



MOTION PICTURE ASSOCIATION

# **MPA Comments Regarding Foreign Trade Barriers to U.S. Exports for 2023 Reporting**

**Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Malaysia, Mexico, the Netherlands, New Zealand, the Philippines, Poland, Russia, South Africa, South Korea, Spain, Switzerland, Taiwan, Thailand, the UK, and Vietnam**

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October 2022

October 28, 2022

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

William Shpiece  
Chair of the 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 on Significant Foreign Trade Barriers for the 2023 National Trade Estimate Report (Docket: USTR-2022-0013)

Dear Mr. Shpiece:

MPA proudly represents one of our nation's most vibrant industries – the American motion picture, television, and streaming 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 the nation's creativity and dynamism. To that end, please find in the enclosed submission our industry's observations on significant trade barriers in priority foreign markets. MPA's submission is organized by region and includes specific comments on Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Malaysia, Mexico, the Netherlands, New Zealand, the Philippines, Poland, Russia, South Africa, South Korea, Spain, Switzerland, Taiwan, Thailand, the UK, and Vietnam.

The American motion picture, television, and streaming industry is a major U.S. employer that supported 2.2 million jobs and \$192 billion in total wages in 2020. Nearly 273,000 jobs were in the core business of producing, marketing, and manufacturing of motion pictures and television shows. Another nearly 480,000 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 hundreds of thousands of largely small companies that do business with the industry, such as caterers, dry cleaners, florists, hardware and lumber suppliers, and retailers.

In 2020, the enduring value and global appeal of U.S. entertainment earned \$17.3 billion in audiovisual exports. Moreover, this industry is one of the few that consistently generates a positive balance of trade. In 2020, that services trade surplus was \$9.6 billion, or three percent of the total U.S. private-sector trade surplus in services.

The U.S. motion picture industry distributes its films, television shows, and streaming content 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 significant 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 migrating 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, local content investment obligations, network usage fees, 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. Legitimate online platforms allow global audiences to enjoy creative entertainment wherever, whenever, and on whatever device they choose. Consumer demand for high-quality content is driving this global digital trade, which helps support millions of American workers and thousands of jobs overseas.

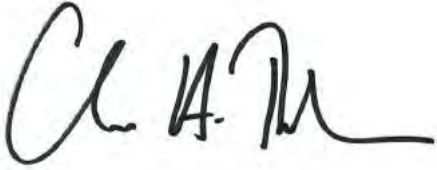
However, as countries increasingly propose and implement barriers to digitally enabled services, the widespread availability of MPA member content through legitimate channels is placed in jeopardy. Open, free, and reciprocal digital trade is key to our industry's ability to compete globally and to continue offering billions of consumers access to content of their choice. Addressing and dissuading our international trading partners from adopting restrictive and often discriminatory measures is not only beneficial to U.S. industry but underpins good governance practices, global rule of law, and the exchange of information and ideas. Further, in order to ensure the continued existence of a thriving, open online marketplace, it is imperative that the U.S. government encourage countries seeking to regulate digital industry to use a light-touch regulatory approach, as heavy-handed measures can pose a threat to business development and act as a market access barrier.

Further impeding MPA member companies' ability to operate in many important overseas markets is the global proliferation of content theft. The theft and illegal dissemination of content deprives creators of millions of dollars in fair remuneration that they would otherwise use to produce new content and to employ American workers.

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 systems.

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'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Charles H. Rivkin  
Chairman & CEO, Motion Picture Association

# REPORTING FORMAT

As with the last few years, the MPA has focused its trade barrier submission on those countries and issues where the association 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.



# 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.

For further information about this report, contact Olivia Rademaker, Manager of Federal Affairs and Trade Policy, 1600 Eye Street, NW, Washington, DC 20006. This document is protected by copyright. It may, however, be reproduced or quoted with appropriate credit.



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# NATIONAL TRADE ESTIMATE



# AFRICA



The African region holds great potential for MPA members. Established film and television industries in Nigeria, South Africa, and Kenya release a multitude of productions each year, available for viewing both locally and globally via streaming and broadcasting. However, across the continent, weak intellectual property protections and deficient enforcement hinder economic growth and limit opportunities for foreign investment.

Piracy remains a significant challenge across the continent. While Nigeria has one of the most productive film industries in the world, the Nigerian Copyright Commission (NCC) estimated that Nigeria loses over \$1 billion annually to film piracy. In North Africa, several infringing IPTV providers operate with impunity.

To spur foreign investment and better enable local creators to capitalize on their works, countries in the region should seek to update their copyright frameworks to help address both the opportunities and the challenges of today's digital marketplace. As a first step, governments should be encouraged to adopt and fully implement the WIPO digital treaties. These treaties are foundational to the legal infrastructure of digital trade, providing copyright holders with the full panoply of exclusive rights for the digital marketplace, as well as protections for technological protection measures, which enable a range of online digital services and help guard against piracy. Nigeria, Burkina Faso, Ghana, and Togo have ratified the treaties; Kenya, Namibia, and South Africa have signed them; and, Benin, Botswana, Gabon, Guinea, Madagascar, and Mali have expressed their intent to join.

While Nigeria has taken some steps to improve copyright protection and enforcement through the NCC and the National Film and Video Censors Board (NFVCB), the existing Copyright Act – and ongoing attempts to amend it – have serious shortcomings. In July 2022, the Nigerian Parliament adopted a revised Copyright Act, which has yet to be published. The bill reportedly contains a number of helpful provisions implementing the

WIPO Copyright Treaty and enhancing online enforcement procedures; however, the legislation is also purported to contain a highly problematic provision that would create a compulsory license for public interest, thus enabling the NCC to replace copyright owners in authorizing uses of their works.

Kenya has similarly attempted to update its intellectual property legislation in recent years. In early 2022, a bill seeking to repeal online enforcement provisions was withdrawn, following strong opposition by national and international creative industries and the Kenyan Copyright Board. MPA encourages the U.S. and Kenyan governments to work together to ensure that updates to existing legislation are consistent with international obligations and standards and protect foreign and domestic rightsholders alike.

In South Africa, the proposed Copyright Amendment Bill (CAB) and Performers' Protection Amendment Bill (PPAB) have been notably problematic for the local and non-domestic creative industries. Both bills were adopted in August by Parliament and will soon be processed by the National Council of Provinces (NCOP). If the bills are enacted by the NCOP, they will seriously weaken South Africa's copyright regime, restrict the ability of rightsholders to produce and operate in the South African market, and bring South Africa out of compliance with international agreements—including the WIPO Internet Treaties and the WTO Agreement on Trade-related Aspects of Intellectual Property Rights. South African and international stakeholders, including the MPA, have expressed serious concerns with the proposed amendments.

With 54 of 55 African Union Member States committed to the African Continental Free Trade Area (AfCFTA) agreement, the AfCFTA could serve as a vehicle for all of Africa to implement strong copyright protections. This would contribute to the development of an open and healthy online marketplace, foster good governance, and serve as a cornerstone of the rule of law. Moreover, the U.S. and Kenya Strategic Trade and Investment



# AFRICA

Partnership is an opportunity to craft a forward-looking agreement that fosters a healthy and open digital market, including by incorporating an obligation to join and implement the WIPO digital treaties.



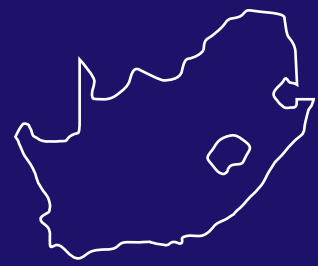


## INTELLECTUAL PROPERTY PROTECTION

### Legislation

Copyright Amendments – In early 2022, a bill proposed by a Member of Parliament to repeal online enforcement provisions (including notice and takedown obligations) was withdrawn, following strong opposition by Kenya’s copyright office (KECOBO), as well local and international creative industries. It is now important that Kenya effectively and consistently implement notice and takedown to help address online infringement.

Mandatory Recordation System – In 2018, Kenya introduced a mandatory recordation system. The recordation process is cumbersome, introduces additional complexities and costs, and does not offer appropriate redress mechanisms. Moreover, mandatory recordation is a formality incompatible with Kenya’s obligations under the Berne Convention. The Kenyan Anti-Counterfeit Authority has announced the recordation system will enter into force in January 2023.



## MARKET ACCESS ISSUES

Broadcast Quota – In May 2021, the Independent Communications Authority of South Africa (ICASA) reinstated local content quotas for television. This followed ICASA’s May 2020 decision to fully exempt “television broadcasting service licensees” from compliance with local television content quotas during the COVID-related National State of Disaster.

“Must Provide” Requirements – In April 2019, ICASA published its draft findings on the *‘Inquiry into Subscription Television Broadcasting Services’*. This report suggests regulatory intervention in the pay-tv market to address perceived and alleged anti-competitive conduct from dominant market players. However, the report’s methodology, and therefore its conclusions, are flawed as ICASA failed to consider the impact of OTT media services on the market. ICASA proposes a new licensing regime that would severely impact the contractual freedoms of rightsholders to license their content, undermining their exclusive rights. MPA hopes that the South African government will ensure that any regulatory interventions into the pay-tv market are informed by international best practices, current market realities, and preserve the contractual freedoms of all parties concerned, while developing a legislative and regulatory framework that is conducive to investment and growth.

VOD Quotas – The Department of Communications and Digital Technologies (DCDT) published in October 2020 a Draft White Paper *‘Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020’* that seeks to adapt South Africa’s content regulatory framework to the online marketplace and recommends the imposition of local content quotas. MPA understands that the DCDT will publish a Final White Paper after its deliberations conclude.

Online Value Added Tax – South Africa currently levies a 15 percent VAT on the online selling of content, including films and television

programming. As of April 2019, income on B2B services provided to South African businesses by foreign providers is also subject to VAT.

## INTELLECTUAL PROPERTY PROTECTION

### Enforcement

South Africa lacks the tools to meaningfully enforce against online piracy. The three main enforcement deficiencies are (1) the inability to act against foreign infringers who do not own assets in South Africa, (2) the lack of no-fault injunctions with intermediaries, and (3) the lack of statutory and punitive damages.

### Legislation

Copyright Amendments – The Copyright Amendment Bill was first introduced in South Africa’s National Assembly in May 2017 and the Performers’ Protection Amendment Bill in July 2016. These bills contain a number of potentially damaging provisions that are likely to curb incentives for film production in South Africa and render South Africa in violation of international copyright norms. For example, the Copyright Amendment Bill includes a broad range of limitations on contractual freedom; a time limitation to certain assignments; a provision concerning ownership of works by the state; inadequate protection of technological protection measures (TPMs) necessary for the licensing of legitimate content; and, a hybrid fair use and fair dealing system of exceptions to copyright, including a broad and invasive regime of new statutory copyright exceptions, the net effect of which constitutes an unlawful deprivation of property. Further, the bill provides inadequate criminal and civil remedies for infringement, including online piracy, that will limit the ability to effectively enforce against infringers, thus thwarting the ability for legitimate markets to develop for copyrighted works. The Performers’ Protection Amendment Bill is inextricably linked to the Copyright Amendment Bill and contains many similar concerning provisions that severely

# SOUTH AFRICA

limit contractual freedom and impede incentives to produce audiovisual works and content in South Africa.

Despite consistent and overwhelming opposition from the majority of South Africa's creative industries, the bills were adopted by South Africa's Parliament in 2019. The bills were subsequently rejected by President Ramaphosa and referred to the National Assembly in June 2020, owing to a broad range of concerns that the bills may not pass constitutional muster and could amount to breaches of relevant international treaties if enacted into law.

The National Assembly's Portfolio Committee on Trade, Industry and Competition has since reconsidered the bills and staged further rounds of stakeholder consultations to assess the President's constitutional reservations. The texts of both bills were subsequently updated - with minor revisions made to mostly non-contentious clauses - and the bills were again sent to the National Assembly, which adopted the revised bills in August 2022. The government ignored concerns that the bills were not properly assessed for constitutionality and that the Department of Trade, Industry and Competition failed to produce an economic impact assessment study on the Copyright Amendment Bill, as required by the government's Socio-Economic Impact Assessment System (SEIAS) guidelines. The bills will now be considered by the National Council of Provinces (NCOP) and the nine provincial governments. If approved by the provinces, the bills will again be presented to the President for his assent.

The Cybercrimes Act – The Cybercrimes Act (CBA), No. 19 of 2020, was recently signed by President Ramaphosa. The CBA defines an Electronic Communication and Service Provider (ESCP) very broadly. It also imposes an obligation on ESCPs to report cyber offenses within 72 hours of becoming aware of them, failing which they may be liable to a fine. In this regard, the CBA mandates that ESCPs preserve any information that may be of assistance to law enforcement agencies, including origin, destination, route, time, date, size, duration, and type of service. However, the provisions of the CBA dealing with the above is yet to come into

force. Continuing consultation with the authorities on the practical aspects of and considerations relating to the enforcement of the CBA provisions may very well be of great value to obtain further insight on the impact of the provisions.



**NATIONAL  
TRADE ESTIMATE**



**ASIA PACIFIC**

# ASIA PACIFIC

The dynamic markets of the Asia-Pacific region continue to offer significant global growth opportunities for MPA members. However, too often, the full potential of these markets is hindered by market access restrictions and/or inadequate protection of intellectual property.

Market access barriers for the region's theatrical, television, and streaming industries take several forms, including content quotas, foreign investment limitations, and dubbing and advertising restrictions. Local screen and content quotas applied to theatrical and/or pay-TV businesses in Australia, China, Indonesia, Malaysia, South Korea, Taiwan, and Vietnam limit consumer choice and often contribute to piracy by restricting the licensed supply of content. The Philippines, Indonesia, Thailand, and Vietnam should remove any consideration of a screen quota in proposed legislative amendments. Further, foreign ownership and investment restrictions, including those in effect in China, India, Malaysia, Philippines, Taiwan, Thailand, and Vietnam, limit U.S. industry's contribution to the growth of local creative economies. Advertising and dubbing restrictions throughout the region make it more difficult for U.S. companies to monetize and distribute content.

Governments in the region have applied content quotas and other restrictive regulations to traditional distribution channels for decades and are increasingly proposing such restrictions for the online over-the-top (OTT)/video on demand (VOD) marketplace. The application of these restrictions to the OTT/VOD marketplace will limit consumer choices, stifle business development, and add a burdensome barrier to market entry in this fast-growing segment. Some governments in the region, such as the Australian government, are considering mandatory investment in local content for VOD services. Several governments in the region, including the governments of Thailand, Vietnam, and Indonesia, are considering or have already implemented local presence requirements. Furthermore, the governments of Indonesia and

India have expressed reservations about extending the WTO e-commerce moratorium, which would disrupt the global consensus on not imposing duties on electronic transmissions.

Tax issues also pose challenges in the region's theatrical sector. For example, the entertainment tax in Malaysia and Local Body Taxes and the Goods and Services Tax (GST), collected by local governments on theater admissions in India, have resulted in ticket price disparities, 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 using such regimes to shift to industry self-regulation and classification based on international best practices. Countries should provide clear guidelines for self-classification, and these guidelines should be transparent and consistent, establish an expeditious process, 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 operators of pirate online streaming, pirate internet protocol television (IPTV) services, as well as "Piracy-as-a-Service" (PaaS) offerings. PaaS constitutes a suite of off-the-shelf services that make it easy for would-be pirates to create, operate, and monetize a fully functioning pirate operation. The development of PaaS shows the scale, sophistication, and profitability of modern online commercial copyright infringement. These infringing services make it difficult for legitimate services to compete and represent the greatest threat to the film and television industry throughout the Asia-Pacific region.

Another major and related problem is the proliferation of piracy devices and apps, sold by



# ASIA PACIFIC

resellers in physical marketplaces and online through e-commerce platforms, often misleading consumers into thinking their offerings are legitimate. Piracy devices and apps offer access to dozens of pay-TV channels or streaming services, large volumes of on-demand movies and television series, and/or live streaming events. Because there may not always be indicia on the devices themselves that the manufacturers had an unlawful purpose in making them, other criteria (such as the way they are marketed by resellers) is often the key to addressing this problem, and laws in some markets are not well equipped to tackle these devices and apps. Taiwan, Singapore, and Malaysia have helpfully outlawed the manufacture of and trafficking in piracy devices and apps. However, continued collaboration among rightsholders, governments, and other stakeholders in the online ecosystem will be necessary to address this growing regional problem, and we are heartened to see the Asia-Pacific Economic Cooperation (APEC) economies continue to address this challenge in 2022 with efforts to agree upon and endorse best practices across APEC member economies going forward.

