent of the gross ticket price, is among the highest in the region, and limits the growth of the theatrical industry by artificially increasing box office prices.

Foreign Ownership Restrictions – Malaysia imposes a 30 percent limit on foreign investment in cable and satellite operations through licensing agreements. Foreign investments are also prohibited in terrestrial broadcast networks.

FINAS Fees – In September 2013, Malaysia's National Film Development Corporation (FINAS) issued a circular requiring payment of fees for Digital Cinema Packs transmitted electronically and replicated locally, even though those activities do not constitute acts of importation, and have no legal basis under the controlling legislation, the FINAS Act. Although nothing official has been issued, FINAS is considering imposing a levy on box office remittances. Malaysia should avoid imposing a discriminatory levy targeting foreign films, which would negatively impact U.S. film exports.

Screen Quota – In 2013, FINAS increased Malaysia's screen quota, doubling the original quota issued by the 2005 Compulsory Screening

Scheme. The current quota requires each cinema to screen at least two local films for two weeks each per year. Although exhibitors have some flexibility to reduce the screening time for local films when those films underperform at the box office, the requirement is unnecessary and remains an obstacle to commercial business.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – With the continued penetration of broadband throughout the country, internet piracy has emerged as the greatest threat to the film and television industry in Malaysia. Dozens of global infringing websites and many that specifically target the Malaysian market populate the top 1,000 sites in Malaysia, causing significant harm to both U.S. and local rights holders.

Enforcement – The Malaysian Copyright Law and regulations have long allowed for administrative orders to ISPs to disable users' access to infringing websites in Malaysia. Starting in 2016, and to date, administrative orders have successfully blocked access to hundreds of pirate websites. Monitoring and enforcement must continue to ensure the efficacy of this program. Further, despite an increase in the sale and usage of piracy devices and apps, there remains no direct enforcement or remedy for rightsholders under the Copyright Act. In response to this concern, the Malaysian Communications and Multimedia Commission (MCMC) is considering implementing a ban against the sale of such illicit devices. Finally, although Malaysia passed anti-camcording legislation in 2011, the government has yet to take legal action against known infringers.

Camcording – There has been a recent spike in both audio and video recordings of MPA member films traced to Malaysian theaters, with seven total recordings detected between January and



# Malaysia

September 2019, compared to zero during the same period in 2018.

## **Legislation**

Copyright Act Amendments – In February 2019, the Intellectual Property Corporation of Malaysia (MyIPO) held a stakeholders' consultation meeting on proposed changes to the Copyright Act to address the rapid changes in digital technology and online piracy of film and television content. MPA encourages Malaysia to strengthen copyright protection and enhance enforcement against online piracy of film and television content.





## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy in New Zealand remains rampant. The government should take steps to strengthen copyright protection in the digital environment, including technological protection measures (TPMs), which are vital to the creation and sustainability of legitimate online distribution models.

Piracy Devices and Apps – Piracy Devices such as media boxes and set-top boxes with pre-installed applications allowing consumers to stream unauthorized live TV channels or VOD content into homes via an internet connection, have boomed in popularity in recent years. Approximately five to ten well-established distributors of these products cater to the New Zealand market. MPA urges the Government to enact legislation to deal with this increasingly threatening form of piracy.

### Legislation

Copyright Act Amendments – New Zealand’s TPPA Implementation Act on copyright amendments, part of a broader effort to implement the Trans Pacific Partnership Agreement (TPP), was inadequate in critical areas. On November 28, 2018, the government released an issues paper on the current Copyright Act. MPA’s member companies and other rights holders remain concerned that New Zealand may continue this trend toward the weakening of IP by introducing unnecessary exceptions and limitations to copyright. New Zealand should implement the WIPO Internet Treaties, which would bring its provisions for TPMs and copyright term in line with global best practices.

Digital Convergence Review – In 2015, New Zealand initiated a broad-sweeping Digital Convergence Review, examining various components of the

country’s regulatory regime, including content classification. Helpfully, the government clarified in September 2019 that the classification of commercial VOD content would be self-regulated under the Broadcasting Act. The current regime for DVD classification, however, is outdated, inefficient and costly for rights holders. MPA encourages New Zealand to conclude the Convergence Review as quickly as possible, or at least, as an interim measure, to adopt a more efficient classification policy that allows the DVD industry to continue, while also supporting the development of legitimate businesses in the digital environment.





## MARKET ACCESS ISSUES

Foreign Ownership Restrictions – Foreign investment in mass media, including film distribution and the pay-TV and terrestrial broadcast sector, is prohibited under the Marcos-era Philippines Constitution of 1987. However, 40 percent foreign direct investment is allowed in the telecom sector. Disparate treatment of these related network-based industries discourages business development in a capital-intensive sector. In addition to impeding investment and limiting consumer choice, these restrictions are now outdated in a digital and internet era that has upended traditional definitions and structures of the “mass media” industries.

Taxation – Film companies doing business in the Philippines are subject to inordinately high taxes – among the highest in the Asia-Pacific region. U.S. companies are burdened with a 30 percent income tax on net profits, a 5 percent withholding tax on gross receipts chargeable to income tax liability, and a 10 percent tax on the distributor’s share of the box office. A municipal license tax of 0.75 percent of a company’s prior year gross receipts is also imposed on motion picture companies. Moreover, the Philippines imposes a tax on all related advertising materials and royalty remittances. The combined effect is an oppressive tax regime that harms the continued development of a legitimate audiovisual marketplace in the country.

Screen Restrictions – In September 2019, the Film Development Council of the Philippines (FDCP) hosted the third annual Independent Film Festival, Pista ng Pelikulang Pilipino (PPP). The PPP is a seven-day, exclusive screening of local independent films in all cinemas nationwide. During the festival, FDCP allows only local independent films to be screened. Similarly, during

the annual 10-day Metro Manila Film Festival held every December, authorities limit all screen time exclusively to locally-produced films. Local authorities have recently proposed a similar edition of the Metro Manila Film Festival be held in April 2020 (together with the existing festival held every December). Such periodic restrictions limit screen time for U.S. films during peak movie-going times of the year and depress new investment in the sector by limiting cinema owners’ ability to program their theater according to market demand.

In July 2019, a member of the Philippines’ Congress introduced a bill that would mandate a minimum 40 percent screen quota for locally-produced films (and conversely limit the screen share for U.S. and other foreign films to no more than 60 percent). Passage of this bill would represent a further direct restriction on domestic cinemas’ ability to screen U.S. films according to market demand.

Furthermore, the Film Development Center of the Philippines (FDCP) passed a Memorandum of Circular (MC) in July 2019 mandating a Friday opening for all films and a 150-day online distribution window from theatrical release. Although the MC faces a court challenge, it remains a threat to commercial arrangements.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – With the continued penetration of broadband both in homes and internet cafes throughout the Philippines, online piracy is a growing threat to the legitimate sale and distribution of audiovisual works. Moreover, the Philippines is home to the region’s most active piracy websites. The U.S. Government should continue to engage the Philippines on the need for a more robust intellectual property enforcement regime, including more timely investigations and prosecutions of



# Philippines

online copyright theft.

Camcord Piracy – From 2014 to 2018, a total of 33 illicit audio and video recordings of MPA member company films were forensically matched to cinemas in the Philippines. Although no MPA members' titles were traced to the Philippines from January to September 2019, the threat of camcord piracy remains. We urge the U.S. Government to press its counterparts in the Philippines to maintain vigilance and bring effective action against this damaging form of source piracy, which harms the lifecycle of filmed entertainment in the Philippines and beyond.



# South Korea



## MARKET ACCESS ISSUES

Now fully implemented, the KORUS FTA has produced notable liberalization in certain areas, allowing the U.S. motion picture and television industry to better compete in the Korean entertainment market.

Screen Quotas – In 2006, prior to the KORUS negotiations, the Korean government agreed to reduce by half its screen quota requiring exhibition of Korean films, to 73 days per year. Over a decade later, amidst rapid development of its cultural industries and the success of many Korean films internationally, now is the time for Korea to show leadership in the region, trust the choices of its consumers, and further reduce or eliminate its screen quota.

In 2016, lawmakers proposed amendments to the Motion Pictures and Video Products Act that would restrict vertical integration of film distribution and exhibition, and would “fairly” allocate screens to all movies. The focus of the amendments appears to have shifted to market dominance by conglomerates, with proposals to restrict conglomerate-owned or -operated multiplexes from allocating more than 40 percent of screens to the same film at any given time. The draft amendments fail to clarify how the proposal would promote the diversification of the Korean film industry.

In April 2019, a bill was introduced by lawmakers proposing to limit the ratio that the same film may be shown in theaters (with a minimum of six screens, during prime-time period from 1pm to 11pm) to 50 percent of all showings. Korea should avoid implementing such restrictions, which impede the free market and have the unintended effect of encouraging piracy.

Advertising Restrictions – In July 2015, Korea introduced an advertising cap that limits the maximum total duration of advertisements aired, regardless of the type of advertisement, to an average 17 percent of program duration and no more than 20 percent of any specific program’s duration. In-program advertising, in particular, is limited to one minute of advertisement per airing of the program, with the balance of advertising appearing prior to and following the program. Additionally, Korea maintains a protectionist policy that prohibits foreign retransmitted channels from including ads for the Korean market.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – As a major marketplace for locally-produced drama programming, Korea has a major stake in ensuring adequate and effective protection of copyright online. Since 2011, the Korean government has put into place administrative mechanisms to disable access to infringing websites, and to-date has successfully disabled access to more than 520 primarily infringing sites.

Since the late 2017 launch of the Korea Copyright Protection Agency (KCOPA)’s copyright protection initiative to take down unauthorized content on local cyber lockers known as “webhards” (or web hard drives), more than 30,000 postings on webhards have been successfully blocked/taken down.

VOD Piracy – Korean viewers can now enjoy the latest movies on VOD approximately one month after a film’s theatrical release. This has unfortunately led to serious digital leakage, as early release content represents the most attractive targets for piracy, due to the quality and exclusivity of the product. Leaked content from Korea is spreading to torrents and cyber lockers, implicating the global market. This piracy takes a significant toll on both content creators and legitimate content platforms.







## MARKET ACCESS ISSUES

Foreign Investment Restrictions – The Cable Radio and Television Law limits foreign direct investment in a domestic cable television service to 20 percent of the operator’s total issued shares. Foreign investment in satellite television broadcasting services is also restricted to no more than 50 percent. Such investment restrictions limit U.S. companies’ ability to compete fairly and inhibit the pay-TV industry’s potential growth.

Pay-TV Price Cap – In 1990, Taiwan set a rate cap for basic cable TV service of NT \$600 (US\$20) per month per household. Although the consumer price index has risen substantially since 1990, the price cap has never been adjusted and proposed reforms have been postponed until at least 2021. This cap has hindered the development of the cable TV industry.

Local Content Quotas – In January 2017, Taiwan implemented new quotas for broadcast and satellite TV. These rules require that, 1) terrestrial TV stations broadcast at least 50 percent locally-produced drama programs between 8:00 pm and 10:00 pm, and 2) local satellite TV channels broadcast at least 25 percent locally-produced children’s programs between 5:00 pm to 7:00 pm and at least 25 percent locally-produced drama, documentary and variety programs between 8:00 pm and 10:00 pm. Furthermore, a cable TV service must provide at least 20 percent local programming in its channel lineup. These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan and restrict U.S. exports.

Content Ratings – In December 2016, the National Communications Commission (NCC) issued the Television Program Classification Regulations

requiring all terrestrial, cable, and satellite channels to display Taiwanese ratings and warning messages, regardless of the content being broadcast. Taiwan has indicated it will consider requests for waivers, but such requests will be discretionary and not always granted. This onerous requirement is likely to pose a significant market barrier for non-Taiwanese content.

