



MOTION PICTURE ASSOCIATION

MPA Comments Regarding the 2021 National Trade Estimate Report on Foreign Trade Barriers

October 2020

October 29, 2020

Filed via www.regulations.gov

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

Re: MPA Response to USTR's Request for Comments to Compile the National Trade Estimate Report on Foreign Trade Barriers (Docket: USTR-2020-0034)

Dear Mr. Gresser:

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

The American motion picture and television industry is a major U.S. employer that supported 2.5 million jobs and \$181 billion in total wages in 2019. Nearly 320,000 jobs were in the core business of producing, marketing, and manufacturing of motion pictures and television shows. Another nearly 573,000 jobs were engaged in the distribution of motion pictures and television shows to consumers, including people employed at movie theaters, video retail and rental operations, television broadcasters, cable companies, and online video services. The industry also supports indirect jobs in the thousands of companies that do business with the industry, such as caterers, dry cleaners, florists, hardware and lumber suppliers, and retailers.

Despite the ongoing challenges presented by the COVID-19 crisis, the U.S. film and television production industry remains one of the most highly competitive in the world. In 2019, the enduring value and global appeal of U.S. entertainment earned \$16.3 billion in audiovisual exports. Moreover, this industry is one of the few that consistently generates a positive balance of trade. In 2019, that services trade surplus was \$9.4 billion, or four percent of the total U.S. private-sector trade surplus in services.

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

of legitimate commerce and impair U.S. global competitiveness.

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

MPA aims to expand the legitimate market and protect our member companies' content as it flows to consumers through a variety of traditional and new distribution channels. There are now at least 450 legitimate online platforms around the world, allowing global audiences to enjoy creative entertainment wherever, whenever, and on whatever device. Consumer demand for high-quality content is driving this global digital trade, which helps support millions of American workers and thousands of jobs overseas.

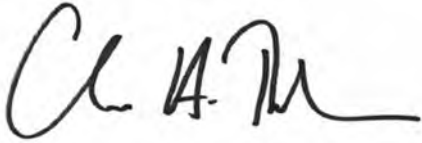
However, as countries increasingly propose and implement barriers to digitally enabled services, the widespread availability of MPA member content through legitimate channels is placed in jeopardy. Open, free, and reciprocal digital trade is key to our industry's ability to compete globally and to continue offering billions of consumers access to content of their choice. Addressing and dissuading our international trading partners from adopting restrictive 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 utilize 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.

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

Sincerely,

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

Charles H. Rivkin
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 it and its member companies are most actively engaged. Therefore, the countries included in this year's filing are commercially significant markets or potentially commercially significant markets.

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



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 platforms. However, across the continent, weak intellectual property protections, market access barriers, and lacking enforcement hinder economic growth and limit opportunities for foreign investment. MPA members report ongoing issues with online piracy and the illegal distribution of works via internet protocol television (IPTV) applications and piracy devices—with little progress made in recent years. In the context of the ongoing implementation of the African Continental Free Trade Area (AfCFTA) agreement, MPA strongly urges regional governments to enact effective measures to open markets and protect intellectual property.

Market access barriers continue to hinder both the growth of local creative industries and foreign investment in the region. Further, value-added taxes (VATs) in South Africa, Nigeria, Kenya, and Uganda on online transactions serve as a barrier to both local and international companies seeking to offer affordable, legal programming and distribute content online.

In addition to barriers to market access, intellectual property theft and piracy remain significant challenges across the continent. Rightsholders have consistently noted piracy as a major challenge to operating in Sub-Saharan markets, particularly in Nigeria and Kenya. While the Nigerian film market has one of the most productive film industries in the world, the Nigerian Copyright Commission (NCC) estimates that Nigeria loses over \$1 billion annually to film piracy. Nonetheless, despite rampant piracy, international investment in Nigeria's creative sector has increased substantially over the past few years. However, in order to spur further international investment and allow all participants in the Nigerian film industry to capitalize on their works, stronger legislation is needed to stem physical and digital piracy.

Nigeria has taken some steps to improve copyright protection and enforcement through raids conducted by the NCC and the National Film and Video Censors Board (NFVCB) and proposed authentication labels. However, the existing Copyright Act—and ongoing attempts to amend it—have serious shortcomings. Both the existing law and the draft amendments to it, proposed in 2015, fall short of international copyright norms, and fail to implement the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) [collectively referred to as the WIPO Internet Treaties]. Though Nigeria ratified both the WPPT and the WCT in 2018, the country remains noncompliant with its obligations under both treaties.