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 intermediaries participating in and profiting from the use of their online services to locate pirated materials. Payment processors and online advertising services should do their part by restricting money flows and advertising revenues to piracy services, which would essentially eliminate their sources of income.

Site blocking, often through no-fault injunctive relief, is an established best practice to reduce online copyright infringement. This highly effective anti-piracy tool allows governments to disable access to copyright infringing websites, thereby reducing piracy site visits and increasing access to legal services. Site blocking is currently available as a remedy in more than a half dozen jurisdictions in APAC and is under consideration in other major markets, including Japan and Taiwan. In addition, voluntary arrangements with certain

search engines to remove listings for sites blocked by a court order from their search results have further reduced visits to piracy sites.

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. To this end, MPA welcomes Thailand and Vietnam’s respective accessions to the WIPO Copyright Treaty and encourages Thailand to finalize their accession to the WPPT and fully implement these important protections for copyrighted works. India has acceded to the WPPT and WCT treaties and should take steps to fully implement these foundational treaties, notably by strengthening protections against circumvention of access and copy control technological protection measures.

The global norm for the term of copyright is 70 years after the death of the last surviving author and 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 links 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,





# ASIA PACIFIC

Australia, Japan, Philippines, and Sri Lanka are parties to the convention and New Zealand is an observer.

Illicit camcording remains a problem in certain markets in the Asia-Pacific region, including some high-quality camcords from China. These illegal camcords often provide the source material for early digital/online pirated content. In 2011, 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 encourages 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 in Asia-Pacific. MPA additionally urges the government of India to pass long-considered anti-camcording provisions in the Draft Cinematograph (Amendment) Bill.

Pay-TV piracy, a longtime challenge in and of itself, is now often interconnected with other forms of online piracy in the Asia-Pacific region. As more content is made available through legal streaming services, some illegal websites now specialize in the unauthorized online retransmission of entire channels through pirate web portals. Increasingly, many rightsholders face the theft of signals of their live broadcasts, including live sporting events. Laws should be adapted to address this new threat.

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 historically tended to eliminate burdensome market access barriers, benefitting both U.S. industry and the local creative economy. MPA supports the negotiation of trade agreements that improve the protection and enforcement of copyright, augment market access, and foster a healthy online marketplace for copyright materials. MPA hopes for further progress in the U.S. and China trade relationship now that the “Phase One” trade agreement is in place. In particular, it would be important to encourage ongoing work to ensure that the

agreement, including the services purchasing obligations, are fully implemented.





## 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 that 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.

**OTT Restrictions** – 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 over the past five years regarding the availability of Australian content and asymmetry between local content obligations for free-to-air broadcast and the absence of these obligations on digital platforms. Most importantly, in 2019, the Australian Competition and Consumer Commission (ACCC), through its Digital Platforms Inquiry Final Report, recommended “harmonisation” of content regulation across broadcast and VOD, introducing the possibility of expanded local content obligations on VOD services. In April 2020, the previous government responded with an Options

Paper on “Supporting Australian Stories on our Screens.” While the Options Paper did not conclude that Australian consumers are denied access to Australian content or that Australian content is not readily available, a mandatory Australian content investment obligation was nonetheless proposed in the November 2020 “Media Reform Green Paper.” A revised content investment obligation was announced by the previous Government in February 2022. The new Albanese Government has outlined a commitment to introducing an investment obligation and is currently consulting on a National Cultural Policy that is expected to contain such an obligation. Such an investment obligation would raise concerns with Australia’s compliance with its FTA obligations. To ensure the continued production of Australian content, Australia should maintain competitive programs 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 or content investment obligation for digital delivery.

## INTELLECTUAL PROPERTY PROTECTION

### Enforcement

Australia has developed excellent tools to fight online piracy, including effective laws allowing for no-fault injunctive relief against ISPs and search engine providers. Rightsholders have succeeded in disabling access to more than 2,000 piracy domains, resulting in significant reductions of piracy visitation and increases in visits to legitimate VOD services. The new Australian government is expected to review its laws related to online copyright enforcement.

### Legislation

**Copyright Modernization** – With the change in



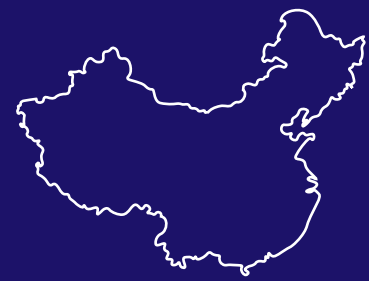
# AUSTRALIA

government, it appears increasingly likely that the “Copyright Access Reform” agenda and other copyright initiatives (e.g., a proposed orphan works proposal and worrisome broad exceptions) will not proceed.

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

Illegal IPTV Services, Devices and Apps – Australia’s anti-piracy laws, while generally effective, are not specifically targeted to address the growing problem of illicit IPTV services, piracy devices and apps, or Piracy-as-a-Service (PaaS). To better protect rightsholders, the government should take steps to strengthen the laws to address PaaS and deter the manufacture, distribution/dissemination, and trafficking of illicit services, devices, and apps.





## MARKET ACCESS ISSUES

Import Quotas/Revenue Share – Despite 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, the country would make a meaningful increase to compensation, as the current 25 percent U.S. share of revenue is far below comparable markets and the international norm. To date, a new MOU has yet to be concluded.

Government Film Importation and Distribution Monopoly – The China Film Administration (CFA), formed in 2018, 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 determines the release dates and length of theatrical runs of foreign films, often restricting the ability of the U.S. producer to obtain the full commercial value of the film.

Blackout Periods During Peak Seasons – In order to prevent competition against domestic films released during peak movie-going periods, the Chinese government has historically implemented a “blackout” during which no new foreign imported films may be released. Such blackouts typically occur during national holidays, 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 total annual screen time. The same screen quota was maintained in the Film Promotion Law that took effect on March 1, 2017.

Film Development Fund – In March 2016, the former SAPPRFT issued a notice allowing the refund of a percentage of the Film Development Fund collections to cinemas that report favorable annual box office receipts from the screening of Chinese films. Under the notice, if 66 percent or more of a cinema’s total annual gross box office comes from Chinese films, that cinema will receive a 50 percent refund of the money paid towards the Film Fund for Chinese films. This refund 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 and limit online distribution of foreign content to 30 percent, and additionally modified the content review process. The 30 percent foreign content cap is further limited by country and genre, so effectively, U.S. content is restricted to 10 to 13 percent in real market terms. The content review process allows only two windows each year for online distributors to submit content for registration and censorship review and prohibits content review by provincial authorities. Further, it requires foreign TV series to be submitted as complete seasons,



versus the global market practice of per episode submissions. These rules have substantially reduced the number of U.S. TV programs licensed in China and have resulted in delays in the availability of TV series, effectively curtailing day-and-date releases. 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 sum, China’s online video policies increasingly create uncertainties and barriers, and have disrupted the growth of and access to the country’s online video market.

Censorship – The China Film Administration (CFA) and the National Radio and Television Administration (NRTA), 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. The adoption of a voluntary, age-based classification system would help China’s integration into the international classification system and eliminate the advantage uncensored pirate content has over legitimate market players. China should also shorten the content review process to provide certainty of release, increase frequency of content review windows, remove the burden of resubmitting film and TV programs that have already been approved, and establish a fast-track system for content review under special circumstances. A transparent, predictable, and expeditious content review process would reduce barriers to entry and attract investment. In June 2022, the NRTA issued a new system of administrative licensing for domestic online audiovisual works, essentially applying the same rules and standards already in place for censorship of theatrical and online content. This reflects a further tightening of government

oversight for online audiovisual works and the push for a higher standard of censorship for the online content industry in China.

Foreign Investment Restrictions – Although China has pledged to widen market access and promote fair competition, the country maintains a prohibition on foreign investment in film importation, distribution, and production companies. China also prohibits foreign investment in pay-TV/online audiovisual program services and television, including in television production companies. Foreign investment partnerships are also prohibited in online video platforms. China’s revised Negative Investment List, which came into effect in July 2020, failed to relax these investment restrictions. Such foreign investment restrictions limit the ability of U.S. content creators and distributors to compete in China’s audiovisual market.

Television Quotas – If the proposed September 2018 administrative provision on the importation and dissemination of foreign audiovisual programs on broadcast television 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. China should remove or relax these proposals in NRTA’s ongoing implementation plans.

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 USD.

#### 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. rightsholders' ability to control the print quality and to trace sources of camcording piracy.

## INTELLECTUAL PROPERTY PROTECTION

The U.S.-China Phase One agreement included significant obligations for China to strengthen its copyright and enforcement frameworks to the benefit of both American and Chinese creators. MPA hopes the U.S. and China can continue to work to effectuate these obligations.

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 legitimate digital economy in China. However, the NCAC's administrative sanctions are not enough to deter persistent piracy through websites, apps, and related services. Piracy over cloud storage services (or cyberlockers), such as Baidu Pan, remains prevalent, with links to unauthorized content disseminated through popular Chinese social media platforms and piracy linking sites. China's authorities should continue to focus on infringing websites and piracy devices and apps, including the facilitation of infringing content being distributed on social media and cloud storage platforms, all of which threaten the continued growth of legitimate business.

Camcord Piracy – China remains a source of illicit camcording in the Asia Pacific region, although, due to the pandemic and related lockdowns and theater closures, numbers for the past two years are anomalous. The quality of recent illegally camcorded films is high. A related and growing concern is the live-streaming of theatrical broadcasts of films online. China should enact a specific criminal law against using or attempting to use an audiovisual recording device to make or transmit a copy, in whole or in part, of audio and/or video of an audiovisual work from a performance in an exhibition facility. The Copyright Law should also be revised to prohibit the unauthorized retransmission of content online.

Piracy Devices and Apps – China is a leading source for the manufacture and trafficking/export of devices that permit the installation of third-party, pre-loaded, or post-purchase infringing applications. This illegal business practice allows consumers to easily access pirated content. Many of the illegal IPTV services advertised to customers worldwide are bundled or preloaded on devices originating from China. Because of the adherence by some key judges to the “server principle” (i.e., 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), rightsholders are deterred from bringing action against pirate services. In addition, enforcement against pirate apps is a challenge, due to their availability on various third-party app stores. These stores are not as amenable to intermediary outreach efforts by rightsholders, when compared with more reputable app repositories.

Mini-VOD Cinemas and Chains – Despite the impact of the pandemic on the exhibition industry, mini-VOD cinemas remain a concern. Despite China imposing regulations on mini-VOD cinemas and chains in March 2018, an estimated 14,000 mini-VOD cinemas and chains continue to operate in different cities across the country without proper licenses and are routinely screening U.S. content without authorization. During a 2019 Chinese government crackdown, four illegal camcording syndicates were uncovered, 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 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 is often ignored. As a result, U.S. content is frequently used for unauthorized public performances. For example, some Chinese pay-TV operators or digital licensees distribute U.S. content to hotels for public viewing without permission.

## Enforcement

MPA members and other stakeholders have brought actions against the pirate operators of *RenRen ShiPin*, which are currently pending in the courts. In November 2021, the Shanghai Intermediate People’s Court sentenced the founder of the China-based, multi-million user site YYeTs.com (also operating as Rrys) to 42 months’ imprisonment and a major fine following a guilty plea for copyright infringement offenses, in a case jointly referred by MPA and a local Chinese rightsholder.

On the administrative side, China has been operating its annual “Sword Net” anti-piracy campaign for over 17 years. While these administrative enforcement campaigns have been important, on their own, they are not enough to deter widescale piracy. Although the 2022 campaign has yet to commence, targets of the 2021 campaign included short videos of copyrighted content from films or TV programs, and livestreaming programs disseminating unauthorized films. While China has stated their intention to increase administrative enforcement efforts, penalties remain low and, unless the source of the piracy can be definitively established in China, deterrence has been difficult to achieve. In the meantime, rightsholders have continued to take steps to protect their rights in China where possible, including through voluntary outreach with e-commerce platforms.

In 2019, the Chinese government committed to reduce thresholds for criminal cases and in recent years, in practice, a slightly more flexible approach has been taken to achieve the numerical or monetary thresholds needed to refer a copyright infringement case for criminal prosecution. Civil cases remain challenging due to burdensome documentary requirements to launch cases and the aforementioned “server principle.”

## Legislation

Strengthening the Protection of Intellectual Property Rights – In November 2019, the Chinese government released a set of guidelines that set out enforcement goals, including agreeing to reduce criminal thresholds, increasing punitive damages for infringement, and providing a mechanism to disable access to infringing websites. The government has passed several regulations, guidelines, opinions, and judicial interpretations, many of which touch on important enforcement and judicial functions (including, e.g., preservation orders and calculation of damages in internet piracy cases). The government should continue to ensure effective implementation of legislative and enforcement measures.

Copyright Law amendments came into force in June 2021, introducing several general enforcement improvements, including by increasing maximum civil damages and creating stronger presumptions against infringement defendants. Meanwhile, judicial documents (including new legal interpretations and procedural guidelines) from the Supreme People’s Court (SPC) coming into force from 2020-22 also improve the position of rightsholders generally by clarifying, strengthening and/or streamlining the application of copyright and other IP laws with respect to civil and criminal enforcement actions brought in Chinese courts. Most recently in April 2022, in relation to judicial efficiency, the SPC released a judicial interpretation and a subsidiary notice, which provide that all copyright-related civil and administrative cases of first instances should be filed with basic-level courts designated by the SPC, but that cases of significance can start at the Intermediate People’s Court. MPA is hopeful that this will ease the heavy dockets of the IP courts in China.

China should also eliminate the distinction between crimes of entities and individuals; criminalize

internet offenses that may lack a demonstrable profit motive but nonetheless damage rightsholders on a commercial scale; and, extend the term of protection in line with the global norm. 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 applies to online transactions of physical infringing goods. The required standard of knowledge for a platform operator to take action is that the platform “knows or should know” that the good is infringing. It is critical that the new E-Commerce Law supports rightsholder action to prevent the illegal trafficking of piracy and circumvention devices on e-commerce platforms.

In August 2020, the State Administration of Market Regulation (SAMR) issued a draft Opinion on strengthening regulatory standards and compliance of online marketing practices, including compliance with the E-commerce Law, to protect consumer rights against infringing activities. In August 2021, the SAMR amended the law to allow the revocation of platforms’ licenses if they fail to take necessary measures against vendors that are found to have infringed intellectual property rights. China should include unauthorized online broadcasting of movies, TV dramas, TV programming, sports events, other audio-visual works, and sale of audio-visual products and/or provision of services that enable unauthorized access to copyrighted audio-visual works as part of the scope of illegal activities of online marketing practices.





## INTELLECTUAL PROPERTY PROTECTION

### Enforcement

Internet Piracy – Illegal streaming websites and the easy availability of illicit streaming devices in physical marketplaces remain concerns in Hong Kong. Due to the absence of a full civil communication to the public right under the Copyright Ordinance, copyright holders can face uncertainty in obtaining effective civil relief in relation to illegal video streaming on online platforms. The government is also not particularly willing to engage in criminal enforcement of intellectual property crimes.

### Legislation

The HKSAR Government is working on a new Bill to amend and update the Copyright Ordinance. This follows a public consultation from November 2021 to February 2022. The HKSAR Government should strengthen the copyright law to effectively address online piracy.

Censorship – In June 2021, Hong Kong amended and gazetted its film censorship guidelines under the Film Censorship Ordinance (Cap. 392). This was followed by draft legislative amendments to the Ordinance in August 2021. The revised guidelines have an expanded scope to include censorship of films based on “national security grounds” under the HKSAR National Security Law. The uncertainty regarding the interpretation of the revised guidelines poses a concern for international film exhibition in Hong Kong.