OTT Regulations – The Ministry of Culture and the NCC are considering various OTT regulations that could require foreign OTT service providers to set up local permanent establishments and potentially mandate local content quotas. Although these agencies state that they are primarily concerned about regulating OTT services and streaming content originating from Mainland China, such requirements, if applied to all OTT services, would stifle business development and add a burdensome barrier to market entry.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy is a serious problem in Taiwan, where laws are inadequate to address a growing problem. The government has taken some positive steps recently, including confirming the illegality of piracy devices under revised Article 87 of its Copyright Law. The Taiwanese government should take further effective steps, including criminal remedies, to combat this rampant online infringement.

Piracy Devices and Apps – As noted above, Taiwan passed amendments to Article 87 and 93 of the Copyright Act in April 2019. These amendments impose criminal penalties on 1) the provision of software / apps which enable members of the public to access unauthorized copies of films and television programs on the Internet; 2) assisting members of the public to access such unauthorized copies of films





# Taiwan

and television programs; and 3) manufacturing or importing devices with such pre-loaded software/apps. The penalties that may be imposed by a court are a sentence of up to 2 years imprisonment and/or a maximum fine of NT\$500,000. Taiwan should strictly enforce these amendments to combat online infringement.

## Legislation

Copyright Amendments – Despite the recent legislative achievements related to piracy devices and apps, other longstanding draft copyright amendments continue to languish before the Legislative Yuan. Taiwan should prioritize copyright reform and move the legislation forward. Proposed copyright amendments would make certain positive changes to Taiwan’s law, including expressly protecting temporary reproductions. Taiwan needs to address online piracy and provide a remedy that permits no-fault actions against pirate sites. Taiwan should also extend term of protection to the international standard of life of the author plus 70 years (or 70 years from publication).





## MARKET ACCESS ISSUES

Foreign Ownership Restrictions – Foreign ownership of terrestrial broadcast networks is prohibited in Thailand. In January 2015, the National Broadcasting and Telecommunications Commission (NBTC) issued new rules governing media mergers, acquisitions and cross-media ownership. The new rules require prior NBTC approval when a television license holder seeks to invest more than 25 percent directly or more than 50 percent indirectly in another licensed company. This rule severely limits investment and creates new barriers to entry for U.S. companies.

Screen Quota – Section 9(5) of the Motion Picture and Video Act (MPVA) allows the Film Board to establish ratios and quotas against foreign films. If implemented, such restrictions would create new barriers and reduce consumer choice. Since 2017, the Ministry of Culture has been in the process of amending the MPVA. MPA has urged 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.

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.

OTT Regulations – 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 percent is being proposed on non-resident business operators who employ electronic payment for e-commerce services, including digital online services. Under the existing VAT guidelines implemented in 1992, any person or entity supplying goods or providing services in Thailand with an annual turnover exceeding 1.8 million baht (\$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.

## INTELLECTUAL PROPERTY PROTECTION

Online Piracy – Online piracy is rampant in Thailand. Fledgling legitimate online services are harmed by the increasing threat from copyright infringing websites, and some longtime licensed operators have stopped doing business as a direct result of intractable piracy. While U.S. producers and distributors suffer from this piracy, Thai film producers are also profoundly harmed by internet pirate platforms, who specifically target Thai users with Thai language sites.

Enforcement – In late 2017, via amendment to the Computer Crime Act, the Thai government enacted a mechanism to disable access to infringing sites. Although a promising reform, the mechanism has proven largely inefficient and ineffective, as a result of multi-ministerial handling and a lack of transparency and specificity in the courts’ blocking orders, leaving rights holders with no clear recourse



# Thailand

for enforcement against egregious piracy sites. On a positive note, in December 2018, Thailand established a new anti-piracy agency, the Center of Operational Policing for Thailand against Intellectual Property Violations and Crimes on the Internet Suppression (COPTICS).

Camcord Piracy – Thailand remains a significant source of illicit audio and video camcording in the region, with a total of 17 MPA member titles forensically matched to cinemas in Thailand from January through September 2019, up from 11 during the same period in 2018.

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, while bars in tourist areas openly exhibit films without authorization.

## Legislation

Copyright Legislation – MPA urges the 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.

Thailand’s pending copyright amendments are still being scrutinized by the State Council. The amendments are aimed at improvements in Thailand’s copyright laws regarding safe harbor provisions and addressing deficiencies in technological protection measures (TPM) provisions. The TPM provisions should close the loophole of permitting circumvention of a TPM for the purpose of benefiting from a specified

copyright exception. As weak copyright and TPM protections create de facto barriers to trade, efforts to strengthen such protections effectively reduce such barriers. Unfortunately, as of September 2019, Thailand’s proposed draft copyright amendments do not go far enough in strengthening copyright law.

WIPO Internet Treaty Implementation – Thailand needs to accede to and implement the 1996 WIPO Internet Treaties to provide the global minimum standard of protection against online piracy. As noted above, the 2014 amendments pertaining to protection for TPMs and ISP liability fell short of international expectations.

Anti-Camcording Legislation – Thailand enacted anti-camcording legislation in 2014. However, the anti-camcording provision falls short because it requires a link between the act of camcording and a copyright infringement, instead of simply criminalizing the camcording act itself. Criminalizing the act of camcording including Thai audio, without requiring a link to copyright infringement, would empower law enforcement to intercept illegal recordings before they enter the online pirate ecosystem.





## MARKET ACCESS ISSUES

Screen Quotas – Under Cinema Law/Decree 54, Vietnam requires that at least 20 percent of total screen time be devoted to Vietnamese feature films. Vietnam is producing more local films, which now command over 20 percent market share in the country, rendering this quota irrelevant. Vietnam should remove this quota, which is currently not enforced. Further, the Vietnamese government should remove screen quota provisions from its recently proposed amendments to the Cinema Law, targeted for 2021.

Broadcast Quotas – In the free-to-air television sector, foreign content is limited to 50 percent of broadcast time and foreign programming is prohibited during prime time. Broadcast stations must also allocate 30 percent air time to Vietnamese feature films. These restrictions limit U.S. exports of film and television content.

Foreign Investment Restrictions – Foreign companies may invest in cinema construction, film production and distribution through joint ventures with local Vietnamese partners, but these undertakings are subject to government approval and a 51 percent ownership ceiling. Although Vietnam has recently proposed amendments to its Cinema Law which would facilitate foreign investment in film distribution, these amendments maintain the 51 percent ownership ceiling.

Pay-TV Regulation – In March 2016, Vietnam enacted pay-TV regulations (Decree 06/2016/ND-CP) requiring the number of foreign channels on pay-TV services be capped at 25 percent of the total number of channels the service carries. These regulations also require operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in

Vietnam. Furthermore, most foreign programming is required to be edited and translated by an approved licensed press agent. The regulations also provide that all commercial advertisements airing on such channels in Vietnam must be produced or otherwise “conducted” in Vietnam. Further, these regulations essentially expand censorship requirements to all channels, while such regulations had previously applied solely to “sensitive” channels. This mandate also appears to impose new “editing fees” on international channels. These measures are unduly restrictive and severely impede the growth and development of Vietnam’s pay-TV industry.

OTT Regulations – In August 2018, the Ministry of Information and Communications issued draft amendments to Decree 06 with intent to expand the scope 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 venture. In addition, the proposed revisions include a 30 percent screen quota and onerous censorship requirements. Over the past year, U.S. industry stakeholders have been intensely engaged in consultations pertaining to the draft Decree 6, including meeting with various Vietnamese officials to convey our significant concerns and highlight international and regional best practices.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy is rampant in Vietnam. The majority of Vietnam’s 20 most active infringing websites are operated from within the country, and are hosted by local ISPs. MPA has asked that these ISPs and hosting providers promptly respond to rights holders’ notice and takedown



# Vietnam

requests. On a positive note, in 2017, the Ministry of Information and Communication (MIC) was given clear authority to address online infringement. The MPA encourages the MIC to follow through on this authority through meaningful and effective enforcement actions and imposition of deterrent sanctions against infringing websites.





# NATIONAL TRADE ESTIMATE



# EUROPE

# European Union Overview

The 2014 – 2019 Juncker Commission declared its Digital Single Market Strategy (DSMS) as a top legislative priority. The EU’s DSMS included initiatives aimed at mandating cross-border access to audiovisual content. Such limitations would have damaged the principle of contractual freedom, affected the value of rights and deterred future investments in the production of high-value content. As firms with major European operating entities, MPA member companies have worked closely with the European audiovisual and creative sectors to mitigate the harmful elements of such initiatives.

## MARKET ACCESS ISSUES

European Content Quotas – The EU Directive on Broadcasting, initially adopted in October 1989, and referred to as the Television Without Frontiers (TVWF) Directive, established European content quotas for broadcast television, cable and satellite programming. All EU countries have implemented this directive, which creates restrictive provisions for foreign program suppliers.

Some EU Member States, such as France, Italy, and Spain, have taken measures that go beyond the basic provisions of the TVWF Directive.

In 2007, the Audiovisual Media Services (AVMS) Directive replaced the TVWF Directive. The AVMS Directive widens the scope of the TVWF Directive to also cover audiovisual media services provided on-demand, including via the internet.

In May 2016, the European Commission released its proposal to modernize the AVMS Directive, which, after more than two years of negotiations with the Parliament and EU Member States, entered into force in December 2018. EU Member States must adopt the new AVMS Directive into their national

laws by September 2020.

The EU legislators agreed on new obligations for video-on-demand (VOD) services, which must now reserve at least a 30 percent share in their catalogues for European works and ensure prominent placement of those works. VOD services with a low turnover and a low audience are exempted from the obligation; the EU Commission is expected to publish non-binding guidelines by end the of 2019, which will provide an indication as to what defines “low audience” and a “low turnover.”

The new European works quota provision maintains the country-of-origin principle anchored in the 2007 AVMSD, which provides that each EU Member State having jurisdiction will determine the quota (30 percent or more). The directive also sets out a new provision which allows EU Member States to oblige media service providers (linear or non-linear) to contribute financially to the production of European works, even if a media service provider falls under the jurisdiction of another Member State (i.e. country-of-destination approach). Several EU Member States including France, Italy, Germany, Belgium (Flanders and Wallonia), Portugal and Croatia, have begun to implement the financial contribution obligation.

The new directive also allows for restrictions to the country-of-origin principle for national security reasons, public interest and safety. Video-sharing platforms are included in the scope for the protection of minors and public safety, if the provision of user-generated videos constitutes an essential functionality of their service.

Electronic Commerce VAT – EU Member States impose a value-added tax (VAT) on companies established in a third country that use the internet to sell and deliver products within the EU, including



# European Union

movies, pay broadcasting, and music. The measure does not apply to business-to-business transactions. Since January 1, 2015, companies established in the EU are now subject to VAT in the country of consumption.

## INTELLECTUAL PROPERTY PROTECTION

Overall, the EU IP Directives provide a satisfactory level of protection for rights holders. In several cases, certain Member States have failed to correctly implement key provisions of the Directives, undermining the spirit and letter of the legislation.

Digital Single Market Strategy (DSMS) – The 2014-2019 Juncker Commission adopted a set of legislative proposals based on three pillars: 1) providing better access for consumers and businesses to digital goods and services across Europe; 2) creating the right conditions and a level playing field for digital networks and innovative services to flourish; and, 3) maximizing the growth potential of the digital economy.

This legislative package included a “regulation on ensuring the cross-border portability of online content services in the internal market,” which became applicable in all EU Member States in April 2018. A year later, in April 2019, the EU adopted a new directive on copyright and related rights in the Digital Single Market (see below).