Kenya has similarly attempted to update its intellectual property legislation in recent years. While those efforts to improve copyright protections and adapt to the digital age are laudable, both Kenya's 2019 amendment to its Copyright Act and other proposed intellectual property legislation (the 2020 Intellectual Property Bill) arguably fall short of international standards and best practices. Further, the extensive updates on intellectual property legislation and copyright protection and enforcement proposed by an interagency task force earlier this year do not meet the requirements of the Berne Convention and the WIPO Internet Treaties, or otherwise conform to international best practices. MPA encourages the US and Kenyan governments to work together to ensure that updates to existing legislation meet international standards and ultimately protect rightsholders more effectively.

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 alike. Containing a number of seriously harmful proposals, the CAB proposes new exceptions to copyright (including an additional fair use provision), limitations on contractual freedom, inadequate provisions on technological protection

AFRICA

measures (TPMs), and insufficient criminal and civil deterrents for copyright infringement. The PPAB also proposes compulsory collective rights management for the remuneration of audiovisual performers. Both, if enacted, would 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 (TRIPS Agreement). Both local South African and international creators, including the MPA, have expressed serious concerns with the proposed amendments. While President Ramaphosa recently referred these two bills back to Parliament for redrafting, MPA encourages the U.S. government to continue to engage with South Africa to ensure that revised versions of the CAB and the PPAB conform to international best practices, adequately protect rightsholders, and enable sufficient enforcement mechanisms.

As internet access rapidly increases across the continent, ratification and effective implementation of the WIPO Internet Treaties is of paramount importance. These treaties require parties to establish legal frameworks that allow copyright holders to control their works published online and be compensated for them. While there has been progress made towards implementation – with Nigeria ratifying the Treaties; Kenya, Namibia, and South Africa having signed the Treaties (albeit without a timeframe for ratification); and Benin, Botswana, Burkina Faso, Gabon, Ghana, Guinea, Madagascar, Mali, Senegal, and Togo having expressed intent to join—MPA encourages the U.S. government to continue engaging with local governments to advocate accession to the Treaties. Effective IP frameworks will benefit local and foreign rightsholders, strengthen Africa's existing film and television industries, and provide more opportunities for partnership and investment in the continent's burgeoning and diverse creative sectors.

Further, ongoing implementation of the AfCFTA agreement affords an excellent opportunity to enhance intellectual property rights and create

strong copyright protections on the continent. With 54 of 55 African Union Member States committed to the agreement, the AfCFTA could serve as a vehicle for all of Africa to implement strong intellectual property protections and contribute to the development of an open, regulated, and thriving online marketplace. Robust intellectual property protections are a cornerstone of rule of law and good governance, and implementation of the AfCFTA and WIPO Internet Treaties will serve to further facilitate legitimate digital trade across the continent.





MARKET ACCESS ISSUES

Broadcast Quota – In 2014, the Independent Communications Authority of South Africa (ICASA) reviewed a regulation introducing South African local content quotas on television and radio. In March 2016, the ‘ICASA Regulations and Local Television Content’ was published in the Government Gazette, which installs local program quotas for licensed broadcasters of televised content in South Africa. In May this year, ICASA published a new regulation, which fully exempts ‘television broadcasting service licensees’ from compliance with the local television content quotas during the National State of Disaster (NSD) and allows a three month grace period from the end of the NSD. The exemption is set to expire on October 15 and the President of South Africa is expected to make an announcement on any possible extension thereof.

Non-domestic media service providers licensing content to local broadcasters are exempted from the program quotas. In 2018, ICASA clarified that non-domestic OTT services targeting South Africa are exempted from the local program quota.

Online Value Added Tax – In May 2014, South Africa published regulations relating to registration and payment of VAT on all online transactions conducted in, from, or through South Africa. Currently levied at 15 percent, the tax includes online selling of content 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

Legislation

Copyright Amendments – The Copyright Amendment Bill was first introduced in South Africa in July 2015 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 new exceptions to copyright, including an additional fair use provision; a range of limitations on contractual freedom, including a limitation to assignments and a provision concerning ownership of works by the state; inadequate protection on technological protection measures (TPMs) necessary for the licensing of legitimate content; and, overbroad exceptions to prohibitions on the circumvention of such measures. Finally, the bill provides inadequate criminal and civil remedies for infringement, including online piracy, that will deny 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 limit contractual freedom and impede incentives to produce in South Africa.

The bills were approved by the Parliament and Council of Provinces but, in June 2020, referred back to the Parliament by the President who cited constitutional concerns. The Parliament now has three options. First, it could reconsider the bills and limit the list of constitutional concerns by justifying why some elements are constitutional. The Parliament can then send the bills back to the President for assent. If the President is not satisfied with the constitutionality of the reconsidered bills, he can refer them to the Constitutional Court. Second, it could table amendments to the bills, with the view of addressing the constitutional reservations raised by the President. Or, third, it could withdraw the bills and instruct the Department of Trade and Industry (DTI) to redraft.