## 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. Despite the lifting of many foreign direct investment restrictions in 2015, the government’s attempt at price controls reduces the incentive for foreign investment in the audiovisual sector. Currently, TRAI is holding consultations to finalize a new regulatory framework for broadcasting and cable services.

Foreign Ownership Restrictions – The Permission Guidelines issued in March 2001 by the Ministry of Information and Broadcasting (MIB) limit investments by broadcasting entities to 20 percent, despite the foreign direct investment (FDI) policy issued in 2016 allowing 100 percent FDI in broadcast distribution platforms, including direct-to-home (DTH). This is in clear contradiction to the Government of India’s stated goal of increasing foreign investments in the services sector. Although India in recent years has raised the FDI cap for Indian news channels from 26 percent to 49 percent, foreign investments above 49 percent for news channels require government approval. Further, FDI in digital news sites is restricted to the earlier limit of 26 percent.

Taxes – India established a national Goods and Services Tax (GST) in 2017. Currently, cinema tickets are subject to between 12 percent and 18 percent GST rate depending on ticket price. However, Local Body Taxes collected by state governments have been left out of the GST, prompting Tamil Nadu and Kerala 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. 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. It is estimated that India will reach more than 500 million users of online video by 2023, positioning India as the second largest market for VOD after China. The Irdeto Global Consumer Piracy Threat Report estimated that video will account for more than 77 percent of all internet traffic in India by 2022. Further, in a 2021 study by anti-piracy consulting firm Muso, India was found to be the highest-ranked country for film piracy traffic by demand and unlicensed downloads.

Indian law still does not expressly address Piracy-as-a-Service (PaaS). It should be clarified that the commercial provision of middleware to enable, with knowledge, piracy sites and services is actionable.

Camcording Piracy – Unauthorized camcording is an ongoing challenge for rightsholders in India. During 2019, 47 illicit audio and 6 video copies were traced to Indian theaters. Numbers from 2020, 2021 and 2022 are anomalous owing to COVID-19-related theater closures. However, the high number of audio cams in 2019 reflects the strong demand for



local language audio files, which are sourced for various international release groups. Unauthorized camcording of films during their initial release windows has been an ongoing issue in India, and criminal referrals to date against suspects have unfortunately not resulted in meaningful steps to deter such activities.

## Enforcement

India remains one of the world's most challenging major economies with respect to the protection and enforcement of IP, in no small part due to the absence of a centralized and nationally coordinated enforcement department.

The seminal April 2019 Delhi High Court decision establishing permanent site blocking as a viable remedy to curtail online infringement in India has been followed up with many recent decisions blocking thousands of domains and with improved speed of implementation and coverage. The 2019 orders were later that year made “doubly dynamic,” meaning variations of the same piracy service can be blocked quickly and efficiently. In 2022, rightsholders achieved a new milestone in India, obtaining orders allowing for a domain to be blocked on the basis of its association with an already-blocked site. This will create further efficiencies and help disrupt persistent infringers who mimic the name or brand of popular pirate sites to attract traffic and ad revenues to their copycat sites.

It is unfortunate that the National Internet Exchange of India (NIXI), which serves as the registry for .in domains, has ceased suspending the use of domains whose registration information (Whois) is false or fraudulent. Additionally, timely access to accurate Whois information has almost entirely ceased as a result of an inaccurate interpretation of the EU's General Data Protection Regulation (GDPR). This has taken a toll on enforcement efforts in India.

The Maharashtra IP Crime Unit (MIPCU), formerly the Maharashtra Cyber Crime Unit, has been active since 2017. MPA was heartened to see one enforcement action in July 2021 against a pirate service called Thop TV. Time will tell whether this action leads to broader activity to successfully curtail piracy in India.

## Legislation

Anti-Camcording Legislation – The Government has included anti-camcording provisions in the 2021 Cinematograph (Amendment) Bill, which awaits clearance in Parliament. India should swiftly enact legislative amendments to outlaw unauthorized recording of all or part of an audiovisual work in a cinema.

WIPO Treaty Implementation – India acceded to the WCT and WPPT on September 25, 2018. However, India has yet to fully implement its obligations under these treaties, especially with respect to protection against unlawful circumvention of technological protection measures (TPMs).

Copyright Legislation – The Ministry of Commerce and Industry published the 2019 Copyright (Amendment) Rules, which would have extended statutory licenses to online transmissions. This was met with stakeholder opposition as the draft Rules were beyond the powers granted by the Copyright Act, 1957. Subsequently, this particular proposal was dropped when the Copyright (Amendment) Rules were notified on March 30, 2021. However, in August 2021, the Department for the Promotion of Industry and Internal Trade (DPIIT) held a stakeholder consultation on a proposed amendment to Section 31D of the Copyright Act to extend the existing statutory license for radio and television broadcasting of literary and musical works to “internet or digital broadcasters.” This was done in narrow response to the Parliamentary Standing Committee on Commerce's 161st Report on “Review of the Intellectual Property Rights Regime

in India” (paragraph 14.8(ii)), which recommended amendment of the Copyright Act to ensure a “level playing field... for traditional and internet broadcasters alike.” U.S. motion picture studios are also affected by these licensing rules, as local films almost always feature musical content having a substantial stand-alone monetization value. India should abandon the proposed amendments as they would, if adopted, violate India’s obligations under international copyright treaties and TRIPS.

Delhi High Court Intellectual Property Rights Division Rules – The Delhi High Court Intellectual Property Rights Division Rules entered into force in February 2022. The rules establish an IP Division of the Delhi High Court and seek to ensure that the judges hearing IP cases are well versed in intellectual property laws and practice. These rules have had a positive impact on the adjudication of IP cases to date and could provide a model for other states.

Supreme Court Ruling – In May 2022, the Supreme Court of India held that offenses under Section 63 of the Copyright Act, 1957 are cognizable and non-bailable offenses. The decision essentially gives the police greater ability to respond in an agile manner to copyright infringements being committed within their jurisdictions. MPA urges the Ministry of Commerce and Industry to analyze, and, as necessary, seek to amend any penal provisions or ancillary provisions related to Section 63 that could still lead to conflict with this Supreme Court judgment.



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

Film Law – The Indonesian government has expressed its intention to amend the 2009 Film Law, which contains a 60 percent local screen quota and prohibits imported films from being dubbed into local language. In September 2019, without official notice or industry consultation, “Ministerial Regulation (MR34/2019) Concerning the Procedure for the Distribution, Exhibition, Export, and Import of Film” was issued. While these regulations have yet to be enforced, they maintain the 60 percent local screen quota and dubbing restrictions and add further limitations on screen time by a single distributor, importer, or producer to 50 percent. In recent years, domestic films have accounted for a growing and substantial share of the market and local films are seeing greater investment without the imposition of heavy-handed regulations. Moreover, these restrictions undercut Indonesia’s laudable 2016 decision to remove the film sector from the Negative Investment List. Indonesia should remove such barriers and ensure that both local and international stakeholders are engaged in the process.

Customs Duties on Electronic Transmissions – In creating new tariff lines for digital products

that are transmitted electronically, which includes the threat of imposing customs duties on those products, Indonesia has set a troubling precedent that raises serious concerns with respect to the WTO e-commerce moratorium on customs duties for electronic transmissions. Heightening this concern, the Government of Indonesia has expressed some reservations about permanently extending the e-commerce moratorium. Such duties would likely raise prices for consumers, place Indonesia out of step with regional and international best practices, and stifle the growth of Indonesia’s digital market.

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. There is ongoing speculation that KPI will subject OTT providers to its strict censorship and classification requirements.

OTT Regulations – The Ministry of Communication and Information Technology (KOMINFO) implemented GR71 via MR5, which came into effect in late 2020. MR5 requires domestic and foreign OTT service providers to obtain certification, moderate their content, and comply with content takedown requests from authorities. MR5 also grants law enforcement authorities access to electronic systems and data. KOMINFO subsequently set a deadline for all platforms operating in Indonesia to comply with MR5 by the end of July 2022 or be blocked; in late July, some platforms were temporarily blocked for failing to register. The blocks were subsequently

lifted when the firms registered with KOMINFO under MR5. Such requirements have the potential to stifle business development and add a significant barrier to market entry.

While a constitutional court case brought by two Indonesian broadcasters arguing that VOD services should be regulated under the Broadcasting Act was ultimately unsuccessful, we understand that a long-anticipated revision of the Broadcasting Act could still be undertaken in 2023. MPA remains concerned that a future revision of the Broadcasting Act could seek to extend existing problematic content quotas, content censorship, and ownership restrictions on television services to VOD services.

## **Enforcement**

Internet Piracy – Under the revised Copyright Act, and Regulations Nos. 14 and 26 of 2015, rightsholders have successfully petitioned the Indonesian government to disable access to thousands of infringing domains. The Regulations could be further improved by ensuring faster response times to rightsholders who apply to the government for verifications and through the implementation of dynamic site blocking.

## **Legislation**

Indonesia's Directorate General of Intellectual Property Rights (DGIPR) is considering a partial revision of the Copyright Law. It is critical that any new exceptions or limitations are confined to the Berne Convention three-step test, in accordance with international best practice, that copyright ownership for films reside with the producer, unless there is an agreement to the contrary, and that any collective management organization is governed by rightsholders, without interference by Indonesia's government.

Any revision of the Copyright Law should also

revisit a number of existing, highly problematic provisions that create legal and commercial uncertainty for the copyright industries. These include removing the 25-year reversion of rights provision; deleting an overbroad exception to the making available right; clarifying rights of making available and communication to the public; setting forth clear principles of secondary copyright liability; improving protections for technological protection measures (TPMs) and rights management information (RMI); extending the term of copyright protection for works to life of the author plus 70 years; and, providing clear guidelines that criminalize the acts of camcording and live streaming.



## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – In 2021, there were 3,107 piracy websites in Japan that featured manga, anime, television programs, and films, averaging up to 600 million monthly piracy visits. Further, in July 2022, the Ministry of Internal Affairs and Communications (MIC) released a Study Group Report, which concluded that there are still many pirate and successor sites available in Japan. MPA filed a submission with the government in August 2022, highlighting the need for Know Your Business Customer (KYBC) disciplines, lending support for greater accountability/rights of information through ICANN and from intermediary services, and calling on the Japanese government to enter phase three of its consideration of countermeasures, including a discussion on legislating no-fault injunctive relief to disable access to infringing sites.

### Legislation

Link Site Law – The “Law Concerning Special Provisions on the Registration of Program Works” (Cabinet Submission No. 49), which clarifies liability against link sites, entered into force on October 1, 2020. The law amended Articles 113 and 119 of the Copyright Law of Japan to provide civil and criminal remedies against the facilitation of piracy through link sites.

Copyright Legislation – On May 26, 2021, the Japanese Diet unfortunately passed an amendment to the Copyright Act that inserted an amendment to Article 63(5) to include a presumptive license for simultaneous/delayed transmission of broadcasts over the internet, as well as for services such as time-shifted or “catch-up” viewing, which cannot be considered as a retransmission and implicates the far more valuable exclusive right of making available. The amendment and implementing

guidelines entered into force January 1, 2022. The presumption of online simultaneous/delayed transmission of broadcasts over the internet and presumptive license of catch-up rights for such broadcasts is an inappropriate taking of rights (if the rightsholder does not specifically reserve such rights) and adversely impacts voluntary licensing and appropriate compensation, for each and every form of transmission, whether simultaneous, repeat broadcast, or making available services such as “catch-up.”

The Agency for Cultural Affairs (ACA) is still considering introduction of a system similar to extended collective licensing. MPA is opposed to the introduction of extended collective licensing as it interferes with freedom of contract and well-established licensing models for audiovisual works.





## 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. Malaysia should remove or reduce the rate, particularly in view of the 2018 imposition of the national sales and services tax.

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.

Screen Quota – Malaysia 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 – Internet piracy and the use of piracy devices and apps remain problems in Malaysia. Dozens of global infringing websites and many that specifically target the Malaysian

market populate the top thousand sites in Malaysia, causing harm to both U.S. and local rightsholders. The piracy ecosystem around piracy devices and related apps, including illegal IPTV services such as “SVI Cloud,” continues to proliferate in Malaysia. Streaming devices that are preloaded with infringing apps and enable subscription access to a wide array of live channels and VOD content are readily available via online and physical marketplaces, with popular illicit streaming devices (ISDs) including UnblockTech and EVPAD.

Camcording – There was an increase of both audio and video recordings of MPA member films traced to Malaysian theaters in 2019, with a total of nine recordings detected. Numbers from 2020, 2021, and 2022 are anomalous owing to COVID-19-related theater closures. Although Malaysia passed anti-camcording legislation in 2011, the government has yet to take legal action against known infringers.

## Enforcement

Beginning in 2016, rightsholders have successfully been able to obtain administrative orders to block access to thousands of pirate domains.

There have additionally been some improvements in enforcement against piracy devices and apps, the illegality of which and enforcement against was previously in question. In March 2022, new anti-illicit streaming device amendments to the Copyright Act came into force. These amendments should now be implemented by the government, with action taken against the most egregious operators.







## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy in New Zealand remains rampant. In particular, piracy devices, such as set-top boxes with pre-installed applications that allow 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 – In recent years, the Ministry of Business, Innovation and Employment (MBIE) released several sets of objectives for copyright reform that would drastically undermine copyright and contractual freedoms, including overly broad exceptions to copyright.



## 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 Philippines Constitution of 1987. However, 40 percent foreign direct investment is allowed in the telecom sector. Disparate treatment of these related network-based industries not only discourages business development in a capital-intensive sector, but also has a direct impact on foreign investment. These restrictions impede investment for the development of innovation and creativity, limit consumer choice, and favor domestic investors. Such restrictions are also now outdated in the digital and internet era, which 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. Foreign 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 Philippines.

Screen Restrictions – During three annual film festivals, including the annual Pista ng Pelikulang Pilipino film festival in September, only local independent films are allowed to screen in cinemas nationwide. This is in addition to the Metro Manila

Film Festival held in December, during which the screening of all foreign films in cinemas nationwide is also banned. These severe bans limit screen time for U.S. films during peak annual movie-going times and depress investment in the sector by limiting the ability of cinema owners to program their theaters according to market demand.

In July 2019, a bill was introduced in the Philippines’ Congress 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). Although the proposed bill ultimately expired at the end of the Eighteenth Congress in June 2022, passage of this or similar bills in the new Congress would represent a further direct restriction on the ability of domestic cinemas to screen U.S. films according to market demand.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy is a major threat to the audiovisual sector. 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 online copyright theft.

Camcord Piracy – Due to COVID-19-related theater closures, camcording numbers for 2020, 2021 and 2022 are anomalous. However, the Philippines has long been a primary source of camcord piracy of major motion pictures. MPA encourages the Philippine government to lend greater support in the fight against unauthorized camcording.

## Legislation

IP Code Amendments – New draft IP Code amendments have been introduced in Congress



# PHILIPPINES

that would, for the first time in the Philippines, provide for an administrative no-fault remedy to disable access to infringing websites. MPA encourages the government to enact this remedy so that rightsholders will be better positioned to enforce against online piracy and exercise their rights, but requests that the government eschew any fiscal bond requirement (as a condition for obtaining no-fault orders against ISPs for the blocking of infringing websites), which would run counter to proven global best practices for combatting copyright piracy online. This draft also contains problematic extended collective licensing and includes additional remuneration for performers for subsequent communications/broadcasts, which runs counter to established best practices and interferes with freedom of contract and the audiovisual industry's established licensing arrangements.





## MARKET ACCESS ISSUES

Screen Quotas – In 2006, prior to the KORUS FTA negotiations, the Korean government agreed to reduce its screen quota requiring exhibition of Korean films to 73 days per year. Over 16 years later, amidst rapid development of its cultural industries and the success of many Korean film and television productions 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. However, several bills have been introduced in the recent past that would further restrict the legitimate market.

Advertising Restrictions – Korea 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.

OTT Regulation – In May 2020, the National Assembly passed the Telecommunications Business Act Amendments (Articles 22-7), which require content providers to take responsibility for “network stability” and consumer demand. The Enforcement Decree does not mandate content providers to pay a network usage fee to ISPs. However, there are, several amendment bills in the National Assembly that would force content providers to pay for network usage fees, including a provision mandating negotiations for network fees in network service contracts. If implemented,

these proposed amendments would raise KORUS concerns and restrict trade and freedom of contract.