Also, in April 2019, the EU adopted a new directive on copyright and related rights applicable to online transmissions and retransmissions of television and radio programs, as a complement to the existing 1993 Satellite and Cable directive. This new directive introduces a country of origin principle for ancillary online services of broadcasters for news and current affairs programs and fully financed productions of the broadcasting organization (excluding sport programs). The

directive also introduces a mechanism imposing mandatory collective rights management for rights of retransmission, extending the 1993 rules concerning cable retransmission to other forms of non-internet IPTV retransmission. Finally, the directive establishes rules to clarify the copyright status of the “direct injection” broadcasting technique. Member States have until June 2021 to transpose the new rules into their national laws. It is crucial that Member States transpose the directive as faithfully as possible to avoid any unintended consequences.

Digital Single Market Copyright Directive (DSMCD) – In April 2019, the European Union adopted a new Directive (2019/790), referred to as the Digital Single Market Copyright Directive (DSMCD). Member States have until June 2021 to transpose the provisions of the directive into their national laws.

The directive significantly changes European Copyright law. It introduces two new exceptions to the reproduction right to enable text and data mining tools to crawl content: one covering journals for the purpose of scientific research and the other covering content that is made freely available online. The directive also includes two updates to existing exceptions: one extends the illustration for teaching exception to cover digital uses, and the other extends acts of preservation to include digitization.

The directive also contains a provision aimed at facilitating the licensing of works considered to be out of commerce through an extended collective licensing mechanism. The mechanism enables a collective management organization (CMO) to license on behalf of rights holders, even when rights holders have assigned the CMO no such role.

The directive further addresses the discrepancy between the value certain rights holders derive from online uses of their works on online content sharing services and the value received by these





# European Union

platforms making those works available, by clarifying that these online content sharing service providers perform acts of communication to the public for which authorization from rights holders must be sought. At the same time, this provision introduces specific liability rules for these platforms, providing that they are not liable for copyright infringement if, in the absence of authorization, they can demonstrate that they have made their “best efforts” to prevent pre-identified content, have taken down infringing content which the rights holders have notified, and ensured that it stays down. This provision also provides for lesser “best effort” obligations depending on the size, age, and popularity of the service.

Finally, the directive introduces provisions that prescribe contractual terms when authors and performers license or transfer their exclusive rights for the exploitation of their works.

Transposition of this directive into national legislation comes with risks and challenges. In doing so, national governments should bear in mind the importance of preserving exclusive rights, limiting interference with contractual freedom, and ensuring that content protection efforts are not jeopardized.

2001 Copyright Directives – The 2001 Copyright Directive was principally focused on the harmonization and modernization of copyright law in the digital age. This included the EU and its Member States’ implementation and ratification of the 1996 WIPO Internet Treaties.

Notably, the Copyright Directive contains an exception for private copying that, if interpreted incorrectly, could violate the TRIPS/Berne 3-Step test, as it could interfere with the way rights holders normally derive value from their works. In some countries, the provisions regarding the private copy exception are too broad and could allow the making

of copies for the benefit of third parties, thereby contributing to the illegal transmission of works on the internet. Of specific concern is the German private copy exception, which expressly permits the beneficiary of an exception to use a third party to make the copy.

The directive also established legal protection for technological protection measures (TPMs) necessary for the protection of copyrighted material in the digital environment. However, this protection is threatened by possible Member State interference to regulate the relationship between technological measures and exceptions to copyright.

The Copyright Directive requires the provision of injunctions against intermediaries whose services are used by a third party to infringe copyright, even where an intermediary’s activities may be exempt from liability under the E-Commerce Directive. Some laws are not worded to ensure these injunctions, which are a key tool in the fight against digital piracy.

Enforcement Directive – This instrument establishes an EU-wide minimum standard for certain civil procedures, including the right to ask ISPs for information and the availability of injunctive relief against such intermediaries to prevent and stop ongoing infringement. These tools are invaluable to combating internet piracy. While all Member States had the duty to implement all the provisions of the directive, some Member States have not correctly implemented the “right of information” provision and the third-party injunctive relief provisions, both of which are basic tools for gathering information about infringers and securing other remedies to stop infringements.

The directive provides a number of other benefits, including asset-freezing injunctions, search and seizure orders, presumptions of ownership for holders of related rights, and publication of



# European Union

judgments. Member States are free to apply more stringent provisions in civil law, and to impose criminal or administrative sanctions.

The directive, however, fails to significantly improve the EU's damages regime. In practice, the system falls short of providing a deterrent remedy. As a consequence, many rights holders tend to focus on injunctive relief, as it remains difficult to obtain meaningful damages awards.

Electronic Commerce Directive – The 2000 E-Commerce Directive provides a general legal framework for internet services in the EU's Internal Market. All EU countries have implemented the directive, which establishes rules on commercial communications, country of establishment of service providers, electronic contracts, liability of service providers, codes of conduct, out-of-court dispute settlements, and enforcement. The directive fully recognizes the country-of-origin principle and expressly requires Member States not to restrict the freedom to provide information society services from a company established in another Member State. The directive requires that information society providers offer clear details about their business and whereabouts. However, many online services, in particular those that infringe IP rights, disregard these requirements. The anonymity issue also emerges in online intermediaries providing services to businesses while not “knowing your customer,” a standard practice in some other regulated environments.

With respect to intermediary liability, the directive provides conditions on the limitation of liability of service providers (i.e. safe harbor) for hosting, mere conduit, and caching. While the courts have generally clarified that structurally infringing websites may not avail themselves of the safe harbor for hosting, the directive has generally disincentivized most platforms from responding appropriately to the massive amount of illegal

conduct taking place on their networks or services. The European Court of Justice has developed a workable test for attributing liability based on whether the intermediary is active or passive; however, many national courts continue to accept arguments from service providers that they are passive with regard to the content made available on their sites, despite the role they play in selecting, promoting, ranking and optimizing content. The test may be further refined by the Court, as there are several important cases pending. A potential reopening of the directive may put this useful jurisprudence at risk and create more uncertainty. Some countries' implementations create limitations on liability for service providers that go beyond what is allowed under the directive, thus making anti-piracy efforts more difficult.

Furthermore, although the directive allows monitoring obligations in specific cases, differentiating between general and specific monitoring has proven difficult as it establishes a vague ban on “general monitoring” (Article 15(1)).

In its September 2017 Communication on “tackling illegal content online,” the Commission promised to monitor progress and assess whether additional measures are needed to ensure the swift and proactive detection and removal of illegal content online, including possible legislative measures to complement the existing regulatory framework. This Communication contained some positive (although non-binding) principles encouraging platforms to take more proactive, voluntary action to take down, and keep down, unauthorized content.

As a follow-up, in March 2018, the European Commission adopted a Recommendation on ‘measures to effectively tackle illegal content online,’ partly translating the political commitment of the Communication into a (non-binding) legal form but focusing primarily on terrorist content rather than proactive measures for other forms



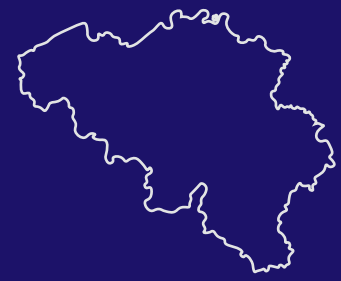
# European Union

of illegal content. More recently, in September 2018, the Commission published a Proposal for a Regulation on preventing the dissemination of terrorist content online. This Regulation will be binding and includes an obligation to remove terrorist content within one hour if requested by competent authorities.

Data Protection Rules -- The General Data Protection Regulation (GDPR) was adopted in April 2016 and became enforceable in May 2018. It strengthens and unifies data protection for all individuals within the EU, but also addresses the export of personal data outside the EU. The GDPR raises concerns about the use of certain personal data in copyright enforcement. In the 1995 Data Protection Directive, rights holders relied on Article 13, which provided derogations to the rules on data processing, referring to the respect of the “rights and freedom of others.” Although the GDPR still provides such a derogation to the rules on data processing (Article 23), it is subject to very strict and defined conditions. As a result, rights holders are not certain that this provision will be given any meaning in the future.

In parallel to the GDPR, in 2016, the Commission adopted a directive on the processing of personal data by police and judicial authorities against criminal offences, which replaces Framework Decision 2008/977/JHA. This directive aims to improve the exchange of information, help fight crime more effectively, and provide standards for the processing of data of people who are under investigation or have been convicted.





## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – While P2P piracy is on the decline, illicit streaming, cyberlocker sites, IPTV and Facebook “watch groups” remain a significant challenge for rights holders.

Enforcement – Police cooperation in Belgium is generally good, although IP cases tend to rank low in priority. Brussels police and customs agencies are confronted with a severe lack of personnel and resources, which negatively impacts the number of anti-piracy actions. The action plan “Digital Belgium” for 2015-2020, conducted by the Minister for the Digital Agenda, and the policy plan for 2015-2019 of national customs, both include tackling illegal content/counterfeiting in their objectives. However, none of this has led to a significant increase of resources dedicated to content protection. While the conviction success rate is relatively high, short-term sentences are not executed and it is difficult for rights holders to collect awarded damages. The Brussels prosecutor views the seizure of counterfeit goods and revenue to be a sufficient deterrent for infringers.

In October 2012, the Belgian Entertainment Association (BEA) signed a collaboration protocol with the Federal Public Service (FPS) to strengthen IP enforcement online. FPS Economy is taking action against illegal online offers. Although rather slow, they have had some successes and their skills are growing.

BEA and Belgium’s four main Internet Service Providers collaborate to a certain extent to facilitate the blocking of copyright infringing websites.

### Legislation

EU Enforcement Directive – Belgium implemented

the Enforcement Directive in May 2007. The implementation provides a number of benefits for civil action against piracy, but the right of information can only be applied after the judge has found that an infringement has been committed. In practice, this requires hearings first on the merits, and, as a result, can cause significant delays before the judge orders provision of the information. In the context of proceedings against P2P users in particular, such losses of time and resources represent a significant burden for rights holders.

EU Copyright Directive Implementation – Belgium has implemented the Copyright Directive.

2018 AVMS Directive – Flanders implemented the financial contribution obligation. “Non-linear television broadcasters” need to invest 2 percent of their annual turnover (based on revenues generated two years before the year of contribution) in Flemish audiovisual works. Alternatively, a service can also choose to contribute to the Flemish film fund directly with 2 percent of its annual turnover. Services that have an annual turnover below 500,000 euro are exempted.





## MARKET ACCESS ISSUES

Broadcast Quota – French broadcast quotas exceed the requirements established by the EU AVMS Directive. Forty percent of the total number of feature films and the total transmission time allocated to audiovisual works must be of French origin. In addition, 60 percent of feature films and audiovisual works must be of EU origin. Thus, 40 percent must be exclusively of French origin, and an additional 20 percent must be of EU origin.

France also imposes a cap of 192 movies per channel, per year, for feature films of foreign origin (and hourly sub-quota). Certain days and time slots are also closed to foreign feature films, and similar constraints apply to pay-TV.

Screen Quota – France maintains Government-sponsored inter-industry “commitments” that limit the screening of a movie to four screens in the case of a 15-screen theater. These measures are of quasi-statutory nature in the country.

Video-on-Demand (VOD) – The National Center of Cinematography (CNC) is encouraging regulation of the supply of VOD through inter-industry agreements. These agreements include release windows, minimum per-subscriber contributions to EU/French language content acquisitions and artist remuneration, investment requirements, and other constraints. Release window constraints include: 1) a 4-month waiting period before movies can be commercialized on physical carriers and transactional VOD platforms, 2) a 36-month waiting period on Subscription VOD platforms, and 3) a 44-month waiting period on free VOD platforms. Significantly, France recently relaxed SVOD windowing constraints to 30 or 17 months when SVOD services contribute to local production.

## Implementation of the EU AVMS Directive –

According to recent announcements by the Minister of Culture, a new French audiovisual law will require VOD services, which fall under the jurisdiction of other EU Member States but target the French audience, to contribute financially to the production of European works, with 16 percent of their net annual revenues made in France. The same VOD services will be required to dedicate at least 30 percent of their catalogs to European works, depending on the jurisdiction in which they are located. VOD services falling under the French jurisdiction must currently reserve 60 percent of their catalogs for European works, of which 40 percent must be original French-language audiovisual works. The new French audiovisual law is likely to enter the parliamentary process during the first half of 2020.