The Cybercrimes and Cybersecurity Bill – The draft bill aims to put in place a coherent and integrated cybersecurity legislative framework. However, the bill overreaches and grants a concerning level

SOUTH AFRICA

of discretion to the government's security cluster. For instance, the bill grants the South African Police Service and the State Security Agency far-reaching powers to investigate, search, and seize any electronic device, with verbally granted search warrants deemed sufficient to take action. Such a provision could invite abuse. The motion picture industry filed comments on this bill, recommending that South Africa introduce a technological neutral no-fault blocking provision similar to successful provisions across the European Union. It is well known that infringing services often operate in complete anonymity, making it impossible to locate them or tie them to a specific country. South African citizens and companies require a mechanism to be protected from structurally infringing content providers and/or providers of otherwise illicit content, harmful software, malware or spyware, by enabling the party who is best placed to take corrective action legally. Without no-fault enforcement legislation, it is impossible to act efficiently against cybercriminals, where the actual infringements and crimes are committed from abroad – something that is more frequent in the era of a globalized internet.

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



NATIONAL TRADE ESTIMATE



ASIA PACIFIC

ASIA PACIFIC

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

Market access barriers for the theatrical and television industries take several forms in the region, including content quotas, foreign investment limitations, and dubbing and advertising restrictions. Local 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 and Thailand 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.

While such restrictions have targeted traditional distribution channels for decades, governments are increasingly proposing content quotas and other regulations for the online over-the-top (OTT)/video on demand (VOD) marketplace, which would limit consumer choices, stifle business development, and add a burdensome barrier to market entry in this fast-growing segment. Several governments in the region, including Thailand, Vietnam and Indonesia, are considering local presence requirements.

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

Censorship regimes of some Asia-Pacific economies, such as China, remain opaque, unpredictable, and slow, often resulting in de facto discrimination against foreign content. MPA encourages countries utilizing censorship regimes to shift to industry self-regulation and classification based on international best practices. Countries should provide clear guidelines for self-classification, and these guidelines should be transparent, consistent, expeditious, and ensure equal treatment of all content regardless of origin.

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

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

MPA urges governments in the region to enact



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

Site blocking, often through no-fault injunctive relief, is an established best practice to reduce online copyright infringement. It allows countries to disable access to copyright infringing websites. Japan recently enacted legislation to clarify that sites that deliberately provide links to third party infringing content can be held liable under Japan's copyright laws. Such enforcement tools and laws are critical to fostering a healthy and sustainable online marketplace.

The 1996 World Intellectual Property Organization (WIPO) Internet Treaties contain the building blocks for protection of copyright in the digital age, including a robust "communication to the public" and "making available" right for online transmissions, as well as prohibitions against the act of trafficking in devices for the circumvention of tools used to protect works in the online market. Countries such as Vietnam, Brunei, and Thailand should join the WIPO Internet Treaties and implement these important protections for copyrighted works. India has joined the treaties but has yet to implement them.

The global norm for the term of copyright is now at least 70 years after the death of the last surviving author, and at least 70 years for subject matter in which term is determined from date of publication. More than 90 countries throughout the world have adopted terms of protection in this range. As countries throughout the Asia-Pacific region look to bolster their creative industries, attract foreign direct investment, and avoid discriminatory

treatment of their own works, they should extend their terms of protection in line with international best practice. In particular, India, Indonesia, Malaysia, New Zealand, Philippines, Taiwan, Thailand, and Vietnam should extend their terms of protection in accordance with global norms.

Recognizing the strong 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, Australia, Japan, Philippines, and Sri Lanka have ratified the convention and New Zealand is considering joining. Illicit camcording remains a serious problem in the Asia-Pacific region. In 2019, there were 103 illicit audio copies and 47 video copies of MPA member films which were forensically traced to Asia-Pacific movie theaters. Because of the widespread closure of theaters in 2020 due to COVID-19, illicit camcord data for the region is anomalous. In 2011, Asia-Pacific Economic Cooperation (APEC) Members agreed on Best Practices that encourage the enactment of effective policies and laws to address camcorder piracy, including legislation that criminalizes unauthorized camcording in theaters and 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 urges the government of India to pass long-considered anti-camcording legislation.

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



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U.S. free trade agreements with Singapore, Australia, and South Korea have provided an important means to enhance intellectual property rights protection with key Asia-Pacific trading partners. These agreements have also eliminated burdensome market access barriers, benefitting both U.S. industry and the local creative economy. MPA supports the negotiation of trade agreements that improve the protection and enforcement of copyright, augment market access, and foster a healthy online marketplace. To this end, MPA encourages the U.S. and Japan to advance to the second stage of negotiations. MPA further commends the U.S. and China for the Phase 1 agreement, which includes meaningful advancements in copyright protections as well as the opportunity to secure improved access for audiovisual products.