Korea should avoid unnecessary intervention with respect to the commercial relationship between content providers and ISPs, apply light-touch regulation to OTT services, and ensure consistency with its KORUS obligations.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Korea has a major stake in ensuring adequate and effective protection of copyright online. In addition to continuing its program to disable access to piracy sites, the government should help facilitate discussions between intermediaries and rightsholders on removing search results for blocked sites.

### Legislation

Korea should continue to ensure that its copyright law provides strong protection for content creators, while upholding the principle of freedom of contract. Since 2020, legislators have continuously proposed problematic copyright law amendments that would introduce portrait rights, extended collective licensing, and additional remuneration schemes that disrupt contractual freedoms. A number of these problematic proposals remain on hold in the current term of the National Assembly. MPA urges the government to not weaken Korea’s copyright framework, ensure consistency with Korea’s international treaty obligations, and focus on improving enforcement penalties.



## 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 – Taiwan has 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. This cap has hindered the development of the cable TV industry.

Local Content Quotas – Taiwan imposes 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 and 7:00 pm and at least 25 percent locally produced drama, documentary, and variety programs between 8:00 pm and 10:00 pm. Further, a cable TV service must provide at least 20 percent local programming in its channel line-up. These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, and restrict U.S. exports.

OTT Regulations – In 2019, the NCC proposed a draft Internet Audiovisual Services Act that would oblige foreign OTT service providers to register with the NCC and disclose sensitive commercial

information. The regulations also contain local content prominence obligations and associated penalties for non-compliance. Such requirements, if implemented, would stifle business development and add a burdensome barrier to market entry. As of May 2022, the draft legislation remains under active consideration by the NCC.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy remains a serious problem in Taiwan. The government has been more proactive in combating piracy websites when the operations have a nexus to Taiwan, but a remaining enforcement gap is the lack of ability for local courts or government bodies to provide a no-fault injunctive remedy to disable access to structurally infringing sites.

### Enforcement

While the Taiwanese courts have delivered positive results in recent years, court cases can drag on, and oftentimes, remedies and/or penalties meted out are non-deterrent. For example, a Taiwanese court delivered a verdict in February 2021 where the defendant was found guilty of breaching Article 92 of the Copyright Act for public transmission without authorization. While he received a sentence of six months imprisonment, it was ultimately commuted to a fine.

### Legislation

Copyright Amendments – Draft amendments proposed by the Taiwan Intellectual Property Office (TIPO), which are now before the Legislative Yuan, contain problematic provisions for rightsholders, including a broadly-drafted public broadcast exception for non-profit use. Taiwan should



# TAIWAN

prioritize needed copyright reform to maintain the proper balance for rightsholders in light of rampant online piracy and to avoid creating new onerous and bureaucratic hurdles or making changes that could undermine Taiwan's international obligations. Taiwan should also extend term of protection to the international standard of life of the author plus 70 years (or 70 years from publication), provide clear guidelines that unauthorized camcording of motion pictures in theaters is illegal, and implement a no-fault remedy to disable access to infringing sites.





## MARKET ACCESS ISSUES

Foreign Ownership Restrictions – Foreign ownership of terrestrial broadcast networks is prohibited in Thailand. Further, rules established in 2015 require National Broadcasting and Telecommunications Commission (NBTC) approval when a television license holder seeks to 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 for 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. The Ministry should delete Section 9(5) and the related Section 68.

Must Carry Requirements – All platforms must carry public and commercial free-to-air television channels nationally. The regulations raise significant intellectual property rights issues.

OTT Content Regulation – Various government agencies, including the NBTC and the Electronic Transactions Development Agency (ETDA), are considering how to regulate OTT services, including by 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). Such regulations, if passed, would create uncertainties for foreign investments and stifle innovation and growth in Thailand’s OTT sector.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy is a serious problem in Thailand, with several websites operating with impunity. U.S. producers and distributors, the local Thai audiovisual industry and its licensees, and increasingly other international rightsholders face continuous challenges from infringing websites and services in Thailand.

Camcord Piracy – Thailand remains a risk for camcording in the region, particularly in relation to audio recordings. During 2019, there were a total of 18 audio copies and three video copies of MPA member titles forensically matched to cinemas in Thailand. 2020, 2021, and 2022 numbers are anomalous owing to COVID-19-related theater closures.

### Enforcement

In late 2017, via amendments to the Computer Crime Act, the Royal Thai government enacted a mechanism to disable access to infringing sites. Although a promising reform that met with early success, the mechanism has not resulted in many domains being fully blocked. The government needs to demonstrate that the IP&IT Court is equipped to issue regular orders to disable access to piracy services and should ensure that these orders are properly implemented by the appropriate intermediaries.

In 2022, Thailand’s enforcement authorities improved coordinated enforcement action against piracy sites in Thailand. Unfortunately, this improved enforcement has not been followed with prosecutions. As a result, pirates continue to operate largely with impunity.

## Legislation

Copyright Legislation – MPA continues to urge 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 rightsholders.

Amendments to the Copyright Act entered into force in August 2022. These amendments contain some helpful improvements to secondary liability and protection of technological protection measures (TPMs), including the reinstatement of a procedure for notice and take down. Unfortunately, they do not include a provision allowing the court to order an ISP to suspend access to a specific online location with the primary purpose/effect of infringing or facilitating the infringement of copyright.

Anti-Camcording Legislation – Thailand enacted anti-camcording legislation in 2014. However, the law 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 – Vietnam amended its Cinema Law in June 2022, increasing the country’s domestic screen quota to at least 25 percent during prime time. Further, an initial version of the draft implementing decree for the Cinema Law seeks to implement the screen quota and includes a highly problematic film fund that discriminates against foreign productions by drawing resources from the box office of imported films and distributing these funds only to local productions.

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

Foreign Investment Restrictions – The June 2022 Cinema Law reaffirmed that foreign direct investment in cinema construction and film production and distribution is limited to 51 percent.

Pay-TV Regulation – Vietnam requires foreign channels on pay-TV services be capped at 30 percent of the total number of channels the service carries. Vietnam also requires operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Furthermore, most foreign programming is required to be edited and translated by an approved licensed press agent and all commercial advertisements airing on such channels in Vietnam must be produced or otherwise “conducted” in Vietnam. All channels are subjected to censorship. This mandate also imposes new “editing fees” on international channels. These measures are

unduly restrictive and continue to severely impede the growth and development of Vietnam’s pay-TV industry.

OTT Content Regulations – In a positive development, the Cinema Law passed in June 2022 allows self-classification for films disseminated on the internet, which includes most VOD content, and a grace period for implementation. Vietnam should maintain such positive changes in the related implementing decrees of the Cinema Law, while removing negative policies like the screen quota and discriminatory film fund.

In August 2018, the Ministry of Information and Communications issued draft amendments to Decree 06 to expand the decree’s scope to include VOD services. In October 2022, these amendments were promulgated as Decree 71. Of concern in this final decree is a licensing scheme that could potentially require a local presence or forced joint venture, along with onerous censorship provisions for any VOD service that offered content not considered to be films (which would be regulated under the Cinema Law). This licensing proposal framework and continued uncertainty around censorship requirements fall short of industry expectations and are likely to limit consumer choice and access to content, while indirectly contributing to online content piracy.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy is rampant in Vietnam, and increasingly, the region is host to some of the most egregious and popular piracy sites and services in the world that target a global and English-speaking audience. These piracy sites cause significant damage to the local and international marketplaces and make Vietnam a haven for piracy.



## Enforcement

Ineffective copyright enforcement in Vietnam is a serious concern and serves as a significant *de facto* barrier to trade and foreign investment. Regardless of extensive evidence of serious infringement provided by rightsholders, there has traditionally been a lack of coordination and transparency among related ministries and agencies and a seeming lack of government commitment to ensure effective enforcement of copyright protection. Notably, Vietnamese authorities' action in August 2021 against the infamous Phimmoi website has, as of yet, still not led to any charges being laid nor any communication with the complainants as to the status of this case. At the time of the present filing, MPA is not aware of any successful criminal prosecution having ever occurred for copyright offenses in Vietnam. Vietnamese authorities should set a precedent in this case and then follow it with action against other very popular sites and services such as Fmovies, BestbuyIPTV, Motchill.net, Dongphymtv.net, and phimmoichills.net.

Vietnam can best address this barrier to trade and investment by ensuring that responsible enforcement authorities, including the relevant police units, the Ministry of Public Security, and the Authority of Broadcasting and Electronic Information (ABEI) under the Ministry of Information and Communication (MIC) follow through on infringement complaints, take meaningful and effective enforcement actions, and impose deterrent sanctions against infringing websites.

It appears that ABEI/MIC has begun to enforce a decree granting it the authority to disable access to infringing websites in Vietnam. While a useful step forward, unfortunately disablement in Vietnam does not stop these Vietnam-based services from harming the overseas markets they target, including the U.S. market. There also remain procedural

difficulties with the system that make it challenging for U.S. rightsholders to employ.

Camcording – An increasing number of films in Vietnam are pirated in theaters by professional camcorders, who then distribute these illicit copies online to dealers across the world. More needs to be done to address this problem, including stronger cinema procedures for curtailing such activity and corresponding criminal enforcement mechanisms.

## Legislation

Vietnam passed amendments to the IP Law in June 2022. The copyright-related amendments will enter into force on January 1, 2023.

The latest amendments contain improvements for rightsholders, with the illegal uploading and streaming of a cinematographic work categorized as a violation of communication rights and the copying of part of a work considered a reproduction (thereby creating additional opportunities for rightsholders to seek civil or criminal relief against online infringers). MPA understands that implementing regulations are currently being drafted by the Copyright Office of Vietnam under the Ministry of Culture, Sports and Tourism. This process offers an opportunity to further clarify and refine some of the law's elements and MPA encourages the government to continue to incorporate feedback from rightsholders to ensure a smooth implementation of the improved IP Law.

# NATIONAL TRADE ESTIMATE



# EUROPE

# EUROPEAN UNION

The European Commission recently adopted two legislative initiatives to update the rules governing digital services in the EU: the Digital Services Act (DSA) and the Digital Markets Act (DMA).

Together, the bills form a single set of new rules that will be applicable across the EU, with the aim of creating a safer and more open digital space. The DSA is likely to have a significant impact on online copyright enforcement in EU Member States. Unfortunately, in many areas, the DSA falls short of providing scalable tools needed for curbing illegal content. Specifically, Know Your Business Customer (KYBC) provisions have an extremely limited scope that only covers online marketplaces and lacks a stay-down obligation.

In 2021, the European Commission additionally launched an audiovisual stakeholder dialogue to enhance availability and cross-border access to audiovisual content. Meanwhile, many EU national governments are still working to implement the three EU Digital Single Market directives of the 2014-2019 Juncker Commission (Copyright, SatCab, and Audiovisual Media Services).

## MARKET ACCESS ISSUES

European Content Quotas – The updated Audiovisual Media Services Directive (AVMSD) entered into force in December 2018. Most Member States have transposed the directive. The 2018 AVMSD updates the 2010 and 2007 AVMS directives, which in turn replaced the 1986 Television Without Frontier Directive (TWFD).

The updated AVMSD obliges video-on-demand (VOD) services to reserve at least a 30 percent share in their catalogues for European works and ensure prominent placement of those works on services accessible from the EU. This new

quota provision maintains the country-of-origin principle, which means that VOD services have to comply with the rules of the jurisdiction in which they are established in the EU. The directive also allows EU Member States to require media service providers (linear and non-linear) targeting their audiences to contribute financially to the production of European works and/or local AV production funding schemes, even if a media service provider falls under the jurisdiction of another EU Member State. Slightly more than half of EU Member States have completed or are in the process of completing the legislative process to obligate media services providers targeting their territory to either invest in the production of domestic works and/or to contribute a percentage of their turnover to a national film fund. MPA is concerned that disproportionate investment obligations, coupled with excessive subquotas for works of original national expression and restrictions on contractual freedom, might fuel an inflationary trend in production costs and work against the objective of supporting and attracting foreign investment and opening the market to new entrants. The local content quota obligations for linear services remain unchanged: broadcasters are required to reserve, where practicable and by appropriate means, the majority of their transmission time for European works, excluding the time allocated to news, sports events, or advertising.

Network Fees – In May 2022, the European Telecommunications Network Operators' Association (ETNO) published a report on Europe's internet ecosystem, which argues for regulation that would oblige large content providers to contribute to the cost of internet infrastructure currently borne by telecommunication companies. The EU Commissioner for the Internal Market confirmed in September 2022 that the Commission will publish a consultation on this issue in the first half of 2023.



# EUROPEAN UNION

MPA is concerned that, if adopted, such a measure would likely create new financial obligations for VOD services.

## INTELLECTUAL PROPERTY PROTECTION

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

Digital Single Market Strategy (DSMS) – Under the 2014-2019 Juncker Commission, a set of new legislative instruments were adopted, which aimed to harmonize certain aspects of copyright, address challenges with online access to works uploaded by users across the EU, and address other aspects related to the functioning of the internal market. Several EU Member States are still in the process of implementing the 2019 EU copyright directive, although the transposition process was due to be completed by June 2021 (see more details below under EU Copyright Directive).

Enforcement Directive – This instrument establishes an EU-wide minimum standard for certain civil procedures, including the right to ask internet service providers (ISPs) for information and the availability of injunctive relief against such intermediaries to prevent and stop copyright infringement. These tools are invaluable for combating internet piracy. However, the CJEU's decision in July 2020 (*C-264/19 Constantin Film Verleih*) concerning the right of information covered under this Directive impedes enforcement. The CJEU applied an extremely narrow interpretation of the law, granting rightsholders only a claim to the name and postal address of infringers, and not to additional critical identifying data such as e-mail-addresses or IP-addresses. Each Member State must now expressly permit the release of this

information.

Electronic Commerce Directive/Digital Services Act – The 2000 E-Commerce Directive (ECD) provides a general legal framework for internet services in the Internal Market. The Directive establishes rules on commercial communications, 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. Article 5 of the E-Commerce Directive requires that information society identify themselves, by providing clear details about their business and whereabouts on their website. However, the Article is essentially unenforceable and businesses that have the intention of profiting from illegal content and infringing IP rights do not comply with this obligation and do not suffer any consequences. This directive is now being partially replaced (i.e., all the liability provisions) and otherwise complemented by the DSA, with new due diligence obligations for online intermediaries. Regrettably, however, the scope of the KYBC provision included in the Digital Services Act is so narrow (limited to online marketplaces) that it fails to provide a meaningful tool to fight the broad range of illegal activities online and failed to include a stay down mechanism.

NIS2 Directive – The recently agreed NIS2 Directive includes obligations for top-level domain (TLD) name registries and entities providing domain name registration services to collect and maintain accurate and complete domain name registration data. While the Directive's recitals state that their verification processes should reflect current industry best practices, further guarantees should be sought during national transposition to make sure that the verification obligation is sufficiently effective.



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With respect to liability, the E-commerce Directive provides conditions on the limitation of liability of service providers (i.e., safe harbor) for hosting, mere conduit, and caching (to be replaced by Articles 4-6 of the DSA). The European Court of Justice has developed a workable test for attributing liability based on whether the intermediary is “active” or “passive”. This test and the underpinning legal basis are still relevant and have been codified in a recital in the DSA. The test has been discussed and confirmed by the CJEU in several important cases, such as the recent YouTube (C-682/18) and Cyando (C-683/18) joined cases. The Court confirmed the relevance of the active/passive distinction and emphasized that exemptions from liability cover only cases in which the activity of the information society service provider is of a mere technical, automatic, and passive nature.

The ECD’s ban on “general monitoring” has interfered with injunction proceedings. Although the ECD, as well as the DSA, allow monitoring obligations in specific cases, differentiating between general and specific monitoring has proven difficult. Specific monitoring obligations are permitted, as is monitoring pursuant to an order by national authorities in accordance with national legislation. Member States are permitted to impose duties of care on online services in order to detect and prevent certain types of illegal activity. It would be helpful to codify the Court’s decision in C-18/18 - Glawischnig-Piesczek - that a ban on general monitoring does not preclude an injunction to remove content identical and equivalent to the content in question and on a worldwide basis. It remains to be seen how national courts will apply these principles.