Subsidies – The French government provides extensive aid and subsidies to assist film production. The film industry continues to contribute to subsidy funds through 1) dues levied on distributors, exhibitors, exporters, newsreel producers, dubbing studios, broadcasters, and (as of January 1, 2019) international VOD platforms financially registered abroad; 2) fees for release certificates, permits, and registration; and 3) special admission tax revenues.

Film Rental Terms – The law limits the gross box office revenues remitted to the film distributor to a maximum of 50 percent. MPA maintains that film distributors should have the freedom to negotiate film rental terms based on market conditions.

Ban on Advertising Feature Films on Television – Currently, theatrical releases of feature films are not allowed to promote their activities on television.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy is a serious source of concern in France. Illicit streaming is the most



# France

popular form of piracy in the country. P2P sites, although in decline, remain highly popular.

Enforcement – In 2009, the Government adopted the HADOPI legislation to address online piracy, mainly targeting the then-dominant use of P2P protocol, through a graduated response sanctioning control over the subscribers' Internet access. Since then, the Government has been educating Internet users through successive notifications. The Government repealed Internet access suspension in June 2013. Fines remain in place, but they must be imposed by a judge. Only a symbolic number of infringers are prosecuted, and even fewer are condemned for misdemeanors.

Site blocking and delisting have proven effective enforcement tools in France.







## MARKET ACCESS ISSUES

Film Levy – Pursuant to the Film Support Act (FFG), companies exploiting feature films must pay a portion of their revenues to the German Federal Film Board to fund local film and television production. The German legislature is currently reviewing a revision of the FFG; only minimal changes are expected.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet exchange of illegal copies, direct download, streaming and P2P are the primary online piracy concerns in Germany. Several German domain name registrars (in particular KeySystems and 1API) remain uncooperative, and as such, create a safe haven for internet access through notoriously rogue domain names, such as The Pirate Bay domain names.

Camcording – German-language release groups illegally record local soundtracks and encode them with video camcords often sourced from other international release groups, to create unauthorized copies of movies in theatrical release. These groups are a primary concern because they are the original source of illegal German audio material on the internet and are used in the illegal reproduction of optical discs. Soon after the material is encoded, it is mass distributed via the internet and facilitated by portal sites. From January to September 2019, six illicit audio recordings were traced to German theaters, unchanged from the same period in 2018.

Enforcement – German law enforcement authorities, especially the police and public prosecutors, are aware of piracy problems and, over the last few years, have committed resources to a number of successful investigations and prosecutions. Helpfully, the judiciary has imposed

deterrent sentences in cases such as Kino.to and Kinox.to. These copyright infringements are on a commercial scale and German officials recognize them as organized criminal activities.

While it is possible for rights holders to obtain an injunction under civil law, injunctions against website operators and hosting providers are title-specific, which is of limited use against online sites that facilitate copyright infringement on a massive scale. Significant case law at the Supreme Court level is pending, with regard to liability of cyberlockers and Youtube. The court has referred questions about this case to the CJEU.

### Legislation

Copyright Act Revision – The transposition of the EU Digital Single Market Copyright Directive into German legislation will lead to changes to the German Copyright Act (GCA). The German Federal Government in its statement to the EU Council has indicated the risk of amendments specific to Germany that could further weaken exclusive rights or copyright protection. Having concluded its consultation process, the German government is now developing draft legislation.

The existing German private copy exception (PCE) does not provide an exclusion of copying by third parties, and therefore, the exception may violate the TRIPS three-step test. In April 2014, the CJEU ruled that, under EU law, legal copies may only be made from legal sources. Existing German law, which excludes only copies made from “obviously” illegal sources, must now be interpreted to accommodate the decision and conform to EU law.

The legal framework for technological protection measures (TPMs) also remains inadequate. To strengthen the law, Germany should provide



# Germany

specific civil remedies for illegal acts relating to the circumvention of TPMs and provisions for the seizure, delivery, and destruction of illicit circumvention devices.

EU Enforcement Directive Implementation – During 2012, the German Supreme Court corrected a previous failure with the implementation of the directive’s right of information, restricting it to cases of infringements committed on a commercial scale. Under the German implementation, however, rights holders contemplating legal action against internet pirates still face difficulties in identifying infringers, due to restrictions imposed by Germany’s data protection law. Further, the right of information is circumscribed in practice because many ISPs reject information requests, asserting that the data is simply not available and that they are not permitted to retain the data. Concerning the right of information, there is a significant referral underway by the German Supreme Court to the CJEU with regard to Art. 8 (2)a Enforcement Directive, as to whether this right includes the email addresses of the infringing users, their telephone numbers, and their IP addresses (C-264/19 Constantin Film Verleih).

During 2013, the German legislature dramatically restricted remuneration by capping the attorneys’ fees for legal claims against infringers, to limit the number of remand cases. Fees incentivize attorneys to take rights holders’ cases. Such a severe limit on attorneys’ fees creates another obstacle for rights holders when they pursue legitimate claims of infringement. However, the courts subsequently established case law minimizing harmful impact in permitting the continuation of cease and desist letters directed at end users.

In June 2017, the Bundestag passed a reform of the country’s Telemedia Act (TMG) that aimed to end the principle called ‘Störerhaftung,’ under which private and business WiFi hotspot providers could

be held liable for their users’ illegal online activities. This reform rendered virtually impossible any IP enforcement for infringements via (public) WiFi hotspots.

In July 2018 the German Federal Court of Justice (BGH) decided that the TMG provision, which implemented Art. 8 (3) Copyright Directive into German law for WiFi-providers only, applies to all other access providers, and ‘Störerhaftung’ would no longer apply. As a result, website blocking in Germany must now be undertaken using Section 7 of the TMG. By this, Art. 8 (3) of the EU Copyright Directive (EUCD) has finally been implemented into German law, although indirectly. The German Federal Government is currently in the process of coordinating a further revision to the TMG which would more directly implement Art 8 (3) of the EUCD into German law.





## MARKET ACCESS ISSUES

Audiovisual Quotas – In 2019, a number of new quotas – affecting both programming and investment, for linear and non-linear services (such as VOD) – took effect. The percentage of European content broadcasters must air will rise incrementally to 60 percent by 2021. Non-linear providers must devote at least 30 percent of the catalogue to EU works produced within the past five years.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The Italian market suffers from the massive use of linking websites that share illicit content through cyberlocker services. Torrent sites are also popular in Italy. In recent years, MPA members have witnessed an increase of illicit content shared through user-generated content (UGC) streaming platforms, as well as the proliferation of piracy devices and apps.

Camcording – Italy is the source of significant audio source-theft, in which individuals record local soundtracks and then match them with video camcords to create unauthorized copies of films in theatrical release, localizing pirate content and undermining legitimate commerce in the Italian market. From January to September 2019, ten illicit audio captures of MPA member films were traced to Italian theaters, a slight increase from the same period in 2018. Helpfully, in August 2019, the Public Safety Consolidated Text was modified to provide for the installation of video surveillance systems in movie theaters, to help identify those who illegally record films.

Enforcement – Italy’s overall enforcement efforts show progress consistent with recent CJEU decisions. In recent years, rights holders

have worked closely with Italian judicial and law enforcement authorities to share information about the scourge of piracy. This collaboration has led to better criminal enforcement. Despite Italy’s lack of specialized personnel to investigate increasingly complex infringements committed online, some significant criminal cases have led to stiffer sentences for infringers.

On the administrative side, AGCOM is a key institution for site blocking in Italy. On the civil side, in June 2018, the District Court of Milan issued a first website-specific (i.e. dynamic) civil site blocking order.

## Legislation

Data Protection Law – Italy’s Data Protection law, and in particular the conservative approach of Italy’s Data Protection Authority, is an obstacle to reasonable enforcement. The Data Protection Authority prohibits ISPs from disclosing information about their subscribers for civil or administrative purposes.

E-Commerce Directive Implementation – Decree 70/2003 implementing the E-Commerce Directive establishes that takedown procedures are subject to a prior notice by the “relevant authorities.” This reference to an intervention by an undefined judicial or administrative authority is contrary to the E-Commerce Directive.





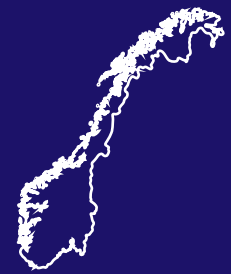
## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The Netherlands houses both locally-oriented pirate internet sites aimed at various language regions (e.g. Russian) and several international (English language) pirate sites. Dutch hosting providers host servers for illegal IPTV services internationally. The Netherlands also hosts a number of notorious cyberlockers.

Enforcement – Dutch police and public prosecutors are reluctant to take action against internet piracy, although they do respond to official requests for assistance in criminal investigations by foreign law enforcement. Government policy is that rights holders are responsible for civil enforcement and criminal enforcement will be considered only in case of organized crime involvement. As a result, nearly all enforcement efforts are carried out by rights holders collectively through the BREIN foundation.

In court, ISPs vehemently oppose blocking access for consumers. In January 2014, the Dutch Appeals Court rejected blocking The Pirate Bay web site. In 2015, the Supreme Court ruled that the Appeals Court applied an overly broad effectiveness test, but then asked the CJEU to answer prejudicial questions of whether The Pirate Bay itself is infringing copyright. The CJEU confirmed this in June 2017 and, subsequently, Dutch ISPs in preliminary injunction proceedings were asked to block The Pirate Bay while the proceedings on the merits are pending. The Supreme Court referred the case back to the Appeals Court to rule on the proportionality of blocking, which is contested by the ISPs. The hearing is scheduled for December 2019. Blocking of other websites is not expected before mid-2020.





## MARKET ACCESS ISSUES

Video Taxes – Three different sets of levies continue to be imposed on home video sales in Norway: 1) a 25 percent value-added tax (VAT) on both the rental and the sale of optical discs; 2) a fixed price levy of NOK 3.50 per optical disc (rental and sell-through), payable by the distributor and dispersed as subsidies to the theatrical and home video market; and, 3) a registration fee of NOK 0.60 per both rental and sell-through optical discs. U.S. copyright holders receive no benefit from the fixed levy. The high VAT and the licensing scheme for retail outlets continue to burden the video rental market and stifle the development of a healthy sell-through market in Norway. For online sales and rentals (streaming) of movies, Norway applies the VAT, while the taxes set out in 2) and 3) above are applied once for each copy on the service provider’s server (i.e. not once for each download).

Norway also applies a VAT to the purchase of streaming services from abroad. There is no VAT on private import where the value of the good including freight and insurance falls below NOK 350 (approximately \$39 USD). However, Parliament may adopt a new VAT regime for such goods by the end of 2019, in connection with the adoption of the 2020 federal budget.

Fair Compensation – In Norway, rights holders’ compensation for legal reproductions made for private use is funded through yearly allocations in the government budget. The Ministry of Culture has, however, stated that only rights holders that are citizens or domiciled within the European Economic Area (EEA), or companies with a registered office within the EEA, are entitled to such compensation. This measure contravenes Norway’s national treatment obligations under the Berne and TRIPS agreements.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy is a significant problem in Norway, where P2P networks are still popular and streaming sites are rapidly gaining popularity.

Enforcement – Site blocking is the most effective enforcement tool in Norway. In total, 25 websites/applications have been blocked based on the specific site-blocking legislation introduced in 2014. An important and precedent-setting case in early 2018 resulted in the blocking of Popcorn Time, a hybrid streaming and BitTorrent app, which had overtaken The Pirate Bay as the most popular piracy platform for Norwegian internet users.