MARKET ACCESS ISSUES

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

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 four 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 recently, in 2019, the Australian Competition and Consumer Commission (ACCC), through its Digital Platforms Inquiry Final Report, recommended “harmonisation” of content regulation across broadcast and video on demand, introducing the possibility of expanded local content obligations on OTT services. In April 2020, the government responded with an

Options Paper on ‘Supporting Australian Stories on our Screens.’ While the Options Paper did not make the case that Australian consumers are denied access to Australian content or that Australian content is not readily available, a mandatory Australian content investment obligation is being considered. Such a quota would raise concerns with Australia’s compliance with its FTA obligations. To ensure the continued production of Australian content, Australia should maintain competitive schemes for attracting international film and TV productions. Doing so would boost the quantity and quality of local Australian content, rendering any consideration of quotas or content investment obligation for digital delivery unnecessary.

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 service providers.” Rights holders have succeeded in disabling access to hundreds of blatant piracy sites, resulting in reductions of piracy visitation and increases in access to legitimate VOD services. The Australian government is planning to review its laws related to online copyright enforcement. MPA will participate in that review.

Legislation

Copyright Modernization – In March 2018, Australia commenced the Copyright Modernization consultation, which is considering further exceptions to copyright, either in the form of newly defined fair dealings or fair use, as well as restrictions on contracting out of exceptions, and orphan works. In August 2020, the government announced its Copyright Access Reform agenda, which includes



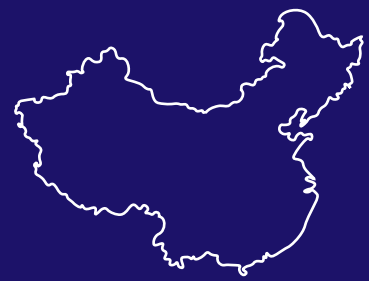
AUSTRALIA

the introduction of a limited liability scheme for the use of orphan works, a new fair dealing exception for non-commercial quotation, amendments to education and library and archives exceptions, and a streamlining of the government statutory licensing scheme. This agenda risks undermining the balance of IP protection in Australia that has notably fueled Australia's creative industries; could create significant market uncertainty; and, effectively weaken Australia's infrastructure for intellectual property protection. Although Australia has yet to issue any policy conclusions on the consultation, an exposure draft is expected to soon be released.

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

Illegal IPTV Services, Devices and Apps – Similarly, Australia's anti-piracy laws, while generally effective, are not specifically targeted to address the growing problem of illicit IPTV services and apps, including illicit streaming devices (ISDs) that provide users with access to pirated materials or encourage them to download apps which provide access to the same. Similarly, it would be beneficial for the government to take steps to strengthen the laws to deter the distribution/dissemination of such illicit services, devices, and apps.





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MPA commends the U.S. and China for completion of the Phase One agreement. The agreement’s purchasing requirement for IP licensing includes audiovisual products which could be meaningfully used to increase the licensing of audiovisual products for VOD services within China’s 30 percent quota, as well as revenue share.

Import Quotas/Revenue Share – Notwithstanding China’s commitment under the U.S.-China Film MOU to permit an additional 14 “enhanced format” foreign revenue-sharing films into its market annually, China still maintains an official quota of 20 foreign revenue sharing films per year. Furthermore, China committed that in 2017 they would make a meaningful increase to compensation, as the current 25 percent U.S. share of revenue is far below comparable markets. 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 dictates the release dates and length of theatrical runs of foreign films, often restricting the ability of the U.S. producer to obtain the full 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 during the same period. Such blackouts typically occur during Lunar New Year, school and summer holidays, or coincide with political events. Restricting the release of new foreign imported titles during peak season and day-and-date releases not only drives down theatrical revenues, but also contributes to increased unauthorized consumption, as piracy websites and services meet consumer demand for foreign blockbuster titles. This was less evident in 2020 when cinemas were closed for six months because of COVID-19.

Screen Quota – Under State Council regulations, public screening of foreign films must not exceed one-third of the total annual screen time. The same screen quota was maintained in the Film Promotion Law which took effect on March 1, 2017.

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

Online Video Restrictions – In recent years, the Chinese Government has issued a number of regulations that further restrict the online media space. In September 2014, the former SAPPRFT



issued regulations requiring that websites obtain permits and limit online distribution of foreign content to 30 percent, and additionally modified the content review process. The content review process allows only two windows each year for online distributors to submit content for registration and censorship review and prohibits provincial authorities from being used for content review. Further, it requires foreign TV series to be submitted as complete seasons, compared to the previous practice of submitting TV shows on a per-episode basis, which was consistent with international market practice. These rules have substantially cut down on the number of U.S. TV programs licensed in China and has resulted in delays in the availability of TV series, effectively curtailing day-and-date releases. As the 30 percent foreign content cap is further limited by country, in reality, U.S. content is restricted to 10 to 13 percent in real market terms. The range of policies has undoubtedly led to increased online piracy. Furthermore, in 2016, the government instructed video websites to allow state-owned media enterprises to own “Special Management Stakes,” including voting powers in decision making; thus far, platforms have not complied.