EU Copyright Directives (2001 and 2019) – The principal objectives of the 2001 Information Society Directive (InfoSoc) were the harmonization and modernization of certain aspects of copyright law

in the digital age. This included the implementation and ratification by the European Union and its Member States of the 1996 WIPO Internet Treaties.

The InfoSoc contains an exception for private copying that, if interpreted incorrectly, could violate the TRIPS/Berne 3-Step test. In some countries, the provisions regarding the private copy exception are too broad. 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 InfoSoc Directive also establishes legal protection for technological protection measures (TPMs) necessary for the protection of copyrighted material in the digital environment. However, this protection is undermined by some Member State’s intervention to regulate the relationship between technological measures and exceptions. Moreover, some countries fail to provide appropriate protections for TPMs. Germany and Luxembourg do not provide adequate sanctions against the act of circumvention and preparatory acts facilitating circumvention. Germany also provides a right of action for individuals and associations against rightsholders who fail to accommodate certain exceptions. Finland and Sweden do not provide adequate protection against the act of circumvention. Belgium, Spain, and France establish broad power for national authorities to intervene and dictate to rightsholders how to make their works available. Article 6(4)(1) of the 2001 Copyright Directive provides that Member States can only put in place appropriate measures to ensure the benefit of the exception “in the absence of voluntary measures taken by rightsholders” and “to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.”

Article 8(3) of the Infosoc directive also requires injunctive relief against intermediaries whose



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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 EU Member States have either not implemented Article 8.3 of the InfoSoc Directive or have done so incorrectly. Poland is a prominent example where Art. 8.3 has not been implemented in national legislation. However, in Germany, the courts ruled that the urgency requirements for obtaining preliminary injunctions are not available for sites which the applicant has been aware of for longer than one month. Consistent implementation of existing EU law by all Member States is critical, especially for a provision as central to effective enforcement as Article 8.3.

In April 2019, the European Union adopted a new Directive (2019/790), referred to as the Digital Single Market Copyright Directive. Member States had until June 2021 to implement this Directive, but as of September 2022, eleven Member States have yet to finalize the transposition. The Directive introduced two new exceptions to the reproduction right to enable text and data mining tools to crawl content: one covering academic content 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 and cross border uses and the other extends acts of preservation to include digitization.

In addition, the Directive contains a provision for the availability of works considered to be out of commerce. Such works can either be licensed through an extended collective licensing (ECL) mechanism or accessed/made available under an exception to copyright. The Directive also contains a general ECL provision enabling Member States to introduce ECL for other purposes under certain conditions.

The Directive further clarifies that certain content sharing platforms perform an act of communication to the public, and therefore, absent authorization from the relevant rightsholder, are liable for copyright infringement (Article 17). However, content sharing platforms are not liable if they can demonstrate that they have made their 'best efforts' to either obtain an authorization or prevent the availability of pre-identified content, take down notified content, and ensure that such content stays down. This provision also contains obligations proportional to the size, age, and popularity of the service. MPA is concerned that EU Member States might transpose Article 17 unfaithfully and dilute copyright protection by introducing overly broad exceptions for users when they upload copyright protected works, as has occurred in Germany and Austria.

In the final chapter, the Directive introduces several provisions that would interfere with contractual freedom or well-established market practices. For example, it provides a new provision on appropriate and proportionate remuneration for authors and performers for the exploitation of works they contributed to; it imposes onto licensees an obligation to annually report on revenues and remuneration due; and, it provides that authors and performers may renegotiate agreements if the remuneration originally agreed upon turns out disproportionately low compared to the revenues. Finally, the Directive introduces a revocation mechanism for authors and performers whereby they may revoke their licensed or transferred rights if a work is not exploited after a reasonable time.

Data Protection Rules – The General Data Protection Regulation (GDPR) 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 on the use of certain personal data in copyright enforcement. In the 1995 Data



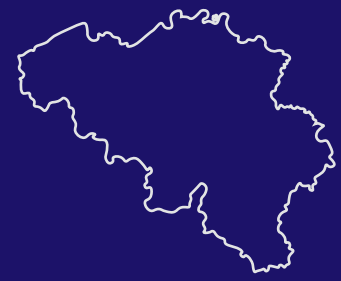
# EUROPEAN UNION

Protection Directive, rightsholders relied on Article 13, which provided derogations to the rules on data processing, referring to the respect of the “rights and freedom of others.” The GDPR still provides such a derogation to the rules on data processing (Article 23); however, it is subject to very strict and defined conditions. As a result, rightsholders 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 offenses. 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.







## MARKET ACCESS ISSUES

Broadcast Quotas – The Flemish community and the Federation Wallonia-Brussels (FWB) both transposed the 2010 AVMSD. Broadcasters reserve a majority of their transmission time for European works (excluding time allotted to news, sports events, games, advertising, teletext services, and teleshopping). Commercial broadcasters in Wallonia are required to invest in European productions, or alternatively pay a levy to the FWB film fund. The precise percentage required to invest depends on the annual turnover and is between 0 - 2.2 percent.

Investment Obligations – In 2020, the Flemish community introduced a new obligation on non-domestic AV services targeting the Flemish territory. The new law requires services to invest two percent of their annual turnover earned from the Flemish audience into the production of Flemish/European works, either directly or via a contribution to the Flemish film fund. FWB opted for a similar model: non-domestic services targeting FWB are requested to finance the production of European works with 1.4 - 2.2 percent of revenues generated in FWB. Similarly, AV services can either directly finance productions or contribute to a public film fund. MPA recently learned that the Ministry of Culture of FWB is considering reviewing the investment requirement, with the objective of increasing the investment requirements.

## INTELLECTUAL PROPERTY PROTECTION

While P2P piracy is on the decline, illicit streaming, cyberlocker sites, IPTV, and Facebook Watch groups remain a significant challenge for rightsholders.

## Enforcement

Brussels police and customs agencies are confronted with a severe lack of personnel and resources. Therefore, IP cases tend to rank low in priority. The action plan “Digital Belgium” for 2015-2020, conducted by the Minister for the Digital Agenda, and the Customs policy plan for 2015-2019 of National Customs both included tackling illegal content/counterfeiting in their objectives. However, neither 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 rightsholders to collect awarded damages.

Promisingly, in 2022, the government agreed to deploy more resources for the police and customs, especially in the fight against organized crime.

## 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. As a result, there are significant delays before the judge orders the provision of the information. Such losses of time and resources represent a significant burden for rightsholders.

EU Information Society Directive (Infosoc Directive) Implementation – Belgium has implemented the Copyright Directive.

EU DSM Copyright Directive/SatCab – Belgium transposed the DSM Copyright and SatCab Directives in 2022. The existing author and

# BELGIUM

performer unwaivable remuneration right subject to mandatory collective rights management for cable retransmission and for direct injection, when they transfer their rights to AV producers, is extended to the new definition of retransmission. This new definition includes simultaneous/live and unabridged retransmission of television or radio programs when carried out by a party other than the broadcaster, including via satellite, digital terrestrial, IPTV networks, and mobile networks. It also covers live retransmission if it takes place in a controlled and secure environment for authorized users. However, online on-demand, broadcasting, replay, or streaming is excluded. Belgium also went beyond what is prescribed in the Directive by introducing a mandatory unwaivable remuneration right for performers and authors paid by audiovisual and music on-demand services and, unless there is a collective agreement, subject to mandatory collective rights management. The new Belgian law implementing the DSM directive entered into force in August 2022.





## MARKET ACCESS ISSUES

Broadcast Quotas – French broadcast quotas exceed the requirements established by the EU 2010 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 non-domestic origin (and hourly sub-quota).

The rules for the broadcasting of cinematographic works on television services were relaxed in August 2020, creating flexibility in the programming schedule for cinematographic works applicable to “non cinema” channels. This means that films can now be shown on Wednesday and Friday evenings and on Saturdays and Sundays during the day. The broadcasting ban was maintained for Saturday evening from 8:30 p.m., except for films pre-financed by the channels which broadcast them as well as for “art and essay” films.

Screen Quota – France maintains government-sponsored inter-industry commitments that are quasi-statutory and limit the screening of a movie to four screens in the case of a 15-screen theater.

Release Windows – France mandates the chronology of how cinematographic content is released. The media chronology was last updated in January 2022. However, several international and local stakeholders have argued that the chronology lacks flexibility, that the mandated release windows are too long, and that such windows exacerbate piracy. There are ongoing discussions to re-update the media chronology.

VOD Quotas/EU 2018 AVMS Directive – In 2021, the French government established a complex legislative framework which requires domestic and non-domestic VOD services to invest in original French productions as permitted by the EU 2018 AVMS Directive. The law sets out an investment obligation of at least 15 percent (for TVOD services) and up to 20-25 percent (for subscription SVOD services) of their net annual revenues generated in France. The precise rate depends on the release windows that services choose – the shorter the window, the higher the rate. The new law also imposes significant sub-quotas (up to 75 percent) for independent productions and works of original French expression.

Subsidies – The French government provides extensive aid and subsidies to assist local film productions. The film industry, domestic and foreign, must contribute to 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 targeting viewers in France; 2) fees for censorship, 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.

Advertising Feature Films on Television – Since August 2020, the government of France has temporarily permitted the advertising of feature films on TV. Once this 18-month trial period has concluded, the government is planning to issue an impact assessment and may potentially lift the ban permanently.

Protection of Audiovisual Catalogues – In October 2021, France published a law which obliges anyone seeking to buy French cinematographic or AV works to seek continued exploitation so that French audiences and authors/performers will continue to benefit from the distribution of the work. In particular, the law includes a burdensome process for the transfer of an audiovisual work and audiovisual catalogues.

In January 2022, the audiovisual Regulator CSA and the anti-piracy authority HADOPI merged. The new entity, ARCOM, is charged with fighting piracy. ARCOM will assist rightsholders with a court order in combatting the circumvention of measures initially ordered and publish a list of infringing services.

## INTELLECTUAL PROPERTY PROTECTION

Internet piracy is a major source of concern in France. Illicit streaming is the most popular form of piracy in France. P2P sites, although in decline, remain popular.

DSM Copyright Directive – France’s transposition of the DSM Copyright Directive goes beyond what is prescribed in the Directive. For example, it includes – irrespective of the nationality of the author – a provision on the immediate application of French law for authors of musical works in an audiovisual work for the exploitation on French territory. France also requires that VOD services share specific information concerning audiovisual works including information on the number of downloads, listening, and/or views of the work to CMOs and assignors.

### Enforcement

In 2009, the Government adopted legislation to address online piracy, mainly targeting the then-dominant use of P2P protocol, through a graduated response program. Over the years, the efficacy of this legislation has eroded. Siteblocking and delisting court orders have proven effective enforcement tools in France. In 2019, these orders produced a 40 percent decline in visits to all pirate sites for French visitors. This decline can also be attributed to the success and popularity of legitimate VOD services in France.





## MARKET ACCESS ISSUES

Film Fund 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 productions. Major revisions are currently being discussed.

Production Incentives – To receive a production incentive from the German Federal Film Fund (DFFF), there is a mandatory exclusive theatrical window, which thus diminishes the freedom to decide the adequate exploitation of the work. Further, the production incentive for serial, non-theatrical content is essentially unattainable for bigger foreign projects because of the high thresholds in the cultural test.

Taxation: License Fees – The addition of license fees is increasingly being taken up in tax audits. In some cases, the authorities assert that such license fees should be added to the respective fee debtors for trade tax purposes.

Taxation: International Co-productions – Over the past several years, co-productions have been treated as separate tax subjects in local tax audits and are no longer included in the overall annual results of the individual production companies. This has led to considerable additional bureaucratic expenditure and resulted in a minimum taxation of loss-making productions, thus capping loss offsetting possibilities and making Germany increasingly challenging as a co-production location.

## INTELLECTUAL PROPERTY PROTECTION

The internet exchange of illegal copies of content through direct download, streaming, and P2P platforms are the primary piracy concerns in

Germany. While in previous years, German-language release groups mostly illegally recorded local soundtracks and encoded them with video camcords sourced from other international release groups, they have now also made several complete recordings of movies in theatrical release, including video. These groups are a primary concern because they are the source of illegal German content that is mass distributed via the internet and facilitated by portal sites.

### Enforcement

While it is possible for rightsholders 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.

Furthermore, the German courts ruled that while preliminary relief is title-specific, the urgency requirements for obtaining preliminary injunctions are site-specific and that any new infringement of new content on the same website does not cause a new urgency. This creates a wide gap in rightsholders' protection and threatens to unreasonably delay legal protection as preliminary injunctive relief is simply not available for any piracy website of which the applicant is aware for longer than one month. This unhelpful jurisprudence is being challenged before the German Federal Court of Justice.

In August 2019, the “Roundtable DNS (Domain Name System) Blocks” launched between rightsholders and ISPs, aiming to find common ground for self-regulation in Germany for DNS site blocking. The roundtables established the “Clearing Body on Copyright on the Internet” (CUII). The CUII works with the Bundesnetzagentur (BNetzA, the German networks regulator) and the German



# GERMANY

Federal Cartel Office (Bundeskartellamt) and aims to avoid unnecessary court proceedings and allow DNS blocks to be implemented faster and more effectively. However, 18 months into the project, only nine websites have been blocked.

## Legislation

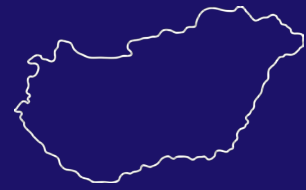
Copyright Act Revision – The 2021 transposition of the EU DSM Copyright Directive, weakened exclusive rights and copyright protection. Broad new exceptions for copyright protected works on Online Content Sharing Service Providers (OCSSPs) were introduced, interfering with legitimate exploitation of works and likely violating international copyright treaties and the EU InfoSoc Directive. The amendments are being challenged before the Federal Constitutional Court.

Germany's private copy exception is too broad and may violate the TRIPs three-step test, as there is no exclusion of copying by third parties.

The legal framework for TPMs also remains inadequate. Germany should provide specific civil remedies for illegal acts relating to the circumvention of TPMs and provide for the seizure, delivery, and destruction of illicit circumvention devices.

EU Enforcement Directive Implementation – Rightsholders contemplating legal action against internet pirates 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.





## MARKET ACCESS ISSUES

Hungarian Media Act Amendments – In June 2021, Hungary amended the Hungarian Media Act and the Advertisement Act, restricting the availability of LGBTQI+ content to minors.

While the Hungarian Media Act applies only to media content providers established or deemed to be established in Hungary, the Advertisement Act covers any advertisement published and performed in Hungary. In response to violations of the Media Act, the Hungarian Media Council has the power to initiate proceedings against media content providers established in other EU Member States, namely in cases where there has been repeated infringements. Such proceedings may result in the Hungarian Media Council ordering the media content provider to suspend its services for a period of time. Further, the Hungarian Consumer Protection Authority is also empowered to levy fines against any infringements of the Media Act, depending on the severity of the violation. These fines can range from 37 euros to 1.25 million euros.

## INTELLECTUAL PROPERTY PROTECTION

### Enforcement

Although the provisions of the European Union’s copyright related Directives – including the 2001 Copyright Directive (Directive 2001/29/EC) and the 2004 Law Enforcement Directive (2004/48/EC) – have been incorporated into Hungarian copyright law, the effectiveness of copyright enforcement still leaves much to be desired. It remains to be seen whether the recently amended rules regarding the copyright liability of online content-sharing platforms will in practice result in a higher level of protection for rightsholders.

Criminal enforcement is a persistent challenge for rightsholders in Hungary. The efficiency of criminal copyright procedures is hindered by the fact that the Tax Authority (NAV) lacks specialized investigators who are familiar with copyright protection and online infringement. Additionally, criminal proceedings against some BitTorrent platform providers have dragged on for over five years.