### Legislation

Extended Collective Licensing – The MPA has concerns about an amendment to the Norwegian Copyright Act including a general extended collective license which entered into force in July 2015 and was maintained in the new Norwegian Copyright Act which entered into force in July 2018. The adopted collective license could in principle apply to over-the-top services, internet transmissions, and other audiovisual delivery platforms. The adopted collective license will not apply to rights holders that have affirmatively opted-out of the system.

While the MPA supports initiatives that enable collective management organizations to better serve their members, collective licensing should not undermine opportunities for rights holders to exercise their exclusive rights individually. Strong protection for the individual exercise of exclusive rights remains the most effective way for rights holders to derive value from their creative works, particularly in the audiovisual sector. The majority



# Norway

in the Standing Committee in the Parliament have clarified that the purpose of the legislation is not to limit the opportunity to enter into individual agreements directly with the rights holder, and that the existing principles governing the relationship between individual licensing and collective licensing shall remain unaltered. Further, the majority underlined that collective licensing shall not cover areas where individual licensing may take place. The majority also stated that the required approval for organizations offering collective licensing must apply to each individual area where the new provision is to be exercised.

MPA urges the Ministry of Culture to act in accordance with these principles when implementing the new provisions, to ensure proper protection of the individual exercise of exclusive rights. To date, no party has used this new extended collective licensing provision.

Copyright Act – In July 2018, the new Norwegian Copyright Act entered into force. The new act contains a helpful provision that clarifies that streaming of content from illegal sources is illegal. The focus is not on end-user liability as such, but rather the need to enable action against intermediaries who are best placed to end infringing activities. Furthermore, the new Act strengthens the sanction regime in line with the sanction regime for industrial rights, which is important in order to remove barriers to effective enforcement of copyright in Norway.

On the more problematic side, the new Act contains a clarification that the use of works in “classrooms” is private and thus does not implicate copyright. MPA shares local rights holders’ concerns, which have been conveyed to the Ministry, along with a request that the Ministry reconsider this provision.

DSM Implementation Process – The directive must first be adopted by the EEA Committee and

incorporated in the EEA Agreement before it is implemented. The Ministry of Culture expects this to happen in late 2019.







## MARKET ACCESS ISSUES

Broadcast Quotas – Poland’s television broadcasters must reserve more than 50 percent of their quarterly transmission time for European works (excluding news, advertising, teleshopping, sport events and gameshows) and dedicate at least 33 percent of their quarterly broadcasting time to programming produced originally in Polish.

Video-on-Demand (VOD) – On-demand services shall promote European works, including those originally produced in Polish language by: 1) giving prominence by identifying the origin of works, creating a search option for European works, and 2) reserving at least 20 percent of their catalogues for European works. This quota must be increased to at least 30 percent following the new AVMS Directive.

Foreign Ownership Restrictions – Poland limits foreign ownership in a broadcasting company to 49 percent.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy is steadily growing in Poland. A 2017 Deloitte study concluded that, in 2016, online content piracy generated PLN 3 billion in GDP losses in the country. BitTorrent remains a popular way of pirating movies in Poland, but linking sites (direct download), hosting sites and streaming video are on the rise. Sites offering illegal Polish subtitles are also a serious concern, as the uploading of pirate copies of new releases is typically followed by the posting of a Polish-language dialogue list, enabling the creation of localized subtitled pirate copies.

Enforcement – Polish courts are seriously backlogged. While the majority of piracy cases

brought to court conclude with guilty verdicts, sentences are insufficient. MPA remains concerned that enforcement authorities will lose interest in working with rights holders as a result of languishing court cases and disappointing sentences.





## MARKET ACCESS ISSUES

Customs Duties – Russia’s customs authorities continue to assess duties on the royalty value of some imported audiovisual materials, rather than solely on the value of the physical carrier medium. This is contrary to standard international practice. Although modern-day digital transmissions mitigate the impact on film and audiovisual content, such assessments are nonetheless a form of double taxation, since royalties are also subject to withholding, income, value-added and remittance taxes.

Foreign Ownership Restrictions – Since 2014 the Mass Media Law imposes a ban on establishing mass media activities, including broadcasting, with respect to the following categories of investors: a) Foreign States, international organizations, as well as organizations under their control; b) Russian legal entities with a foreign participation (regardless of the participation percentage); c) Foreign citizens, individuals without citizenship, or Russian citizens with an additional citizenship. In addition, none of the above entities has the right to own (including through a third party) more than 20 percent of the capital of an entity who participates (as a member or shareholder) in the founding of a mass media entity or in the organization acting as a broadcaster. MPA opposes these types of restrictions, which reduce consumer choice and unreasonably favor domestic investors.

Advertising Ban on Pay-TV – In January 2015, Russia introduced a ban on advertising on pay-TV channels, with an exception for pay-TV channels that distribute more than 75 percent of domestic content. While the law has no practical effect on state-owned television channels, it has a significant impact on cable and on-demand services, including those operated by foreign companies. MPA opposes

such laws, as they interfere with the market and hinder the growth of the pay-TV industry.

Discriminatory VAT – The 1996 Law on State Support of Cinematography provided a VAT exemption for films granted a national film certificate. National film certificates are granted to Russian-made films. Any legal entity distributing a domestic film is exempt from VAT provided that such entity is a cinematography organization. As part of its accession to the WTO, Russia obligated itself to provide national treatment for taxes on similar products, without regard to whether they were imported or produced domestically. The Government of Russia appears to be in violation of this obligation as it is currently applying a VAT to non-Russian films and not to domestic films. Russia raised its VAT from 18 to 20 percent on January 1, 2019.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – While Russia remains host to a number of illicit sites that cater to English-speaking audiences, negatively impacting markets worldwide, many pirate sites have moved to foreign hosting locations after the implementation of the “Internet Anti-Piracy Law,” that allows rights holders to apply for injunction measures via the Moscow City Court. Infringement on Russian social media platforms such as VK, OK and Telegram remains a significant concern to rights holders.

Camcord Piracy – Russia continues to be a major source for illicit camcording. From January to September 2019, 65 illicit audio and video recordings of MPA member films were traced to theaters in Russia, up from 41 during the same period in 2018.

Enforcement – Russia needs to increase its enforcement activity well beyond current levels



# Russia

to provide adequate and effective enforcement against IPR violations, including the imposition of criminal deterrent penalties. A critical element of the U.S.-Russia bilateral IPR agreement is Russia's obligation to provide for effective enforcement of IPR online; Russia will need to take effective action on the basis of its amended legal framework to meet this obligation. Meanwhile, although the government's special sub-unit within Department K previously dealt exclusively with IP internet cases, they are no longer taking responsibility for these matters. Also, meeting the monetary threshold to have copyright cases accepted by law enforcement and the prosecutor's office is a serious challenge for rights holders and a de facto hurdle for proper enforcement.

Judicial action against unauthorized camcorders in theaters continues to be challenged by the private copy exception, despite amendments clarifying that the private copy exception is not applicable. MPA continues to urge the government bodies reviewing IP legislation to revisit this issue.





## MARKET ACCESS BARRIERS

Video-on-Demand (VOD) Quotas and Investment Obligations – As allowed by EU law, on-demand services under Spanish jurisdiction are already required to reserve 30 percent of their catalogues for European works (half of these in an official Spanish language) and must financially contribute to the funding of audiovisual content with at least 5 percent of their revenue (6 percent for public broadcasters).

Linear services such as TV broadcasters shall reserve at least 51 percent of their transmission time (excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping) for European works. In addition, at least 10 percent of their transmission time shall be reserved for European works created by producers who are independent from broadcasters.

Film Dubbing (Catalonia) – In 2010, the Catalan regional government adopted language restrictions on films released in Catalonia but implementing measures have not been released. In September 2011, film distributors and exhibitors and the Catalan Government entered into a cooperation agreement that established a network of movie theaters exhibiting films dubbed in Catalan, with distributors committing to provide 25 prints in Catalan for new films each year. The Catalan Administration committed to fund the dubbing and amend the law when possible. After the European Commission (EC) found Article 18 of the legislation discriminatory towards other European countries, the Catalan Government amended the law by removing European works from the scope of the obligation and therefore leaving the quotas for non-European works. MPA remains concerned about the dubbing obligation as detrimental to the diversity of feature films releases in Catalonia.

Investment Obligation for Broadcasters – Spain maintains investment provisions whereby audiovisual media service providers, including broadcasters, must annually invest 5 percent of their revenues in the production of European and Spanish films and audiovisual programs. In addition, 60 percent of this allocation should be directed towards productions in any of Spain's official languages. These investment obligations also apply to digital terrestrial channels.

Screen Quota – For every three days that a non-EU country film is screened, one European Union film must be shown. This quota is reduced to four to one if the cinema screens a film in an official language of Spain other than Castilian and shows the film at all sessions of the day in that language. Non-observance of the screen quotas is punishable by fines. These measures stifle development of Spain's theatrical market and deprive Spanish audience from diversity of content in cinemas.

Broadcasting Licenses – In 2015, the Spanish government awarded six digital terrestrial television broadcasting licenses through a public tender process. Non-EU investors were unable to participate directly in this tender process due to restrictions on foreign ownership.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy in Spain is among Europe's worst, although the trend is showing signs of improvement. According to a recent report by the Coalition of Creators and Content Industries, Spanish users accessed 4.35 million unauthorized works online in 2018, a 3 percent decrease compared to 2017.

Camcord Piracy – Illicit camcording remains a



# Spain

concern for rights holders in Spain. From January to September 2019, nine illicit recordings of MPA member films were traced to Spanish theaters, a slight increase from the same period in 2018.

**Enforcement** – In general, judicial action in Spain is slow, but this is even more the case in relation to IP-related crimes. The Ministry of Justice recently announced its goal to set up a public prosecutor’s office focusing solely on IP crimes. Currently, no budget exists for this initiative. Helpfully, Spanish criminal courts have recently handed down positive decisions against administrators of pirate websites, including site blocking orders. With regard to administrative law procedures, the Intellectual Property Commission (IPC) has failed to address complaints against linking sites and cyberlockers, which are usually located outside of Spain.

## Legislation

EU E-Commerce Directive – Spain’s E-Commerce Law creates a limitation on liability for ISPs that goes beyond the standard permitted by the EU E-Commerce Directive. The law fails to correctly implement the constructive knowledge standard and confers liability only on the basis of “effective knowledge.” In addition, Spain does not require ISPs to respond to any take-down request that is not accompanied by an order from a “competent body,” which has been interpreted to mean a court order. Recent legal amendments (detailed below) improve the IPC’s site-blocking powers by providing it with the authority to fine non-cooperative ISPs.

Enforcement Directive – Spain’s IP law amendments, which date back to 2006, correct Spain’s earlier improper implementation of the right to information under the EU Enforcement Directive. Judges can now grant right of information while limiting its application to cases involving an “appreciable” Spanish audience and a “relevant” number of copyrighted works.

Spanish Data Protection Law – This law does not allow a civil party to collect and process infringers’ IP addresses on the basis that such details are personal, confidential data. As a result, rights holders have no viable path to take action against internet users who seriously infringe copyright.

Royal Decree-Law 2/2018 that modifies Spanish Copyright Act – This Royal Decree-Law significantly modifies the administrative proceeding before the IPC. The changes aim to reduce latency by eliminating the obligation for a “judicial decision” to close the infringing websites and, also, by granting the IPC with powers to suspend the internet service to the infringing website, if such website does not provide the relevant information.





## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Sweden is a major contributor to worldwide internet piracy. Significant source piracy infrastructure and group memberships have flourished in the country, contributing to Sweden’s reputation as a “safe haven.” Annual studies from Mediavision show that Sweden has more digital pirates than any other Nordic country. Out of 320 million illegally streamed and downloaded movies and episodes in the region, 132 million (40 percent) were downloaded and streamed in Sweden. This is 3.5 times larger than the legal market. However, these figures have declined slightly since 2018, due to several actions from rights holders, together with enforcement authorities and prosecutors, against illegal services.