In addition, in October 2018, the new National Radio and Television Administration (NRTA) solicited public opinion on two administrative rules, although no official rules were issued. The Administrative Rules on the “Introduction and Dissemination of Foreign Audio-Visual Programs” propose not only a generic 30 percent cap on foreign content, but also stipulate that the quota be further applied on a category-by-category basis to genres of film, TV, animation, documentaries, and “other” programs, such as education, science and technology, culture, variety, and sports. Further, the Administration Rules on the “Overseas Personnel participation in the Production of Radio and Television Programs” propose to restrict the participation of foreigners in the local production

of radio and TV programs. In sum, China’s online video policies increasingly create uncertainties and barriers, and have disrupted the growth of China’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 censorship time 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 will attract investment and boost China’s potential as a regional film and TV production hub.

Foreign Investment Restrictions – China limits foreign investment in film production, distribution and cinema chain companies, and home video distribution companies. China prohibits foreign investment in pay-TV/VOD services and television, including in television production companies. Foreign investment partnerships are also prohibited in online video platforms. China’s revised Negative Investment List 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, and these sectors’ growth.

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.

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

Local Printing/Duplication Requirement – China continues to require that digital film prints be replicated in local laboratories. This scenario impedes U.S. rights holders' ability to control the print quality and to trace the source 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 commends the U.S. and China for progress to date and encourages the parties to 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 growing legitimate digital economy in China. However, the NCAC's administrative sanctions have done little to deter the growth of piracy websites, apps, and related services. Given this reality, China must continue its focus on infringing websites, P2P networks, and piracy devices and apps, including the facilitation of infringing content being distributed on social media platforms, all of which threaten the continued growth of legitimate business.

Camcord Piracy – China remains a significant source of illicit camcording in the region. During 2019, there were 13 audio copies and 16 video copies forensically matched to China, the highest in the Asia Pacific region. The quality of camcorded films from China has improved and is threatening the legitimate theatrical and home entertainment markets. China must impose sufficient criminal



penalties for camcording in order to deter this crime.

Piracy Devices and Apps – China is a leading manufacturer and exporter of devices which permit the installation of third-party, pre-loaded or post-purchase infringing applications, allowing consumers access to 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 below-described “server principle,” rights holders have been left without a remedy, or at best, with an uncertain remedy. Given that the Google Play Store is not officially available in China, a host of third-party Android app stores have proliferated with a multitude of pirate apps, which provide access with impunity to unauthorized audiovisual content and generally are not subject to effective deterrent enforcement action.

Mini-VOD Cinemas and Chains – Despite China’s regulations on mini-VOD cinemas and chains coming into effect in March 2018, an estimated 14,000 mini-VOD cinemas and chains are operating in different cities across the country without proper licenses and are routinely screening U.S. content without authorization. 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 severely penalize or shut down these businesses if they are found to have violated the copyright law.

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

Enforcement

China has been operating its annual “Sword Net” anti-piracy campaign for 14 years. The 2019 campaign focused on combatting piracy of films in theatrical release and combatting unauthorized access to video streaming services. As part of this campaign, China took enforcement actions against illegal camcording and the sharing of pirated films through cyberlocker links, social media, and e-commerce platforms; piracy at VOD mini-theaters and chains; pirated movies and TV content hosted outside of China; unauthorized content made available through Internet Protocol Television (IPTV), Over-the-Top (OTT) services, and smart devices and apps (including aggregating apps) for streaming media; and, the sale on e-commerce platforms of OTT products that enable access to unauthorized content.

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 issued several draft regulations, guidelines, opinions, and judicial interpretations, many of which touch on important enforcement and judicial functions (including, e.g., preservation

orders, calculation of damages in internet piracy cases) and must continue to ensure implementation of effective legislative and enforcement measures. In May and August 2020, in conjunction with the Phase One agreement, the State Council's Legislative Affairs Office (SCLAO) released two consecutive revisions of amendments to the Copyright Law. The latest revisions contain some improvements, including enhanced remedies against infringement, increased damages, and the addition of punitive damages. The revisions also include protections against the circumvention of technological protection measures (TPMs), though it should be amended to ensure that these protections are adequate and effective. China should also ease copyright owners' onerous burden of proof; lower the inordinately high threshold of commercial piracy necessary to trigger a criminal prosecution; establish more deterrent penalties; ensure adequate and effective enforcement against apps and websites that facilitate unauthorized access to copyrighted works stored on remote servers by clarifying the right of "communication over information networks" to reject the "server principle"; eliminate the distinction between crimes of entities and individuals; criminalize internet offenses that may lack a demonstrable profit motive but that nonetheless impact rights holders 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. China should ensure robust and effective copyright amendments and enforcement that are consistent with its international commitments.