## MARKET ACCESS ISSUES

Draft Media Bill – In August 2022, the Ministry of Communications published a draft media bill, which proposes to obligate linear and non-linear and domestic and non-domestic AV media services targeting Israel to finance local productions. Services of medium scope (i.e., with a turnover between 300-600 million Israeli shekels) would have to invest four percent of their turnover generated in Israel. Services of large scope (i.e., with a turnover above 600 million Israeli shekels) would have to invest 6.5 percent of their turnover generated in Israel in local productions. The draft bill also includes a penalty provision, which would require a service to double its investment requirement in case of non-compliance, as well as a threshold, exempting all services below 90 million Israeli shekels from the obligation.





## MARKET ACCESS ISSUES

The Italian Consolidated Audiovisual Media Services Act sets out burdensome rules on programming quotas and investment requirements for linear and non-linear services. The quotas have myriad sub-quotas that are highly prescriptive, complex, and restrict the commercial freedom of local industry players and limit consumer choice.

Broadcast Quotas – Fifty percent of eligible broadcast hours (i.e., the overall amount of broadcasting time, excluding time allotted to news, sports events, games, advertising, teletext services, and teleshopping) must be European content. Commercial Italian TV channels must devote at least 16.6 percent of eligible hours to Italian works (25 percent for the public service broadcaster) with additional sub-quotas regarding programs for minors.

VOD Quotas – Domestic non-linear providers must reserve at least 30 percent of their catalogues for European works produced within the past five years, with at least 15 percent of the catalogue’s titles dedicated to Italian works produced by “independent producers” within the past five years. The five-year requirements do not apply to TVOD. Further, non-linear providers subject to Italian jurisdiction must give prominence to EU works.

Broadcast Investment Obligation – Commercial broadcasters must annually invest 12.5 percent of their revenues to the production of independent European works. Half of this money is reserved for Italian works produced within the past five years and 3.5 percent of that 12.5 percent of revenues are reserved for Italian cinematographic works produced by independent producers. Of this 3.5 percent, 75 percent must be devoted to works produced within the past five years. The national

public broadcaster RAI is not subject to the same investment quotas.

VOD Investment Obligation – In 2022, foreign and domestic VOD providers must devote 17 percent of their annual net revenues generated in Italy to the production of European independent works. This quota will increase to 18 percent in 2023 and 20 percent in 2024, which makes it one of the highest quotas in the EU. Fifty percent of the investment obligation must be reserved for Italian works produced by independent Italian producers within the past five years. A further sub-quota, ranging between 1.7 percent and 2 percent of the total investment obligation, must be reserved for cinematographic works of Italian original expression produced by independent producers

Release Windows – In 2022, the Italian government considered extending a 90-day mandatory release window to all theatrical films, including foreign productions. The Italian government introduced a mandatory window for Italian subsidized motion pictures in 2018. MPA is concerned about the impact of such an extension on a broad scale, as this mandatory window would have serious repercussions on producers’ ability to adequately market their works. It remains unclear at this stage if the new government elected in October 2022 will further pursue plans to regulate theatrical release windows.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The Italian market suffers from the profligate use of linking websites that share illicit content through cyberlocker services. Torrent sites are also commonly used. In recent years, MPA members have witnessed an increase of illicit content shared through user generated content (UGC) streaming platforms, unauthorized IPTV

services, and instant messaging apps.

Camcording Piracy – Italy is a source of significant audio source-theft, in which individuals record local soundtracks and then match them with existing illegal video camcord copies to create unauthorized copies of films in theatrical release. Video source-theft has also become a significant issue, especially for day and date releases. While theaters across Italy were intermittently closed due to the pandemic, there were a number of illicit camcords traced to Italian theaters. In 2021, four illicit video captures of MPA member films were traced to Italian theaters. It is extremely complex for law enforcement to seize an unauthorized live recording while it is being made in a theater. As such, the audiovisual industry has consistently called for stronger and more effective enforcement rules.

## Legislation

The Italian government has transposed the DSM copyright directive, coupled with several concerning elements. In particular, the transparency obligation goes beyond the Directive on the frequency of the reporting and the omission of important safeguards, such as the carve-out for insignificant contributors and the general proportionality.

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. However, the courts ruled that prior notice by the relevant authorities is only required for access and caching providers, but not for hosting providers.

Anti-Piracy Bill – In October 2022, the Anti-Piracy Bill, which provides the Authority for Communications Guarantees (AGCOM) with the

power to dynamically block illicit content, was tabled again. As the bill can only be examined if there is an agreement in the majority, and given that there is no fast-track procedure, the legislative process is expected to take several months to a year. The swift reinstatement of the Anti-Piracy Bill with a full dynamic siteblocking paradigm instead of the current administrative fast-track mechanism will undoubtedly improve the effectiveness of the AGCOM siteblocking program.





## MARKET ACCESS ISSUES

Broadcasting Quotas – Broadcasters must reserve at least 50 percent of their transmission time for European works, of which 10 percent must be allocated for European works created by independent productions - of which at least one third must not be older than five years- excluding time allotted to news, sports events, games, advertising, teletext services, and teleshopping as prescribed by the 2010 AVMS Directive.

VOD Quotas – The Netherlands imposes a 30 percent European works catalogue quota.

VOD Investment Obligation – In July 2022, the Dutch Secretary for Culture and Media proposed a bill introducing a financial contribution requirement for domestic and non-domestic VOD services. The bill requires that services with an annual turnover generated in the Netherlands of at least €30 million, regardless of the revenue model used, must invest 4.5 percent in Dutch audiovisual works or alternatively contribute the same amount to the Dutch film fund. The bill provides for limited exemptions. Parliament is deliberating the bill.

DSM Copyright and SatCab Directives – The Netherlands has transposed the DSM Copyright and SatCab Directives mostly verbatim. However, specifically regarding retransmission, authors and performers retain an inalienable proportional right to equitable remuneration subject to collective management when their exclusive rights are transferred to the producer, as is already the case in the Dutch law for cable retransmission and all other forms of communication to the public (with the exclusion of on demand exploitations). This provision is not prescribed in the Directives. This right now also applies to direct injection and retransmission by means other than cable. The implementing law

of 2021 also extends the beneficiaries of this right to “equitable remuneration” from the main authors and actors to all.

In spring 2022, the government launched a consultation on a revised draft Copyright Contract Act proposing to extend the proportional direct remuneration right to VOD exploitation. Following the consultation, the relevant Ministries modified the draft to replace this provision with an additional equitable remuneration right, subject to mandatory collective rights management, for whenever Dutch law applies to the underlying exploitation agreement. To date, legislative text is still under discussion.

## INTELLECTUAL PROPERTY PROTECTION

The Netherlands houses both locally-oriented pirate internet sites aimed at various language regions (e.g., Russian) and some international English language pirate sites, mostly through co-location. These pirate sites are removed by Dutch hosting providers upon notice from the private Dutch copyright protection foundation, BREIN. Dutch hosting providers similarly host servers for illegal IPTV services. A number of cyberlockers are additionally hosted in the Netherlands and hosting providers refuse to take them offline if the cyberlockers have a notice-and-takedown policy. Further, the Netherlands has one of the highest number of users of unauthorized IPTV services in Europe.

### Enforcement

In practice, Dutch police and public prosecutors only take action against internet piracy when illegal turnover reaches a certain financial threshold, although they do respond to official requests for assistance in criminal investigations by foreign law enforcement. Government policy is that rightsholders are responsible for civil enforcement

# THE NETHERLANDS

and criminal enforcement will be considered only as a last resort. Criminal copyright infringement in itself, even in the case of for-profit uploaders/sellers, is not enough. As a result, nearly all enforcement efforts are carried out by rightsholders collectively through the BREIN Foundation.

When it comes to civil enforcement, rightsholders face strong opposition from intermediaries. Cases to obtain the contact details of commercial scale infringers are contested by ISPs, even up to Supreme Court of the Netherlands. However, after BREIN secured a final blocking order of The Pirate Bay after 11 years of proceedings in 2020, Dutch ISPs agreed in 2021 to a covenant whereby a court order for blocking an infringing website against one ISP will be executed voluntarily by the other ISPs. This has been tested with the blocking of a further six infringing sites (as well as hundreds of proxies) in 2022. Blocking is dynamic, enabling updates by BREIN without further court orders.





## MARKET ACCESS ISSUES

Broadcast Quotas – Domestic broadcasters must dedicate at least 33 percent of their quarterly broadcasting time to programming produced originally in Polish and at least 50 percent of their quarterly broadcasting time to European programming, excluding time allotted to news, sports events, games, advertising, teletext services, and teleshopping, and 10 percent of this must be by independent producers. In addition, half of this 10 percent must be produced in the last five years.

Mandatory Financial Contributions – Starting in 2022, non-domestic EU broadcasters must contribute 1.5 percent of revenues from the Polish market to the Polish Film Fund.

VOD Quotas – Domestic on-demand services must allocate at least 30 percent of their catalogues to European works and ensure prominence of those works.

Foreign Ownership Restrictions – Poland limits non-EEA ownership in a broadcasting company to 49 percent. A broadcasting license may be granted to a foreign person or a subsidiary controlled by a foreign person, whose registered office or permanent place of residence is located in EEA.

Additional Tax – Distinct from the Polish Film Fund levy and mandatory financial contributions discussed above, Poland taxes box office, broadcasters' and cable operators', VOD providers, and DVD revenue to subsidize Polish and European films.

## INTELLECTUAL PROPERTY PROTECTION

Internet piracy is a serious and growing concern in Poland. APP Global's December 2020 piracy

landscape report observed that operators of well-known infringing websites in Poland are often overt and viewed positively by the public. According to the 2021 MPA-ACE Country Landscape Report, 84 percent of Polish respondents reported viewing movies and/or series via unofficial piracy methods in the past 12 months.

Poland also suffers from illegal camcording. In 2021, three illicit video captures of MPA member films were traced back to Poland.

### Enforcement

Law enforcement engagement on IP cases in Poland is extremely inconsistent and wholly inadequate. Many cases are stuck or dropped without justification.

Polish courts are seriously backlogged. Sentences are non-deterrent. The creation of specialized IP courts has not brought about needed improvements. MPA remains concerned that the police will lose interest in working with rightsholders because of languishing court cases and disappointing sentences. Furthermore, civil actions against pirate services are ineffective due to the slowness of the legal process in Poland. As an example, in 2015 Polish film makers obtained a court order against the Chomikuj.pl content hosting platform in relation to the availability of infringing copies of Polish movies, requiring that Chomikuj implement various measures to prevent the availability of infringing content. This decision was confirmed by the Krakow appeal court in 2017 and went further on appeal before the Supreme Court, which issued a decision only in 2022.

### Legislation

2001 Copyright Directive (InfoSoc) – Poland

has not implemented Article 8.3 of the Infosoc Directive. Online service providers whose main purpose is to engage in or facilitate the infringement of intellectual property rights, often establish their operations in countries outside the EU with less robust intellectual property law enforcement, or otherwise operate in complete anonymity, making it impossible to locate them or tie them to a specific country. For example, the operator of the Polish infringing site Chomikuj.pl sold their assets to an entity located in Belize. Such situations can be addressed by no-fault injunctions with intermediaries, a remedy made possible by Article 8.3 of the InfoSoc Directive and confirmed by CJEU jurisprudence to be a proportionate and effective remedy (see CJEU, C-314/12, 27 March 2014, UPC Telekabel v. Constantin). Consistent implementation of existing EU law by all Member States is critical, especially for a provision as key to enforcement as Article 8.3. Lacking this 8.3 implementation, in conjunction with the lack of enforcement, is very problematic.

DSM Copyright and SatCab Directives – Poland is transposing the DSM Copyright and SatCab Directives. Unfortunately, Poland is creating an extended collective license (ECL) mechanism that will enable CMOs to license the works uploaded to online sharing service providers under an ECL, though the transposed ECL does helpfully include an opt out. In addition, the draft law extends the existing Article 70 – which provides authors and performers with an unwaivable, unassignable remuneration right, subject to MCRM – to additional remuneration for the making available space.



## MARKET ACCESS ISSUES

In 2022, in response to sanctions imposed on Russia following the invasion of Ukraine, the Russian government adopted several restrictive measures targeting foreign investors from “unfriendly” jurisdictions. The measures include an obligation for the foreign shareholders of Russian joint-stock and limited liability companies to obtain governmental approval for any deals involving their shares.

Foreign Ownership Restrictions – The Mass Media Law prohibits foreign and Russian legal entities with foreign participation from establishing mass media entities or broadcasters (including through a third party) from owning more than 20 percent of the capital of an entity that participates in the establishment of a mass media entity or broadcaster.

Ownership restrictions also apply to OTT services. Foreign ownership of OTT services is limited to 20 percent, provided that the number of Russian subscribers is less than 50 percent of that services total audience (i.e., the rule targets services with mostly non-Russian audiences). Foreign participation above 20 percent is subject to government review and approval.

Advertising Ban on Pay-TV – Russian law bans advertising on pay-TV channels. 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 pay-TV industry’s growth.

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 given 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. The government of Russia appears to violate 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 starting 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 several legal reforms that allow rightsholders to seek injunctions through the Moscow City Court. Infringement on Russian social media platforms such as VK, OK, and Telegram remains a significant concern to rightsholders.

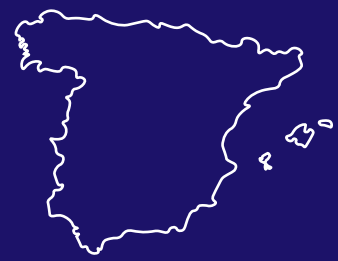
Illicit Theatrical Screenings – As a result of many companies’ decision to suspend operations in Russia, the Russian theatrical market has collapsed. Beginning in April 2022, several theaters in Yekaterinburg, Yakutia, and Vladivostok started offering unauthorized screenings of major motion pictures, renting out the screening rooms to third party operators. In July, according to the Association of Theater Owners, the number of venues increased up to 127. The screenings are not advertised openly, but information about the titles and schedule is relatively accessible via social media. Theaters claim that renting out their premises for a fixed fee to a third party waives their liability for actions during the rental period. Neither the Ministry of Culture nor law enforcement have taken any steps to prevent or disrupt the illegal screenings.

## Enforcement

Russia needs to increase its enforcement activity well beyond current levels to provide adequate and effective enforcement against IPR violations, including deterrent criminal penalties, consistent with its WTO obligations. In addition, Russia should increase the number and effectiveness of criminal IPR cases focused against digital and source piracy.

Also, at present, there are no legally mandated notice and takedown procedures to remove links to infringing content from search results. In lieu of laws mandating compliance with notice and takedown, the representatives of the largest Russian internet companies and Russian rightsholders signed the Memorandum of Understanding for cooperation in intellectual property rights protection in the digital era (MOU)—in November 2018. The MOU introduced a procedure to remove the links to infringing content from search results at the rightsholder’s request. The MOU’s Objective was to develop a law that would regulate search engines’ obligations to remove links to infringing websites from search results. However, the MOU is voluntary and applies only to its parties, and to become a member of the MOU, a candidate must undergo a burdensome approval process which requires approval from all members. As a result, no MPA member or foreign rightsholder has been allowed to join the MOU. The draft law that would replace the MOU and convert its provisions to obligatory requirements entered the parliamentary process in 2021.





## MARKET ACCESS ISSUES

Broadcasting Quotas – Linear services must reserve 51 percent of their broadcasting time for European works, with half of that 51 percent devoted to content in any of the official languages of Spain and 10 percent to independent productions. Half of that 10 percent of works must be five years old or less.

VOD Quotas – On-demand services established in Spain must reserve at least 30 percent of their catalogues for European works, with half of these in any of the official languages of Spain. A minimum of 40 percent of this 50 percent must be reserved for works in one of the official languages of Spain’s Autonomous Communities, reserving at least 10 percent for each.

Investment Obligation – Spain maintains investment obligations for linear and on-demand services. If revenues are over 50 million euros, there is an obligation to invest 5 percent in European audiovisual works. Services can comply with this obligation through the direct finance of European works’ production; indirectly by buying the rights of finished works; or, via a contribution to the national film fund or to the fund for the promotion of cinematography and audiovisual works in different co-official languages. There is also a 70 percent subquota for independent productions of which 15 percent is reserved for official languages other than Spanish.