Illegal streaming in Sweden remains a serious threat to the motion picture industry. While Swedish law is clear that downloading from an illegal source is illegal, the government still has not clarified that it is illegal to make temporary copies from an illegal source. In addition, topsites, highly specialized servers with massive storage and extremely high bandwidth, are used by release groups for the first release of pirate content on the internet. This stolen source content is then passed down using a series of couriers from topsites to Internet Relay Chats, Newsgroups and P2P networks; this is known as the “Scene.” The Scene is very active and growing in Sweden. Further, in recent times, the number of illegal IPTV services in Sweden has grown rapidly.

Enforcement – There is a special unit for IP crimes within the Police and Prosecutor’s offices. The police unit, reorganized in January 2015, now has nationwide jurisdiction. Sweden also created special IP courts in 2016. Swedish court sentences continue to be very modest, but the damages can be very high. A 2019 Supreme Court judgment has led

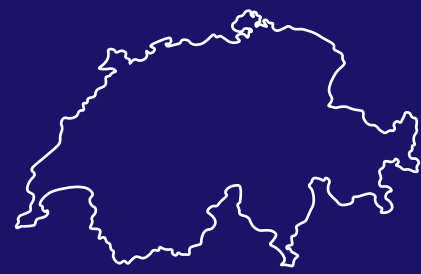
to lower but sufficient levels of damages.

Rights holders have advocated that the penalties for copyright infringement should be in line with similar economical criminal offences such as theft and fraud. The government appointed an inquiry group, which proposed that the new “serious copyright crime” be introduced with penalties ranging from six months to 6 years. The new legislation is delayed but appears likely to be addressed in 2020.

Law enforcement are not yet authorized to seize a website domain during a criminal investigation. This means that an online service can stay online and continue its illegal activities without any disruption from law enforcement.







## MARKET ACCESS ISSUES

Film Act Amendment – Effective since 2016, a Film Act provision known as the “unique distributor clause” has been extended to all forms of exploitation, including DVD/physical home entertainment and all forms of VOD/online distribution, with the exception only of linear television (broadcasters’ ancillary on-demand rights are excepted only for 7-day catch-up). Exploitation of a film in any media in Switzerland now requires exclusive control over all language versions in Switzerland (to the extent actually exploited), in the hands of a single distributor. This is accompanied by laborious registration and reporting duties, which address foreign entities owning and exploiting rights in Switzerland. The provision lacks clarity and has caused several areas of dispute and uncertainty: 1) whether or not all types of VOD (including SVOD) must be included in exclusive “package” licenses for the territory; 2) the extent of “grandfathering” protection for existing contractual fragmentation of film rights (output deals made prior to 2016 lost “grandfathering” treatment as of 2019). In sum, this amendment interferes with internationally established licensing practices. The Federal Office reportedly plans to address the above issues in a guideline for possible publication in 2019 or 2020.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Switzerland’s inadequate legal framework and robust technical infrastructure make it an attractive host for illegal sites. Host and data centers based in Switzerland provide hosting services to other ISPs, including pirate services, often without checking into the identities or businesses of their customers.

## Legislation

Copyright Legislation – Switzerland’s copyright law is wholly inadequate, lacking crucial mechanisms needed for enforcement in the digital era. Swiss copyright law fails to clarify that the private copy exception does not apply to unlawful sources. This plays together with the lack of any access blocking mechanism, providing Swiss consumers with unaltered access to piracy. Swiss law allows acts of circumvention of technological protection measures “for the purposes of a use permitted by law” (Article 39(a)(4)), an exception that is far too broad, particularly given the inappropriately wide scope of the private copy exception.

In November 2017, the Swiss government presented Parliament with a draft revised Copyright Act, which was passed by the Swiss Parliament at the end of September 2019. The bill is expected to enter into force on January 1, 2020. Unfortunately, the draft Copyright Act shows significant shortcomings and will not meaningfully improve copyright protection. The Swiss government has overtly refused to introduce basic elements of internationally accepted anti-piracy norms, such as site blocking, into Swiss law. Instead of proposing a legal source requirement for private use, the draft cements an understanding that private use of illegal sources is permitted. The draft also does not abolish or limit the scope of collective licensing of “catch-up TV” recording/making available services. In addition, it proposes the introduction of a compulsory collective remuneration on VOD for a broad range of content, which would interfere with contractual freedom and licensing practices.

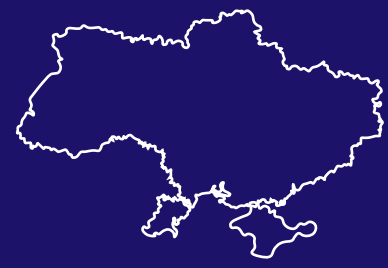
It is critical that the Swiss government come into compliance with the Berne Convention/TRIPs, WIPO Internet Treaties, and internationally acceptable enforcement standards. Necessary



# Switzerland

minimum changes would include: 1) ensuring liability under Swiss law for parties who facilitate, encourage, and profit from widespread infringement; 2) engaging ISPs in the fight against online piracy; 3) affirming that current law does not permit copying from unauthorized sources; and 4) implementing adequate civil and criminal enforcement tools including site blocking.

Enforcement – In 2019, the Swiss Federal Supreme Court dismissed site blocking in a case filed by a local rights holder. The Supreme Court held that ISPs do not contribute to copyright infringement. The Court additionally explicitly upheld the legal permission for private users to access and use infringing sites. Further, overly restrictive interpretation of data protection legislation, following the Logistep decision by the Swiss Supreme Court, has halted effective criminal and civil enforcement against copyright infringement.



## MARKET ACCESS ISSUES

Compulsory Manufacturing of Film Prints – Ukrainian law requires the production of film prints locally as a prerequisite for the issuance of a state distribution certificate. This restrictive policy favors a handful of vendors at the expense of Ukraine’s theatrical industry and consumers.

Customs Valuation – In May 2012, a new Customs Code was adopted which affirms that royalties on both theatrical and home entertainment imports are subject to duties in Ukraine. This methodology is out of step with global norms, burdensome in terms of assessment, and amounts to double taxation. The Ukrainian Supreme Court has rendered views in opposition to this methodology, but Customs authorities disregard the decisions. No developments and no substantial court practice have emerged so far on this issue. Although the previous Government proposed to change the procedure for the inclusion of the amount of royalty and other license fees in the price actually paid or payable for the goods being valued, the proposals have never been implemented.

Local Language Screening Quotas – In July 2019, the Law “On Ensuring the Functioning of the Ukrainian Language as the State Language” entered into force. In accordance with this law, the movie theaters can only show foreign films in the original language, accompanied by subtitles in the Ukrainian language. The total number of movie screenings in a non-national language may not exceed 15 percent of the total number of movie screenings at a movie theater per month. As of July 16, 2021, this amount must not exceed 10 percent of the total number of movie screenings at a movie theater per month. Moreover, the screening of foreign films in the original language, accompanied by Ukrainian subtitles, is subject to 20 percent VAT.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The Government of Ukraine, as part of its effort to promote the rule of law, should take significant steps to change the conditions that allowed Ukraine to become a haven for internet piracy. Both P2P services and illegal hosting-sites targeting Western European and U.S. audiences are very serious problems in Ukraine. The country also hosts some of the most notorious Russian BitTorrent sites, after closure in Russia (rutor.in., rutracker.in., rus-media.org. etc.)

Camcord Piracy – Source piracy from Ukraine remains a concern for MPA member companies. From January to September 2019, four illicit audio or video recordings of MPA member films were traced to Ukrainian theaters, down from eight in the same period in 2018. In April 2017, a new law “On State Support of Cinematography in Ukraine” introduced criminal liability for camcording and card-sharing and some other new provisions. Helpfully, in June 2019, a district court handed down the first court verdict against a camcorder.

Broadcast Television Piracy – A large number of Ukrainian cable operators continue to transmit pirated product without authorization. Enforcement authorities should shut down operators that engage in infringement.

Illegal Film Screening – Small Ukrainian theaters will screen pirate digital copies of films without a State Certificate, which is a punishable offense. Helpfully, thus far in 2019, law enforcement agencies have investigated and shut down 14 illegal theaters for illegal film screening.

Enforcement – The four most significant enforcement challenges in Ukraine are 1) the absence of criminal prosecutions and deterrent



# Ukraine

sentencing; 2) ineffective border enforcement, especially against large-scale pirate operation; 3) illicit camcording in theaters, and 4) the lack of civil remedies to address online piracy. Also, law enforcement practices requiring rights holders to provide damage estimations in every case filed is a serious challenge for rights holders and a de facto hurdle for proper enforcement.

The Supreme Court of Intellectual Property was created in September 2017. In 2019, judges for this court were chosen after competitive selection, but the court is still not operational. This court, as planned, will handle civil and administrative cases concerning intellectual property protection.

## **Legislation**

Criminal Procedure Code—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. The Criminal Procedure Code should be amended to provide Ukraine’s enforcement authorities with this critical enforcement tool.





## MARKET ACCESS ISSUES

AVMSD Implementation – Official consultation documents relating to the implementation of the 2018 EU AVMSD in the UK indicate that the current Government prefers to sustain its current system of tax incentives to support local film and high-end TV production. If the UK exits the European Union prior to the 2018 AVMSD deadline of September 2020, the UK will have the option not to implement the AVMSD 2018. However, with future UK-EU trade and reciprocal relationships in mind, it is likely that the UK will pursue some form of implementation, full or partial, for the purposes of future alignment with its closest trading partner.

Freedom of Movement – A UK exit from the EU without a Withdrawal Agreement is likely to create serious complications for the freedom of movement of people and goods between the UK and other EU Member States. This could add friction to the process of producing audiovisual content in the UK and in the EU by adding additional visa requirements for productions wishing to move cast, crew and equipment between the UK and the EU.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy remains the prevalent form of film and TV piracy in the UK, with streaming of film, TV and sports content via piracy devices and apps, and via digital apps and Add-Ons accessed via laptops, tablets and smaller devices.

Organized criminal gangs, still heavily involved in optical disc piracy, are increasingly involved in the importation, configuration and marketing of piracy devices and apps. MPA appreciates the Border Agency's increased interest in addressing this problem.





# NATIONAL TRADE ESTIMATE



# WESTERN HEMISPHERE



# Western Hemisphere Overview

Our industry's largest foreign markets in the Americas – Canada, Brazil, and Mexico – each pose a unique set of challenges for U.S. media and entertainment exports. Meanwhile, emerging markets such as Colombia are embracing so-called Orange Economy reforms aimed at promoting the creative industries and attracting foreign collaborations and investments. While most countries in this hemisphere are smaller markets for MPA member companies, negative government policies in these territories often proliferate, impacting the global policy framework.

Throughout the hemisphere, MPA members face domestic content quotas. In recent years, Brazil raised its screen quota, increasing the total number of domestic films that must be exhibited per year and the number of days they must be exhibited, while also requiring local content quotas for the pay-TV industry. Argentina recently began enforcing local content quotas for movie theaters and free-to-air television. Canada maintains a web of discriminatory and outdated content quotas for broadcast and pay-TV which artificially inflate the total spend on Canadian programming. Further, recent bills in Chile's legislature, if implemented, would impose screen quotas that appear inconsistent with Chile's FTA commitments.

While countries throughout the region continue to pursue content quotas and similar protectionist measures targeting traditional distribution channels such as theatrical and pay-TV, such measures are now migrating into online markets, threatening the vitality of fast-growing business segments such as video on demand (VOD), and other online services. Several markets, including Argentina, Brazil, and Mexico, are exploring new quotas or regulations on over-the-top (OTT) platforms, which could inhibit market growth and limit consumer choices.

The U.S. motion picture and television industry also faces barriers in the form of foreign ownership caps and advertising restrictions. For example, Canada and Mexico both maintain foreign investment limitations in their broadcasting or pay-TV markets. Further, Mexico and Argentina impose strict advertising limitations on pay-TV channels.