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

physical infringing goods. The required standard of 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 rights holder action to prevent the illegal trafficking of 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. China should include unauthorized online broadcasting of movies, TV dramas, TV programming, sports events, and 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 – Streaming websites and the easy availability of illicit streaming devices in physical marketplaces remain concerns in Hong Kong. Due to the absence of the communication right under the Copyright Ordinance, copyright holders do not have a clear avenue for relief in relation to illegal video streaming on online platforms and have limited recourse to criminal enforcement. While Hong Kong Customs conducted enforcement actions and arrested several illicit streaming device re-sellers in May 2018, the investigation has become mired in technical evidence relating to circumvention.

Legislation

Following a public consultation on the copyright law in 2006, the HKSAR Government introduced a bill to the Legislative Council in 2011. The Bill sought to introduce a technology-neutral communication right to better protect copyright works in the digital environment and provisions for limitations on liability of online/internet service providers. The Bill represented an important step towards addressing rampant online piracy. However, after the Bill was debated in 2012, it was put on hold for non-copyright related reasons. The HKSAR Government should restart the process with the goal to strengthen the copyright law to effectively address online piracy.



MARKET ACCESS ISSUES

Broadcast Regulations – The Indian government regulates the uplink and downlink of satellite signals beaming into India. Foreign broadcasters are required to set up offices in India licensed by the government and must pay prescribed fees per channel beaming into India. More generally, India’s Telecom Regulatory Authority (TRAI) imposes an onerous set of regulations on the broadcast sector, stifling innovation and hindering competition. For example, TRAI has issued tariff orders that establish the amounts, by genre, that broadcasters can charge satellite and cable platforms for content (these orders were upheld by India’s Supreme Court in 2018) and continues to create regulatory uncertainty around pricing of pay-TV channels. The government’s attempt at price controls reduces the incentive for foreign investment in the sector, despite the lifting of many foreign direct investment restrictions in 2015.

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

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

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

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

Taxes – India 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 state governments (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, i.e. to remove a multiplicity of high taxes. India should subsume all taxes into the national GST system.

Mandatory sharing of Non-Personal Data – In July 2020, the Expert Committee on Non-Personal Data under the Ministry of Electronics and IT released a report proposing to mandate the sharing of ‘non-personal data’ with the Government of India and business competitors in India. Such a proposal raises serious concerns with respect to a content owner’s ability to maintain high standards of data security in India, severely disadvantages competition in the Indian market, and undermines intellectual property rights.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy is the greatest threat to the film and television industry in India. According to a 2018 study by antipiracy consulting firm Muso, Indian consumers rank third highest globally for the number of visits (17 billion) to piracy websites.

Camcording Piracy – Camcording is an ongoing challenge for rights holders in India. During 2019, 47 illicit audio and 6 video copies were traced to Indian theaters. The high number of audio cams reflects the strong demand for local language audio files, which are sourced for various international release groups. A key camcorder was referred to police in Kolkata for criminal investigation in mid-2018, and all forensic evidence and identifying details were provided to the police. However, the enforcement unit has yet to take meaningful steps in the investigation. State authorities should undertake efforts to tackle this pervasive problem.

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.

In a move helpful to rights holders, a seminal April 2019 Delhi High Court decision firmly established permanent site blocking as a viable remedy to curtail online infringement in India. The orders were made dynamic, meaning additional domains accessing the site already blocked can be easily added to the orders. A further decision in July 2019 creates a “doubly dynamic” system since domains can be added mid-stream while a case is still being adjudicated. The Delhi High Court has now ordered blocked over 1,000 domains, reducing piracy visitation from India to the most notorious pirate websites in the world.

It is unfortunate that the National Internet Exchange of India (NIXI) has ceased suspending the use of domains if based on false or fraudulent Whois information. The current unavailability of timely and accurate Whois data is taking its toll on enforcement efforts in India.

Legislation

Anti-Camcording Legislation – For years, industry stakeholders have advocated for effective anti-camcording provisions in Indian law. In February 2019, the Indian Cabinet approved proposed anti-camcording provisions in amendments to the Cinematograph Amendment Bill 2019. However, the amendments remain pending. India should swiftly enact legislative amendments to outlaw unauthorized recording of all or part of an audiovisual work in a cinema.