The new AV law also establishes that both domestic and non-domestic linear and non-linear services shall contribute 1.5 percent of their annual gross turnover generated in Spain to the Spanish public broadcaster RTVE. This 1.5 percent contribution may not exceed 20 percent of the total income planned for each year for the RTVE Corporation.

Film Dubbing (Catalonia) – In June 2022, the Generalitat de Catalunya published a preliminary draft law on Audiovisual Communication that aims to update the 2005 AV law. The proposed law is applicable to audiovisual communication services aimed at the public in Catalonia and deviates from the country-of-origin principle. It foresees that VOD services will be required to incorporate works that are dubbed or subtitled in Catalan. In addition, as programs in Catalan and Aranese are considered to be of “general interest”, audiovisual media service providers must guarantee the prominence of content in these languages by setting out a quota that establishes that at least 50 percent of the 30 percent generally reserved for European works must be in Catalan or Aranese. The draft law defines independent audiovisual works as those in which the independent producer holds at least 50 percent, straying from Audiovisual Media Services Directive (AVMSD).

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 from 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 ignore market demand for U.S. and non-EU country films and hinder the development of Spain’s theatrical market. In the Royal Decree of May 5, 2020, to support the cultural sector, the Spanish Government increased the screen quota to 30 percent by linking it to the subsidies granted to support movie theatres. Both quotas concurrently exist, and exhibitors who wish to access the direct subsidies must comply with the standard 25 percent quota in 2020, or—in the event they do not comply in 2020—can still access the subsidy in 2021 if they schedule 30 percent EU country films. The “Ley del Cine” preliminary

text includes a screen quota of at least 20 percent for films from EU members or Ibero-American countries. Films from non-EU or non Ibero-American countries shown in the original version with subtitles are excluded. The failure to fulfill this requirement will be penalized with fines up to 300,000 euros.

Public Subsidy Scheme – The method of awarding subsidies for films and short films is points-based. The scale was recently modified to award an extra-point to producers who choose to distribute their movies through independent Spanish film companies, which can make a significant difference in the allocation of funding as rankings are quite tight.

## INTELLECTUAL PROPERTY PROTECTION

Illicit camcording remains a concern for rightsholders in Spain. However, enforcement has improved in recent years. Since 2020, four camcorders have been arrested.

### Enforcement

The timing of judicial outcomes for IP crimes is unpredictable. The Ministry of Justice recently announced its goal to set up a public prosecutor's office focusing solely on IP crimes but no budget currently exists for this initiative.

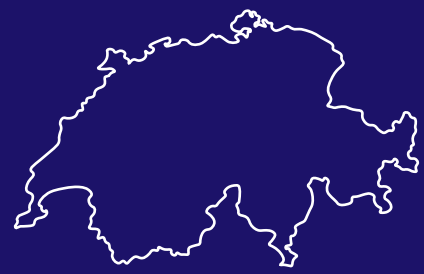
Helpfully, Spanish courts have recently handed down positive decisions against administrators of pirate websites, including site blocking orders. Recent judicial rulings have led to a more dynamic fight against piracy. In April 2021, the Minister of Culture and Sports presided over the signing of a protocol between La Coalition and the internet service providers that offers a useful additional mechanism facilitating siteblocking.

### Legislation

DSM Copyright Directive – The Spanish government transposed the DSM Copyright Directive by way of Royal Decree in December 2021. While the Royal Decree is currently a draft law in Parliament, it will remain in force as is until it is voted on by the legislature.

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 a court order.

Spanish Data Protection Law – This law does not allow a civil party to collect and process infringers' IP addresses on the basis that such addresses are personal, confidential data.



## MARKET ACCESS ISSUES

Broadcasting Quotas – Broadcasters must reserve half of their transmission time for European works, where practicable.

VOD Investment Obligation – In 2022, a public referendum approved a new 4 percent investment obligation for non-domestic VOD services targeting the Swiss market.

VOD Quota – Switzerland imposes a 30 percent quota for European works for non-domestic VOD services targeting Switzerland.

## INTELLECTUAL PROPERTY PROTECTION

Switzerland lacks meaningful remedies and effective enforcement against online copyright infringement, in particular against foreign-based piracy sites. This is fostered by the doctrine of legal private use of content from illegal sources and a lack of action by access providers to block access to such offers. This is particularly concerning, as Switzerland’s robust technical infrastructure has made it an attractive host for sharehosting (wherein website operators share a single server that hosts their websites, allowing a significant decrease in their monthly rent compared to a private server) and hosting illegal sites. Provisions recently introduced have not yet had a visible effect on such activities and may need to be tested in court cases to become operative. Thus, overall, the legislative reform is a disappointment.

Unique Distributor Clause – Exploitation of a film in any media in Switzerland, including VOD, now requires a single distributor to maintain exclusive control over all language versions in Switzerland. This is accompanied by laborious registration and reporting duties. This “unique distributor clause”

provision in the Film Act lacks clarity regarding the extent of “grandfathering” protection for existing contractual film rights. This heavy-handed amendment interferes with internationally well-established licensing practices.

VOD Licensing – Switzerland imposes a mandatory, inalienable collective author and performance rights remuneration on VOD services available in Switzerland. Films from other countries are not affected, though the provision lacks clarity.

## Enforcement

Attempts to enforce access blocking and cessation of sharehosting operations in Switzerland have failed thus far. There are loopholes in the enforcement against the use of Swiss domains for piracy and there is a lack of diligent standards for local hosting and data center operators, who offer their services to copyright-infringing operators in weak enforcement jurisdictions on a “no-questions-asked” basis. In this regard, it is crucial to introduce efficient, practicable enforcement instruments for intermediaries, particularly targeting access providers and local data center operators. Moreover, Switzerland needs to introduce efficient, practicable instruments to identify the owners of domains (in particular, Switzerland-administered top-level domains) in cases of abuse and to enforce rights against such abuse.

Also, it is important for Switzerland to introduce reasonable, efficient rules of platform liability related to platform-based mass content offerings. In fact, Switzerland has never introduced reliable rules for ISP liability and has not adopted practices that have become standard elsewhere in Europe and beyond.

# SWITZERLAND

## Legislation

Copyright Legislation – A recent legislative reform, in effect since April 2020, ultimately introduced two enforcement instruments into copyright: a stay-down duty imposed on hosting providers “creating particular infringement risks” (targeting Swiss-based sharehosters); and a specific legal justification for processing personal data, such as IP addresses, for purposes of criminal prosecution of copyright infringements. Both provisions contain vague legal concepts, lack clarity, and will likely require court decisions lasting several years and high costs to remove the ambiguities and become effective. Data processing for purposes of out-of-court or civil law enforcement, such as cease-and-desist letters and injunctions, remains in legal uncertainty.

Swiss law also still allows circumvention of technological protection measures for purposes of uses permitted by law, including the inappropriately wide scope of the private use exception. In combination, these protection deficits leave the Swiss marketplace largely unprotected against cross-border piracy services. Switzerland’s copyright law remains inadequate, lacking crucial enforcement mechanisms.

The reform also did not abolish or limit the scope of collective licensing of “catch-up TV” recording/making available services. Given the reluctance of policymakers and the extraordinary length of time that past copyright reforms have taken, this is unlikely to be remedied soon.

Nonetheless it remains critical that the Swiss government come into compliance with the Berne Convention/TRIPs, WIPO Internet Treaties, and internationally acceptable enforcement standards. Necessary minimum changes include: 1) ensuring broader liability under Swiss law for parties who facilitate, encourage, and profit from widespread infringement; 2) engaging ISPs, including access

providers, in the fight against online piracy; 3) affirming that current law does not permit copying from unauthorized sources; and, 4) implementing adequate civil and criminal enforcement tools including access blocking.

In addition, Switzerland lacks reliable, abuse-proof standards and limits for orphan works licensing, “scientific research” uses, internal documentation/information copying, and educational uses. The open, undetermined, and unlimited wording of these provisions potentially permits excessive, abusive interpretation thus creating substantial loopholes in protection against emerging new commercial use cases and conflict with the three-step test.

Furthermore, Switzerland needs to introduce appropriate limitations to permitted private use, such as diligence standards or a legal source requirement for private users and limits on third-party commercial services permitted under private use.





## MARKET ACCESS ISSUES

VOD Catalogue Quota – The UK imposes a 30 percent quota for European Works in VOD catalogues and related prominence requirements.

Digital Services Tax (DST) – In April 2020, the UK introduced a two percent tax on the revenues of search engines, social media platforms, and online marketplaces that derive value from UK users to try to tackle the perceived misalignment between the place where profits are taxed and the place where value is created. It also aims to address a strong public perception in the UK that large, multinational companies are not making a fair contribution, through taxation, to supporting UK public services. However, the UK recognizes that the most sustainable long-term solution to the digitisation challenge is reform of the international corporate tax rules, and therefore backs an international, OECD-led solution. The UK Government has committed to adjusting its DST once the OECD’s proposed two-pillar solution is in place.

Freedom of Movement – The freedom of movement of people, goods, and services previously enjoyed by European and UK citizens moving between the UK and the EU ended on 1 January 2021. This has added some friction to the process of producing audiovisual content in the UK following the absence of a specific agreement covering the movement of cast, crew, and equipment between the UK and the EU for productions in the UK-EU Trade and Cooperation Agreement. The UK government continues to pursue bilateral discussions with individual EU Member States to try to reduce cost and bureaucracy around cross-border working and movement of goods and equipment.

## INTELLECTUAL PROPERTY PROTECTION

Online piracy remains the prevalent form of film and TV piracy in the UK, with streaming of film, TV and sports content via TV-connected boxes and other physical devices, 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 tackling this problem.

### Legislation

Text and Data Mining Exception – A recent proposal from the UK Government to amend the UK’s copyright regime through the introduction of a much broader exception to copyright for text and data mining (TDM) risks undermining the delicate balance of rightsholder and user interests struck by the current UK TDM exception and could put the UK in breach of international treaties, including the Berne convention, TRIPS, and the WIPO Internet Treaties.

In June 2022, the UK’s Intellectual Property Office published its response to the *AI and IP: Copyright and Patents* consultation from earlier that year. This included the announcement that, of the approaches considered for TDM, the Government would take forward the option least conducive to maintaining the high level of copyright protection expected and relied upon by UK rightsholders. This option would allow an exception to copyright for TDM for any purpose, commercial or otherwise, and would not give rightsholders the possibility to opt out. It also presents significant questions regarding how

# UNITED KINGDOM

creative sectors would continue to ensure their content is protected from piracy, currently offering no solid safeguards against the abuse of content once mined.

The audiovisual and wider creative industries are unaware of any evidence to suggest that the current licensing regime to facilitate TDM is failing, nor that it does not have the scope to adjust to future technological developments, including TDM for the purposes of training AI. In addition, the breadth of the proposed exception would restrict contractual freedom, as well as the audiovisual sector's ability to innovate through licensing in future.



# NATIONAL TRADE ESTIMATE



# WESTERN HEMISPHERE

# WESTERN HEMISPHERE

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. MPA has seen that protectionist and other policies impacting market access in these territories can sometimes proliferate across the region and beyond, 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. While Brazil’s theatrical quotas have recently expired, some legislators are pushing for renewal and others have called for a so-called supplementary quota, which would limit the number of blockbuster films to be released in a given cinema. Argentina and Brazil are also exploring new quotas and regulations on OTT platforms, which, if implemented, could inhibit market growth and limit consumer choice. In Mexico, there have been legislative attempts to impose local content quotas on both theatrical and OTT distribution channels, via the Federal Telecommunications and Broadcasting Law or the Federal Cinematographic Law. Further, a longstanding bill in Chile’s legislature, if implemented, would impose screen quotas that appear inconsistent with Chile’s FTA commitments.

Canada maintains a web of discriminatory and outdated content quotas for broadcast and pay-TV that artificially inflate the total spend on Canadian programming. In September 2021, the Liberal Party of Canada was re-elected with a minority government and, in February 2022, reintroduced legislation to reform the Broadcasting Act via Bill C-11 (Online Streaming Act), which proposes

to provide the Canadian Radio-television and Telecommunications Commission (CRTC) with the explicit power to regulate non-Canadian digital services delivered over the internet, including those provided by MPA members. This includes granting the CRTC the power to make regulations that would impose financial, discoverability, and reporting obligations to support the Canadian broadcasting system. In June 2022, the House of Commons completed Third Reading of Bill C-11. It is now under review by the Senate Standing Committee on Transport and Communications (TRCM).

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 traditional market access barriers, our industry also faces *de facto* trade 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 the motion picture and television industry. Of particular concern is the proliferation of illicit streaming devices (ISDs) and apps – such as set-top boxes and other devices configured to allow users to stream, download, or view unauthorized content from the internet. These devices are popular throughout the region and are a leading vehicle for the online piracy of audiovisual material, especially in Brazil, where ISDs continue to proliferate in the market despite several inspections and three million seizures in the past year.

Another regional threat in Latin America and Canada is piracy from illegal internet protocol television (IPTV) services that provide stolen





# WESTERN HEMISPHERE

telecommunication signals/channels and video-on-demand content to a global audience via dedicated web portals, third party applications, and ISDs configured to access the service. Although Brazilian enforcement authorities have deployed important raids against online content piracy in recent years, namely Operation 404 against illegal digital content, these raids have not sufficiently addressed the issue due to the overwhelming presence of unauthorized content on the internet. MPA and other audiovisual stakeholders encourage the creation of an efficient administrative site-blocking system in Brazil, which could help tackle online piracy on a larger scale.

In the meantime, authorities from other countries in the region – such as Mexico, Argentina, and Chile – also struggle to combat piracy. 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.

Organized online piracy in the region and internet release groups have been identified in Argentina, Brazil, Chile, Ecuador, Guatemala, Mexico, and Peru. These groups are overtly profit-driven and use different distribution channels to release illicit content. Rather than closely held top sites, some of these groups operate public websites and work at the peer-to-peer (P2P) level. In general, they also have a close association with hard goods operators. Moreover, over the past several years, Latin American release groups have extended their operations outside the region, recruiting operatives in the United States and Russia. It is imperative that countries' legal and enforcement frameworks promote accountability and rule of law and create incentives for intermediaries to cooperate with rightsholders in combating this ongoing problem.

Camcording as source piracy is a persistent problem in Latin America, although progress against this crime is improving overall. As restrictions against

COVID-19 continue to relax throughout the region, MPA expects camcording activity to resume in cinemas.

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 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 rightsholders' efforts to obtain cooperation from law enforcement and prosecutors. Meanwhile, in 2020, Mexico enacted U.S.-Mexico-Canada Agreement (USMCA) legal reforms that included changes to the criminal code that provide new tools for the prosecution of camcording pirates, including the removal of the "proof of profit" requirement – an important legislative improvement that should be followed by other countries in the region.

Rightsholders also face the longstanding challenge of cable and signal theft throughout the region. Rogue cable operators continue to unlawfully retransmit channels and content of international programmers. In Canada and South America, this phenomenon is particularly worrisome. Cable and signal theft is particularly problematic in Colombia, Ecuador, Peru, and Uruguay, but the problem also persists in Central American and Caribbean markets, including Guatemala, Honduras, Trinidad and Tobago, Jamaica, Bahamas, Barbados, and Aruba. 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.

MPA continues to monitor legislative and regulatory proposals in Latin America that would introduce statutory remuneration rights for authors and performers in the audiovisual sector, with particular attention to any proposals to subject such rights to mandatory collective rights management (MCRM) by collective management organizations (CMOs). Of greatest concern are MCRM initiatives aimed at rights in communication to the public (CTTP) exploitations, including interactive on-demand services that implicate making available rights, already in place in Argentina for authors and performers. Such rights can be asserted by CMOs against licensees including streaming platforms, cinemas, and television broadcasters that have acquired exploitation rights by license from producers, but who face subsequent claims for remuneration from a panoply of CMOs representing authors and performers. The Argentine regime imposing MCRM on CTTP rights has been in place for many years, but CMOs in that country have begun to assert claims for making available exploitations, potentially undermining this new sector of the audiovisual business. Other countries in the region have introduced author and performer remuneration rights subject to CRM into their national copyright laws, including Chile, Peru, Colombia, Brazil, and Mexico. Many of these initiatives contemplate voluntary CRM for CTTP rights, although it is not clear to what extent local CMOs discern any difference between a mandatory and a voluntary CRM regime, and some of these regimes impose MCRM for performer CTTP remuneration rights (e.g., Peru and Colombia). Claims from CMOs can be excessive, with cumulating tariffs from multiple CMOs, and cause disruption and confusion in local markets. CRM can be disruptive for the market and mandatory CRM in particular has a profoundly negative impact on U.S. exports in the audiovisual sector, through the imposition of additional, unjustified increases in distribution and licensing

costs and resulting confusion in the marketplace for rights clearance.