Beyond market access barriers, our industry also faces barriers in the form of widespread content theft. While hard goods piracy persists throughout the region, online piracy is the primary barrier and priority for our industry. Of particular concern is the proliferation of piracy devices and apps – media boxes, set-top boxes and other devices – that allow users to stream, download or view unauthorized content from the internet. These devices are gaining popularity throughout Latin America and becoming a leading vehicle for online piracy of audiovisual material. Another emerging regional threat is piracy from illegal internet protocol television (IPTV) services that provide stolen telecommunication signal/channels to a global audience via dedicated web portals, third party applications and piracy devices configured to access the service. MPA is working closely with law enforcement and other IP stakeholders on strategies to address these various challenges, in the Americas and around the world.

MPA has seen increasingly-organized online piracy in the region and the formation of internet release groups. Internet release groups have been identified in Argentina, Brazil, Chile, Ecuador, Guatemala, Mexico and Peru. These groups are overtly profit driven and utilize different distribution channels to release content. Rather than closely-held topsites, some of these groups operate public websites and work at the P2P level. In general, they also have a close association with hard goods operators. Moreover, in the last couple of years, Latin American release groups have extended their



# Western Hemisphere

operations outside the region, recruiting operatives in the United States and Russia. It is imperative that countries' legal and enforcement frameworks promote accountability and the rule of law and create incentives for intermediaries to cooperate with rights holders in combating this serious, ongoing problem.

Camcording as source piracy is a persistent problem in Latin America, although progress against this crime is improving overall. A total of 68 illicit audio and video recordings of MPA member company films were sourced from Latin American theaters from January through September 2019, down sharply from 112 during the same period in 2018. While camcording totals have recently dropped sharply in Mexico and Brazil, incidents are spiking in smaller countries such as Ecuador. In general, over the past several months, rights holders' ongoing outreach with law enforcement and exhibitors has facilitated the arrest/interdiction of professional cammers, audio cappers, brokers, and members of Latin America's most active release groups. While these general trends are encouraging, MPA continues to urge regional governments to strengthen their enforcement regimes so that gains can be sustainable in the face of ever-changing criminal behaviors.

Anti-camcording legislation is a critical tool to assist local law enforcement efforts against camcord piracy. Some countries, such as Argentina and Canada, have legislative frameworks that have fostered effective enforcement against this damaging source piracy. Other territories, notably Mexico, Peru, and Brazil, suffer from the absence of a legislative framework specifically criminalizing the act of illicit camcording in theaters. However, helpful anti-camcording bills are currently under consideration in each of these markets. Until these bills become law, the lack of legal clarity to criminalize unauthorized movie recording complicates rights holders' efforts to obtain

cooperation from law enforcement and prosecutors.

MPA continues to monitor legislative and regulatory proposals in Latin America that would impose mandatory collective rights management (CRM) of author and performer rights in the audiovisual sector, including, in particular, on communication to the public (CTTP) exploitations. The main concern relates to statutory remuneration rights for authors and performers that must be administered by collective management organizations (CMOs) – and could be enforced against licensees (e.g., platforms, cinemas). We have seen various efforts to introduce mandatory CRM but, thus far, only Peru has sought to introduce mandatory CRM for performer remuneration rights for the CTTP of audiovisual works, and that proposal remains stalled. Other initiatives include introduction of voluntary CRM for CTTP rights in Chile; Uruguay's proposal to extend “unwaivable and inalienable” rights to co-authors of audiovisual works (although stopping short of calling for mandatory CRM); a potential Mexican proposal to introduce what seems to be an overly broad private copy levy to be collected by CMOs; and Brazil's recent accreditation of author and performer CMOs despite the absence in the law of remuneration rights for those rights holders. These and any similar proposals would likely have a negative impact on U.S. exports in the audiovisual sector through imposition of additional, unjustified increases in distribution and licensing costs and resulting confusion in the marketplace for rights clearance.

In Central America and the Caribbean, including Honduras, Guyana, Guatemala, and Trinidad and Tobago, rogue cable operators are unlawfully receiving and retransmitting channels and content of international programmers. While some governments in the region, including Jamaica and Dominican Republic, have recently stepped up their focus on this unauthorized use of U.S. intellectual property, more work is needed to address this



# Western Hemisphere

challenge. These rogue operators negatively affect investment and competition in local markets, impacting international programmers, as well as local distribution platforms. Enforcement authorities should revoke the licenses of operators that are infringing copyright.

Over the past couple of years, several Western Hemisphere governments have amended their copyright frameworks or are actively considering amendments. In Canada, the Government passed long-awaited reforms to implement the WIPO Internet Treaties. In 2018, Colombia took necessary steps to update its copyright law and significantly improved copyright protection through its legislative reform. In Argentina, copyright reform is stalled and in Brazil, reform is underway. As Governments consider reforms to address copyright in the digital age, it is critical for the U.S. government to continue to engage them on the need for these reforms to be consistent with both the international copyright framework, and, in the case of FTA partners, consistent with their bilateral obligations.

MPA members distribute film and television content throughout North America, maintaining a healthy trade surplus with both Canada and Mexico. However, there are serious disparities between the level of market access and intellectual property protections offered by the United States as compared to its closest neighbors. The recently negotiated U.S.-Mexico-Canada Agreement (USMCA) includes some important provisions that could enable our industry to compete more fairly and expand the U.S. trade surplus with Mexico. For instance, USMCA contains strong commitments with regard to unauthorized camcording, cable and satellite signal theft, and technological protection measures (TPMs). Helpfully, the agreement also compels parties to implement the WIPO internet treaties. The agreement also provides ex officio authority for police and customs officials,

enforcement against commercial scale piracy, full national treatment, and extension of the term of copyright protection. Regrettably, the USMCA preserves Canada's cultural carve-out. However, MPA appreciates the inclusion of a robust retaliation mechanism to help deter future protectionist policies. MPA looks forward to working with the U.S. Government to ensure that the agreement is fully and effectively implemented.





## MARKET ACCESS ISSUES

Local Content Quotas – In July 2018, INCAA (the National Film and Audiovisual Arts Institute) published Resolution 1050/2018 regulating content quotas for movie theatres. Domestically produced films must represent 30 percent of the volume of content shown, for the entirety of one week per quarter where there is a dedicated screen (while that 30 percent content quota was in effect previously, under the prior regulatory regime, the screen could be shared with another film). Under the current regulation, should the exhibitor share the screen with another movie, the local production must be shown for two weeks, or until the quota is fulfilled. Also in July 2018, ENACOM (National Communications Agency) announced via Resolution 4513 that a 30 percent local content quota would be enforced on free-to-air TV in urban areas (10-15 percent for lesser populated markets).

The status of content quotas for pay-TV and streaming services remains unconfirmed in the vacuum left by the delayed Convergence Communications Law (see below). However, in May 2019, a legislator proposed Bill S-709/208 that would additionally impose three hours of weekly local content quotas on pay-TV services and introduce 10 percent quotas on streaming services. This bill is being debated at the Communications Systems, Media and Freedom of Expression Committee. While the likelihood of a favorable vote on this Bill is unclear for 2019, content quotas are widely expected to remain an issue in 2020.

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

income, value-added, and remittance taxes.

Advertising Restrictions – Argentina imposes strict limitations on advertising minutes in the pay-TV space. Caps on advertising minutes currently stand at 6 minutes per hour, allowing industry averaging up to 144 ad minutes per calendar day.

## INTELLECTUAL PROPERTY PROTECTION

Online Piracy – Digital piracy is an ongoing challenge for rights holders in Argentina. Both online and on mobile phones, digital piracy in Argentina takes many forms, including torrent sites, downloading, streaming, cyberlockers, and linking sites. Following a regional trend, Argentina continues to see an increase in the usage of piracy devices and apps, which are used to stream illicit copies of films and television. The prevalence of piracy undermines the emerging digital economy in the country.

Copyright Enforcement – Procedural hurdles in the criminal and civil courts complicate moving cases through the system. Argentine police do not take ex officio actions, police often fail to comply with search warrants in a timely manner, and prosecutors often fail to pursue criminal cases. Argentina also lacks adequate enforcement resources, such as special police crime units dedicated to online piracy, to enforce copyrights online. To address digital piracy, the government should encourage the development of processes that enhance cooperation between rights holders and online intermediaries. Argentina's law should also establish sufficient liability for known infringements.

## Legislation

ISP Liability Legislation – Argentina's National Congress is developing ISP liability legislation



# Argentina

that, as currently drafted, would severely impair creators' ability to fight piracy on the internet. In general, this initiative is problematic because it 1) provides an overly broad safe harbor for a non-exhaustive list of service providers, 2) suggests voluntary "self-regulation" measures for notice and takedown that are not likely to compel ISP cooperation with rights holders, and 3) imposes burdensome requirements for rights holders, out of balance with responsibilities it imposes on ISPs. While the current proposal may stall at the end of this legislative session, the measure is widely expected to resurface in 2020.

## Communications Convergence ("Media Law")

Legislation – In August 2019, the Ministry of Modernization published a resolution announcing a fourth delay in presenting a Media Law proposal, the "Convergent Communications Bill," to the Executive. Delivery of the proposal was set for mid-November 2018, just prior to the close of the 2018 legislative session, but appears delayed indefinitely as elections approach in late 2019. This reform posed an opportunity for Argentina to eliminate/reduce local content quotas, clarify regulations for TV content, ease caps on TV advertising, and establish a ratings system consistent with U.S. standards. The government should ensure that any subsequent media law reforms respect fundamental business principles, including contractual freedom and respect for copyright, and should avoid/reduce protectionist policies such as screen/content quotas. Further, any media law reforms should respect the principles of the bilateral investment treaty between the U.S. and Argentina.

Penal Code Reform – In March 2019, the Macri Administration presented to Congress a penal code reform bill that 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; 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 illicit streaming devices, which enable piracy of creative works. These provisions, if implemented, would improve the enforcement landscape for copyrighted works in Argentina.







## MARKET ACCESS ISSUES

Television Content Quotas – Effective September 2011, Law 12.485/2011 (Pay-TV Law) 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, 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 (audiovisual regulator), are pending before Brazil’s Supreme Court.

Screen Quotas – The most recent Presidential Decree on Screen Quotas imposed quotas for 2018 that are similar to prior years, requiring between 28 and 800 days of screening of local content, depending on the number of screens in the theater complex. According to Normative Ruling 141, if the same screen displays two sessions, on the very same day, and if only one of the film titles is Brazilian, it will be computed as “half quota” (half-day unit). However, if both films are Brazilian, it will be considered a “full quota” compliance (1-day unit). The Decree also continues to specify that a wide-release film may be limited to exhibition on 30 percent of the screens (the so-called supplementary 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. A decree establishing quotas for 2019 awaits enactment by President Bolsonaro, as of October 2019. Exhibitors continue to comply with the 2018 decree until further notice.

Video on Demand (VOD) Taxation – 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 for annulment of the 2012 Normative Ruling.

Media Cross-Ownership and OTT Regulation – In a related debate, 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 distributors of pay-TV content, and 2) whether direct-to-consumer offers by Over-the-Top (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 costs (tax) that would be passed on to programmers. Final administrative decisions on both topics are expected in late 2019 or early 2020, while numerous related legislative proposals are under consideration, addressing both media cross-ownership and OTT distribution.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Brazil’s legitimate online audiovisual services continue to suffer from the pervasive availability of illicit, advertising-supported services, despite the increasing availability of legitimate options. Recent studies indicate that Brazilian IP addresses ranked second worldwide among those engaged in unlicensed P2P downloads of TV content, and third for such illegal downloads of movies. Use of piracy devices continues to rise in Brazil, exemplified by the increased market penetration of an illicit internet protocol (IPTV) box called HTV. HTV offers a grid of 170+ live pay-TV channels and a VOD service that offers TV shows and motion pictures- many of which are sourced through illegal camcording activity. These piracy devices 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.