Copyright Legislation – India acceded to the WCT and WPPT on September 25, 2018. However, India has yet to implement its obligations under these treaties. The Department of Industrial Policy and Promotion (DPIIT) subsequently put forward draft amendments to the Copyright Rules 2013 proposing to extend compulsory licensing of literary and musical works and sound recordings to websites, portals, and music streaming firms. U.S. motion picture studios are also affected by these licensing rules, as they often produce local films with musical content. These extended compulsory licenses appear inconsistent with India’s commitments in the Berne and TRIPs agreements.

In June 2020, the DPIIT proposed decriminalization of copyright infringement offences in the Copyright Act 1957. If passed, such a proposal will weaken copyright protection, remove an important deterrent for copyright infringers, and disincentivize investment in the creative industries. India should abandon such a proposal as it would also run counter to India’s TRIPs obligations.





MARKET ACCESS ISSUES

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

Film Law – 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, “Ministerial Regulation (MR34/2019) Concerning the Procedure for the Distribution, Exhibition, Export, and Import of Film” was issued. The Regulations maintained the 60 percent local screen quota and dubbing restrictions and added further limitations on screen time by a single distributor, importer, or producer to 50%. In recent years, domestic films have accounted for a growing and substantial share of the market and local films are seeing greater investment without the imposition of heavy-handed regulations. Moreover, these restrictions undercut Indonesia’s laudable 2016 decision to remove the film sector from the Negative Investment List.

Customs Duties on Electronic Transmissions – Indonesia has indicated that it may not agree to a two-year extension of the WTO e-commerce moratorium on customs duties for electronic transmissions and has raised the possibility of charging customs duties on electronic services

such as SVOD. 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.

OTT Regulations – The Ministry of Communication and Informatics has drafted onerous OTT regulations that require foreign OTT service providers to obtain certification, set up local permanent establishments, localize data, and use local national payment gateways, in addition to providing content filtering and censorship mechanisms. In addition, these regulations contain significant penalties for non-compliance. Such requirements, if implemented, would stifle business development and add a burdensome barrier to market entry.

Furthermore, in August 2019, the KPI suggested that it would subject SVOD (OTT) providers to its strict censorship and classification requirements.

There is an ongoing constitutional court case brought by two Indonesian broadcasters arguing that VOD services should be regulated under the Broadcasting Act.



MARKET ACCESS ISSUES

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

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The spread of internet-based film and television piracy, as well as rampant piracy of Japanese anime and manga content— which a number of our members produce and distribute— continues to impede industry’s competitiveness in Japan. Hundreds of primarily infringing websites have proliferated over the years. It is encouraging that the Japanese Diet enacted legislation in June 2020 to confirm liability against link (leech) sites, as well as against the downloading of still images. However, it remains to be seen whether these laws will be effective in addressing piracy that emanates from overseas. The government postponed a discussion on injunctive relief until the new law’s effectiveness can be ascertained. Meanwhile, other remedies, such as the voluntary establishment of an “infringing website list” (IWL) to choke ad revenues, has proven useful to rights holders. However, the IWL is no substitute for more stringent measures to deal with largely foreign-based piracy sites harming the audiovisual industry in Japan.

Legislation

Link Site Law – In June 2020, the Japanese Diet passed the Bill to revise part of the “Copyright Law” and the “Law Concerning Special Provisions on the Registration of Program Works” (Cabinet Submission No. 49). The law clarifies liability against link (“leech”) sites, as well as prohibits the unauthorized downloading of still images. The law enters into force on October 1, 2020, (as to link site liability) and January 1, 2021, (as to illegal downloading of still images). On link site liability, the law amends 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 – The amendments to the Copyright Law which included the extension of copyright term to all authors to life plus 70 years (cinematographic works already enjoyed 70 years prior to this amendment) were passed by the Diet and took effect on January 1, 2019.



MARKET ACCESS ISSUES

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

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

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

FINAS Fees – In September 2013, Malaysia’s National Film Development Corporation (FINAS) issued a circular requiring payment of fees for Digital Cinema Packs transmitted electronically and replicated locally, even though those activities do not constitute acts of importation and have no legal basis under the controlling legislation, the FINAS Act. Malaysia should officially remove the circular as it creates significant market uncertainty and disincentives for foreign investment.

Screen Quota – In 2013, FINAS increased Malaysia’s screen quota, doubling the original quota issued by the 2005 Compulsory Screening Scheme. The current quota requires each cinema to screen at least two local films for two weeks each per year. Although exhibitors have some flexibility

to reduce the screening time for local films when those films underperform at the box office, the requirement is unnecessary and remains an obstacle to commercial business.

INTELLECTUAL PROPERTY PROTECTION

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

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. Although Malaysia passed anti-camcording legislation in 2011, the government has yet to take legal action against known infringers.