For example, a worrisome new bill in Paraguay's legislature proposes a new remuneration right for musical and audiovisual performers, establishing a 10 percent remuneration to be collected by financial institutions out of payments to digital service providers, and would be subject to mandatory CRM. This bill would undermine the free exercise of exclusive rights and contractual freedom and would impose a cumbersome administrative process.

Over the past few years, several governments have amended their copyright frameworks or are actively considering amendments. In Canada, while the government passed long-awaited reforms to implement the WIPO Internet Treaties, amendments to the *Copyright Act* are needed to appropriately deal with the new forms of online copyright infringement not present, dominant, or contemplated when the *Copyright Act* was last amended in 2012, including streaming sites, illicit subscription services, and ISDs. In addition, there are aspects of the legal framework in Canada that do not provide appropriate legal incentives for intermediaries (e.g., ISPs, payment processors, online advertising networks, hosting providers, etc.) to cooperate with rightsholders in deterring online copyright infringement. The framework also provides broad exceptions to copyright that remain untested. In addition, while Canada has already agreed via the USMCA to extend its general term of copyright protection and passed Bill C-19 in June 2022 to amend the *Copyright Act* to extend the general term of copyright protection, the government has delayed fully implementing these changes until December 31, 2022. In Argentina, copyright reform is stalled, and in Brazil, reform is underway. As governments in the region 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



# WESTERN HEMISPHERE

consistent with both the international copyright framework – especially with regard to exceptions and limitations to copyright - and, in the case of FTA partners, consistent with their bilateral obligations.

Mexico has passed legislation to implement many of its USMCA obligations. Helpfully, among a myriad of benefits, these reforms are poised to improve the defense of technological protection measures (TPMs), enable a notice-and-takedown system for the removal of infringing works online, provide higher administrative sanctions for copyright infringement, enable prosecution of camcording without proof of profit motive, and enhance the Mexican Institute of Industrial Property's (IMPI) online enforcement capabilities. Although these developments are positive, the growth of the legal digital marketplace in Mexico has been hampered by the indifference of the judicial authorities and the absence of secondary regulation to implement USMCA reforms to the Mexican Copyright Act. Further amendments are also needed to the Copyright Law or Civil Code to cover cable systems, as well as to provide civil remedies for satellite and signal piracy. MPA looks forward to working with the U.S. government to ensure that the agreement is fully and effectively implemented.





## MARKET ACCESS ISSUES

Pay-TV Content Quotas – Effective September 2011, Law 12.485/2011 imposes local content quotas for Pay-TV, requiring every qualified channel (those airing films, series, and documentaries) to air at least 3.5 hours per week of Brazilian programming during primetime. It also requires that half of the content originate from independent local producers and that one-third of all qualified channels included in any Pay-TV package must be Brazilian. Implementing regulations limit eligibility for these quotas to works in which local producers are the majority IP rights owners, even where such works are co-productions, and regardless of the amount invested by non-Brazilian parties. These quotas are set to expire in September 2023 but could be renewed. Lawsuits challenging the constitutionality of these local content quotas and the powers granted to ANCINE are pending before Brazil’s Supreme Court.

Screen Quotas – The most recent Presidential Decree on Screen Quotas, released in January 2020, imposed quotas for 2020 that were similar to prior years, requiring varying days of screening depending on the number of screens in an exhibitor group. For example, an exhibitor group with 201 or more screens is required to meet a 57-day quota, and all the screens in the exhibitor group’s complexes must individually meet this quota. While these quotas expired in September 2021, there is a draft bill (5092/2020) seeking to extinguish any deadline applied to the theatrical quotas. The MPA opposes local content quotas, which limit consumer choice and can push consumers toward illegitimate content sources.

Video on Demand (VOD) Tax and Regulatory Framework – Brazil currently applies a Condecine tax, on a per-title basis, to films, Pay-TV and “other

segments,” according to ANCINE’s Normative Ruling #105. If imposed on the VOD segment, such a tax would chill investment and curb consumer choice. Helpfully, in September 2021, Brazil’s legislative body, the National Congress, voted against the levy of Condecine tax over VOD content on a per-title basis, overriding an executive branch veto in the process. Although there is not currently a Condecine tax over VOD, discussions within the legislature persist. Notwithstanding recent positive developments in this area, MPA and other industry stakeholders committed to the growth of Brazil’s OTT market remain concerned about the future.

Potential Regulation of OTT Services under SeAC Law – Audiovisual sector stakeholders remain engaged in regulatory discussions about the relationship between OTT services and the Legal Framework for Pay-TV (SeAC Law). There are several legislative initiatives that would seek to regulate OTT services as SeAC (conditional access service – pay-television), potentially creating regulatory and tax burdens for streaming services. In 2020, Brazilian regulatory agencies ANATEL and ANCINE helpfully reaffirmed that OTT linear service is not a SeAC service. However, Congress and the Ministry of Communication continue to discuss the relationship between OTT services and the SeAC Law.

Accessibility Regulation – Audio description, closed-captioning, and sign language must be offered in Brazilian cinemas. In May 2021, the National Congress approved Executive Order 1025/2020, which extended the deadline for cinemas to offer these accessibility resources to people with visual and hearing impairments to January 2, 2023. In the meantime, various legislative measures have been introduced, aiming to compel programmers, broadcasters, and OSPs (online service providers) to provide accessibility tools within their services. The

U.S. film industry supports measures to broaden access to its productions and to better serve patrons with disabilities and is working closely with regulatory bodies and other stakeholders to ensure that the accessibility features are implemented with a technological solution that is secure, efficient, and meets global best practices.

## 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. Studies carried out in 2019 indicate that 73 million people aged 11+ in Brazil have used pirate sources to access audiovisual content, consuming 1.7 billion pirated full-length movies and TV show episodes in a given three-month period. Despite commendable actions by local enforcement authorities such as ANATEL, ANCINE, and Customs, the use of piracy devices continues to rise in Brazil, exemplified by the increased market penetration of ISDs, such as HTV, BTV, and MXQ. As an example, HTV offers a grid of 170+ live pay-TV channels and a VOD service that offers TV shows and motion pictures, many sourced through illegal camcording activity.

Camcord Piracy – Camcord piracy, while a persistent problem in Brazil, is trending in the right direction. However, as cinemas reopen to moviegoers post-pandemic, rightsholders anticipate that this illicit activity will resume.

### Enforcement

Brazil is demonstrating a new political will to combat piracy, with ANCINE creating an anti-piracy working group and the Ministry of Justice’s National Council to Combat Piracy and Intellectual Property Crimes (CNCP) pursuing a number of helpful voluntary initiatives to fight illegal activity.

The Ministry of Justice has consistently deployed enforcement actions against online content piracy, such as Operation 404 in recurrent waves, and regulatory agencies have recently improved their focus on the contraband of ISDs to Brazil. However, current efforts on ISDs are insufficient given the scale of the problem. Brazil additionally has yet to establish an efficient administrative site-blocking system to curb the existence of non-authorized content throughout the internet, 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. Additionally, rightsholders are troubled by three legislative proposals (Bills 3133/2012, 6117/2009, and 3968/1997) that promote broad exceptions and limitations to copyright. These bills are inconsistent with Brazil’s international obligations and, if enacted, would likely deter investment in Brazil’s creative industries.

Camcord Legislation – A 2019 anti-camcording bill (2714/2019) that helpfully removes the requirement to prove a profit motive was approved by the House Committee on Culture and now awaits a vote at the House Committee on Constitutional Affairs. If approved, the bill will move to the Senate.

Site Blocking Legislation and Initiatives – In 2016, the Parliamentary Committee of Inquiry on Cybercrimes approved in its final report a bill on judicial site blocking, now Bill 5204/2016. The bill is still under consideration by the Lower House Committee on Science and Technology, while a similar bill (169/2017) is under consideration in the Senate. Applauded by rightsholders, 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 a global best practice enforcement tool. In addition to judicial site blocking legislation, ANCINE and ANATEL have been working to implement an administrative site blocking system. Furthermore, the 2021-2023 Action Plan of the National Intellectual Property Strategy (ENPI) includes administrative site-blocking as a proposed method to curb infringement of IP rights.

Online Content Moderation – Brazil’s president recently proposed a draft bill to hold OSPs accountable for online content moderation, including the removal of accounts deemed criminal by the terms of use. Content moderation/removal could only happen with a court order. Brazilian policymakers should take care that such legislation, if implemented, does not threaten the numerous successful voluntary agreements between rightsholders and OSPs concerning the takedown of illegal content.

Subtitling and Dubbing of Audiovisual Works – The Lower House has started a debate on the nationality of professionals who dub and subtitle audiovisual works, which could result in a protectionist policy that excludes work undertaken by foreign companies.



## 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 previous year’s gross revenues from their conventional services and discretionary services (specialty and pay-TV) combined, but there is some flexibility as to allocation among the services within the group. CPE obligations have also been assigned to independent signals and to independent discretionary services that have over 200,000 subscribers upon renewal of their licenses and are based on historical levels of actual expenditures on Canadian programming.

Second, per the Exhibition Quota, private conventional broadcasters must exhibit not less than 50 percent Canadian programming from 6 pm to midnight. 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, IPTV, and direct-to-home satellite, must offer more Canadian than non-Canadian services. These protectionist measures inhibit the export of U.S. media and entertainment services.

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

Proposed Obligations on Non-Canadian Digital Services – Non-Canadian digital services



delivered over the internet are currently exempt from most requirements under the Broadcasting Act. However, Parliament is in the final stages of considering proposed legislation (Bill C-11) that will provide the Canadian Radio-television and Telecommunications Commission (CRTC) with the explicit power to regulate non-Canadian digital media services, including the power to make regulations that would impose financial, discoverability, and reporting obligations to support the Canadian broadcasting system. In June 2022, the House of Commons completed the Third Reading of Bill C-11. It is now under review by the Senate Standing Committee on Transport and Communications (TRCM).

Broadcasting Investment Limitations – The Broadcasting Act provides that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay and specialty television) and distribution undertakings (cable and IPTV operators and satellite television distributors), must meet certain tests of Canadian ownership and control: 1) a licensee’s CEO must be Canadian; 2) at least 80 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.

Québec Distribution Restrictions – The Québec Cinema Act severely restricts the ability of non-Québec-based theatrical film distributors to do business directly in Québec. Since 1986, grandfathered MPA member companies have been permitted to apply for a Special License for any film produced in English that meets the less restrictive requirements set out in an Agreement between the MPA and the Québec Minister of Culture and Communications. The Agreement was revisited in 2022 and was extended for seven years.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Canada’s digital marketplace remains hampered by widespread infringement. Canada has seen an influx of operators, sellers, and resellers of infringing paid subscription piracy services (including IPTV and VOD services). Canadians are also actively engaged in the theft of telecommunication signals, thereby acting as the sources of content for these illegal services. Streaming sites and other online sources for unauthorized movies and TV shows, and piracy devices and apps, remain readily available both online and in the legitimate retail market, suppressing the demand for legitimate digital streaming and VOD services. 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 torrent or P2P 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 to cooperate with rightsholders in deterring piracy. The framework also provides broad exceptions to copyright that remain untested.

Copyright Term – The USMCA requires that Canada extend the general term of protection for all works measured by the life of the author to life plus 70 years (currently 50 years). Canada has 30 months from the date of entry into force of the USMCA in which to do so, i.e., until December 31, 2022. On June 23, 2022, Parliament passed Bill C-19 in order amend the Copyright Act to extend the general term of copyright protection. However, these changes will only come into force on a date fixed by order of the Governor in Council (the Cabinet), which has not yet occurred.

## **Enforcement**

Historically, crown prosecutors have been reluctant to seek the breadth of remedies for intellectual property crimes. This issue often arose due to a knowledge gap concerning the prosecution of intellectual property crimes, a problem that is amplified when dealing with emerging piracy models. While there have been recent prosecutions, ongoing education of crown prosecutors is key to ensuring Canada stays ahead of emerging piracy business models.



## MARKET ACCESS BARRIERS

### Advertising on Broadcast and Pay-TV Services

– Mexico imposes advertising limitations and incentives that aim to promote domestically-made programming. Pay-TV channels, which are primarily operated by foreigners, 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. For the past 20 years, channels have been allowed up to 12 minutes of advertising per hour under a practice known as “averaging,” so long as they did not exceed the 144-minute daily limit. This practice was adopted in 2000, approved by the regulator in 2011, and affirmed by Mexico’s Superior Court of Tax and Administrative Justice in 2014. On February 19, 2020, Mexico’s regulatory agency abruptly reversed the long-standing practice and announced limits on Pay-TV operators to only six minutes of advertising per hour for every 24-hour period, including prime time. If not reversed, this sudden mandate may drastically reduce advertising revenues and have a devastating effect on revenues and jobs for U.S. businesses. Moreover, as this move imposes unfavorable advertising limitations on U.S. Pay-TV providers, in sharp contrast to the rules for Mexican free-to-air TV broadcasters, the action breaks with Mexican courts’ prior rulings and raises concerns about compatibility with non-discrimination principles in USMCA.

Foreign Ownership Limitations – Mexico currently maintains a 49 percent foreign equity cap for broadcast networks. By comparison, the U.S. FCC has 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, Mexican

lawmakers and policymakers propose protectionist policies, such as the imposition of local content quotas in both theatrical and streaming/OTT windows, as well as limits to the number of screens in which a given movie can be exhibited. If adopted, such measures would severely limit the exhibition of U.S. films in Mexico and would potentially contravene Mexico’s USMCA commitments.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy is a serious, widespread problem in Mexico. Piracy devices and apps are 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.

Camcord Piracy – A number of MPA member company films continued to be sourced from illicit camcords in Mexican theaters in 2019. As cinemas reopen to moviegoers post-pandemic, rightsholders anticipate that this illicit camcording activity will resume. The USMCA contains strong anti-camcording commitments that should greatly enhance enforcement against camcording in Mexican theaters.

### **Enforcement**

The enforcement problems in Mexico are procedural and structural and are further exacerbated by a lack of resources and focus from authorities, as well as 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.

## Legislation

Traditional Cultural Expressions Initiative – Mexico's Congress recently approved bills aiming to protect traditional cultural expressions in a manner similar to copyrighted works, with the goal of combatting cultural appropriation and plagiarism of indigenous designs and expressions. The measures aim to register, classify and document the traditional cultural expressions of indigenous communities while also broadening the scope of protection and economic rights for these expressions. The measures also introduce a strict enforcement scheme with criminal penalties. This initiative poses legal uncertainty for a range of creative industries, given the absence of guidelines for the granting of authorization, the lack of clarity as to which communities are associated with a particular expression, and the fact that some expressions could be taken from the public domain. The U.S. government should encourage Mexico to implement this initiative with transparency, broad stakeholder engagement, and adherence to good regulatory practices and USMCA commitments.

Legislation to Implement USMCA Reforms – In July 2020, Mexico enacted reforms to its Copyright Law, Criminal Code and Industrial Property Law to comply with its USMCA commitments. Despite the strides Mexico has made in its efforts to implement USMCA, additional work is necessary to properly implement presumption of copyright and TPMs. Further amendments are also needed to the Copyright Law or Civil Code to cover cable systems, as well as to provide civil remedies for satellite and signal piracy.

Subsequent to the reforms of July 2020, Mexico's National Human Rights Commission, an autonomous government agency, filed a case in the Mexican Supreme Court seeking to void the copyright gains as unconstitutional, particularly the provisions regarding criminal sanctions for circumvention of TPMs and the provisions on notice and takedown. The Supreme Court will determine the constitutionality of the reforms with a definitive and unappealable decision in the coming months.