Camcord Piracy – Camcord piracy remains a persistent problem in Brazil, although the problem is trending in the right direction. From January through September 2019, 15 illicit audio and/or video recordings of MPA member company films were traced to Brazilian theaters, down from 24 during the same period in 2018.

Enforcement – Brazil is demonstrating a new political will to combat piracy, as Ancine recently created an anti-piracy chamber and the Ministry

of Justice’s National Council to Combat Piracy and Intellectual Property Crimes (CNCP) has been reinigorated. However, Brazil has yet to establish a dedicated IP police department or an IP court, along with rules to reduce the timing and costs of inquiries and lawsuits. Brazil also needs to enshrine deterrent sentences for copyright theft.

## Legislation

Copyright Reform – In July 2019, the Ministry of Citizenship launched a public consultation to solicit views on how to modernize the Copyright Law. In parallel, two legislative proposals (Bills 3133/2012 and 6117/2009) remain concerning to rights holders, as the bills promote broad exceptions and limitations to copyright that are inconsistent with Brazil’s international obligations and would likely deter investment in Brazil’s creative industries.

Camcord Legislation – In May 2019, the head of the Committee of Justice and Constitutional Affairs released a helpful anti-camcording bill (2714/2019), which has been unanimously approved at the Committee on Culture. MPA supports this initiative, which would punish camcording without requiring proof of the perpetrator’s intent to profit.

Intermediary (Advertising) Liability Bill – In 2018, the Brazilian legislature introduced a proposal (Bill 9744) to increase enforcement over advertising intermediaries who contribute to copyright infringement on local pirate sites. The bill was based on a report conducted by a renowned scientific institution, IBOPE, which revealed high ad-network revenues originating from rogue websites. The bill currently lies at the House Committee on Constitutional Affairs and awaits a final report. In parallel, the National Council against Piracy is facilitating discussions aimed at setting voluntary agreements with advertising associations, to address this piece of the piracy ecosystem. Outcomes from the voluntary initiative may impact the advancement



# Brazil

of the draft bill.

Site Blocking Legislation – In 2016, the Parliamentary Committee of Inquiry on Cybercrimes approved in its final report a bill on site blocking, now Bill 5204/2016. The bill is still under consideration by the Committee on Science and Technology along with a similar site blocking bill (169/17). Applauded by rights holders, these initiatives would expressly authorize Brazilian courts to issue orders requiring ISPs to block access to websites hosted outside Brazil that are dedicated to copyright infringement. Such initiatives would enable Brazil to utilize enforcement tools that are emerging as best practices in Europe and the Asia-Pacific region.





## MARKET ACCESS ISSUES

Television Content Quotas – The Canadian Radio-television and Telecommunications Commission (CRTC) imposes two types of quotas that determine both the minimum Canadian programming expenditure (CPE) and the minimum amount of Canadian programming that licensed Canadian television broadcasters must carry (Exhibition Quota). Such quotas are discriminatory and artificially inflate the amount expended on, or the time allocated to, Canadian programming.

First, large English-language private broadcaster groups have a CPE obligation equal to 30 percent of the group’s gross revenues from their conventional services and discretionary services (specialty and pay-TV) combined, but there is some flexibility as to allocation among the services within the group. As their licenses are being renewed, CPE obligations are being assigned to independent signals and to independent discretionary services that have over 200,000 subscribers. These quotas are effective starting September 1, 2018, depending on the date of license renewal, and are based on historical levels of actual expenditures on Canadian programming.

Second, per the Exhibition Quota, private conventional broadcasters must exhibit not less than 50 percent Canadian programming from 6 pm to midnight. The overall 55 percent quota was removed as of September 2017. Private English-language discretionary services (specialty and pay-TV) must exhibit not less than 35 percent Canadian programming overall.

Non-Canadian Signal and Service Restrictions – Canadian broadcasting distribution undertakings (BDUs), such as cable and direct-to-home satellite, must offer more Canadian than non-Canadian

services. These protectionist measures inhibit the export of U.S. media and entertainment services.

First, BDUs must offer a “skinny basic” tier for not more than \$25 per month that may include one set of “U.S. 4+1” (ABC, CBS, FOX, NBC and PBS) from the same time zone as the BDU’s headend, where available, if not, from another time zone. BDUs may also offer an alternative basic tier that includes the same set of U.S. 4+1 signals. A BDU may 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.

Second, except as permitted in 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. Further, a service may be removed from the Authorized List if it changes formats and thereby becomes competitive with a Canadian pay or specialty service, if it solicits advertising in Canada, or if it does not conduct its negotiations and enter into agreements with BDUs in a manner that is “consistent with the intent and spirit of the Wholesale Code.” A principal purpose of the Wholesale Code is to prohibit contractual terms that discourage or penalize the offering of services on a stand-alone basis.



Broadcasting Investment Limitations – The Broadcasting Act provides that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay and specialty television) and distribution undertakings (cable 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 percent of a licensee’s Directors must be Canadian; and, 3) at least 80 percent of the licensee’s voting shares and votes must be beneficially owned and controlled by Canadians. If the licensee is a subsidiary corporation, its parent must be Canadian and at least two-thirds of the voting shares and votes of the parent must be beneficially owned and controlled by Canadians. The parent corporation or its directors cannot exercise control or influence over the programming decisions of its licensee subsidiary where Canadians own and control less than 80 percent of the voting shares and votes, the CEO of the parent company is non-Canadian, or less than 80 percent of the directors of the parent corporation are Canadian. In such circumstances, the CRTC requires that an “independent programming committee” be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on such independent programming committee. No other developed market in the world maintains such discriminatory foreign investment limitations.

Simultaneous Substitution for the Super Bowl – Starting with Super Bowl LI in 2017, simultaneous substitution of advertising is no longer allowed for Canadian broadcasts of the Super Bowl. This is the result of a 2015 CRTC decision, an appeal from which is under reserve at the Supreme Court of Canada. If the CRTC’s decision is upheld, the simultaneous substitution ban will continue to

be applied to only one program, with significant prejudicial impact on the ability of the National Football League (NFL) and the existing Canadian licensee to monetize the Super Bowl in Canada. Helpfully, the recently negotiated USMCA, if implemented, would commit Canada to permit simultaneous substitution of advertisements during the Super Bowl.

Québec Distribution Restrictions – The Québec Cinema Act severely restricts the ability of non-Québec-based film distributors to do business directly in Québec. Since 1986, 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.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Canada’s digital marketplace remains hampered by widespread infringement, including infringing paid subscription Internet Protocol Television (IPTV) and Video-on-Demand (VOD) services, streaming sites and other online sources for unauthorized movies and TV shows, and piracy devices and apps, readily available both online and in the retail market, that suppress demand for legitimate digital streaming and VOD services.

Enforcement – General intellectual property crimes are not a strategic or operational priority for the Royal Canadian Mounted Police (RCMP). The policy challenges are compounded by the fact that RCMP and the Department of Justice are not provided with adequate financial and human resources to address piracy and counterfeiting. As such, the responsibility is then shifted down to local law enforcement who are equally under-resourced and cannot adequately address intellectual property



crimes. This issue is compounded by the knowledge gap concerning the prosecution of intellectual property crimes, a problem that is amplified when dealing with emerging piracy models.

Amendments to the Copyright Act, which came into force in November 2012, created an “enablement” clause whereby providing “a service primarily for the purpose of enabling acts of copyright infringement” constitutes infringement. While online services that enable others to make illegal copies (such as a BitTorrent sites) are now subject to civil liability, the current tools in the Copyright Act are insufficient to deal appropriately with the new forms of online piracy that were not present, dominant, or contemplated in 2012, such as streaming sites, cyberlocker (host) sites, set-top boxes configured to allow users to access unlicensed content, and illegal IPTV subscription services. In addition, there are aspects of the legal framework that do not provide appropriate legal incentives for intermediaries (e.g. ISPs, payment processors, online advertising networks, hosting providers) to cooperate with rights holders in deterring piracy. The framework also provides broad exceptions to copyright that remain untested.

Copyright Term – It is imperative that Canada extend the term of protection for all works measured by the life of the author to life plus 70 years. Extension of the term of protection for copyrighted works has a direct benefit to the creators of these works, as well as consumers. An extended term creates entrepreneurial opportunities, encouraging investment in new creative works, as well as the preservation, restoration and reissuing of older works in exciting new formats. This provides consumers more choice and preserves cultural heritage. More than 90 countries around the world agree that extending copyright terms to the global minimum standard is necessary and appropriate in today’s highly inter-connected world with simultaneous distribution of a wide variety of

copyright-based products. Helpfully, the recently negotiated USMCA, if implemented, would commit Canada to extend the term of copyright protection to match the global minimum standard.





## MARKET ACCESS BARRIERS

Advertising on Broadcast and Pay-TV Services – Under the 2014 Federal Telecommunications and Broadcasting Act, Mexico imposes advertising limitations on pay-TV channels. These rules aim to promote domestically-made programming through incentives and restrictions on advertising. Pay TV channels, which are primarily operated by foreigners and are less likely to exhibit domestically-made content, are forced to abide by both daily and hourly advertising limits while their domestic and free-to-air counterparts are allowed almost twice the daily advertising limit and are not subject to hourly caps. Furthermore, a free-to-air channel that dedicates 20 percent of its programming to independent domestic content qualifies for an additional five percent bonus in advertising time. This discriminatory treatment harms existing business models and makes it more difficult to distribute foreign content within Mexico, artificially suppressing U.S. industry’s trade surplus.

Foreign Ownership Limitations – Mexico currently maintains a 49 percent foreign equity cap for broadcast networks. By comparison, the U.S. FCC recently permitted foreign entities to hold up to 100 percent of a broadcaster, subject to a case-by-case review.

Local Content Quotas – On a regular basis, and more recently as Mexico undertakes a review of its Federal Cinematographic Law, some legislators have proposed the imposition of screen quotas and limits to the number of screens in which a given movie can be exhibited. If adopted, these protectionist measures would severely limit the exhibition of U.S. films in Mexico. Furthermore, a separate legislative proposal to reform the Telecom Law would impose a 30 percent local content quota

on over the top (OTT) services. These proposals are inconsistent with Mexico’s NAFTA and USMCA obligations and should be opposed.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy is a serious, widespread problem in Mexico. Piracy devices and apps have become increasingly present in Mexico’s electronic-hardware grey markets, denoting increased preference for this type of illegal consumption. While there are some local infringing websites, many of the infringing sites and services routinely accessed by Mexican users are hosted outside of Mexico. Overall, the use of hardware devices, social networks, illicit streaming devices and software to pirate television programming, including subscription streaming services, is increasingly sophisticated and ubiquitous.

Enforcement – Mexico should develop clear third party liability rules and proper injunctive relief to improve enforcement against large-scale infringers, including adopting site-blocking measures for foreign sites. More work, in particular, is needed to disable mirror websites in Mexico. The enforcement problems in Mexico are procedural and structural and exacerbated by a lack of resources and gaps in expertise. The development and adoption of a high-level national anti-piracy plan to target major piracy and counterfeiting operations, coupled with coordination of federal, state, and municipal activities, would improve Mexico’s enforcement landscape.

Camcord Piracy – While camcord piracy is trending in the right direction, Mexico remains one of the largest foreign sources of illegally recorded films in the world. From January through September 2019, 20 illicit audio and/or video recordings were traced to Mexican theaters, down from 70 during





# Mexico

the same period in 2018. Successful enforcement against camcord piracy requires evidence of intent to distribute, that is, proof of a profit motive, which is very difficult to obtain. By comparison, in the U.S. and Canada, the laws recognize the act of unauthorized camcording in a cinema as a crime by itself. The US-Mexico-Canada Agreement (USMCA) contains strong anti-camcording commitments that, if properly implemented, should greatly enhance enforcement against camcording in Mexican theaters.