Enforcement

The Malaysian Copyright Law and regulations have long allowed for administrative orders to ISPs to disable users’ access to infringing websites in the country. Starting in 2016, administrative orders have successfully blocked access to hundreds of pirate websites. Monitoring and enforcement must continue to ensure the efficacy of this program.

Further, despite an increase in the sale and usage of illicit streaming devices, there remains no direct enforcement or remedy for rightsholders under the Copyright Act. In response to this concern, the Malaysian Communications and Multimedia Commission (MCMC) is considering implementing a ban on the sale of such illicit devices.

Legislation

Copyright Act Amendments – In February 2019, the Intellectual Property Corporation of Malaysia (MyIPO) undertook a stakeholder consultation as part of its review of proposed changes to the Copyright Act. Unfortunately, MyIPO has yet to announce further consultations on the amendments, which seek to address the rapid changes in digital technology and online piracy of film and television content. MPA encourages Malaysia to strengthen copyright protection and enhance enforcement against online piracy of film and television content.



INTELLECTUAL PROPERTY PROTECTION

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

Illicit Streaming Devices and Apps – Illicit streaming 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 – New Zealand’s TPPA Implementation Act on copyright amendments, part of a broader effort to implement the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP), was inadequate in several areas. In November 2018, the Ministry of Business, Innovation and Employment (MBIE) released an Issues Paper on “Review of the Copyright Act 1994”, with the objective of modernizing copyright law for the digital age. In July 2020, following industry feedback, MBIE withdrew revised objectives for reviewing the copyright law, which appeared to drastically undermine copyright, equate user interests with creator rights, exclude the possibility of licensing of works on reasonable commercial terms, and promote the interests of the authors over owners of the copyright works. New Zealand should renew its efforts to strengthen

copyright, including by improving its provisions for TPMs, and also extend copyright term in line with international trends when formal consultation on revisions to the objectives is announced.

Digital Convergence Review – In 2015, New Zealand initiated a broad-sweeping Digital Convergence Review to examine various components of the country’s regulatory regime, including content classification. Helpfully, the government clarified in September 2019 that the classification of commercial VOD content would be self-regulated under the Broadcasting Act. The current regime for DVD classification, however, is outdated, inefficient, and costly for rights holders. MPA encourages New Zealand to conclude the Convergence Review as quickly as possible, or at least, as an interim measure, to adopt a more efficient classification policy that allows the DVD industry to continue while also supporting the development of legitimate businesses in the digital environment.



MARKET ACCESS ISSUES

Foreign Ownership Restrictions – Foreign investment in mass media, including film distribution and the pay-TV and terrestrial broadcast sector, is prohibited under the 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. U.S. companies are burdened with a 30 percent income tax on net profits, a 5 percent withholding tax on gross receipts chargeable to income tax liability, and a 10 percent tax on the distributor’s share of the box office. A municipal license tax of 0.75 percent of a company’s prior year gross receipts is also imposed on motion picture companies. Moreover, the Philippines imposes a tax on all related advertising materials and royalty remittances. The combined effect is an oppressive tax regime that harms the continued development of a legitimate audiovisual marketplace in the Philippines.

Screen Restrictions – During three annual film festivals, including the annual Independent 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 and the Metro Manila Film Festival held in April, during which the screening of all foreign films in cinemas nationwide is also banned. These severe bans clearly limit screen time for U.S. films during peak annual movie-going times and depresses investment in the sector by limiting the ability of cinema owners to program their theatres according to market demand.

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

Furthermore, the Film Development Center of the Philippines (FDCP) passed a Memorandum of Circular (MC) in July 2019, mandating a Friday opening for all films and a 150-day online distribution window from theatrical release. Although the Circular faces a court challenge, which as of September 2020 remains pending, it poses a threat to commercial arrangements.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – With the continued penetration of broadband both in homes and internet cafes throughout the Philippines, online piracy is a growing threat to the legitimate sale and distribution of audiovisual works. Moreover, the Philippines has been known to serve as a safe haven for some top piracy websites. In July 2019, the operator of a site known for stealing from Japanese comic book (*manga*) rights holders was arrested in Manila. The U.S. government should continue to engage the Philippines on the need for a more robust intellectual



PHILIPPINES

property enforcement regime, including more timely investigations and prosecutions of online copyright theft.

Camcord Piracy – Although no MPA members' titles were traced to the Philippines in 2019, the threat of camcord piracy remains and MPA encourages the Philippines to remain vigilant.





MARKET ACCESS ISSUES

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

Screen Quotas – In 2006, prior to the KORUS negotiations, the Korean government agreed to reduce its screen quota requiring exhibition of Korean films to 73 days per year. Over a decade later, amidst rapid development of its cultural industries and the success of many Korean 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.

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

In April 2019, a bill was introduced by lawmakers proposing to limit the ratio that the same film may be shown in theaters (with a minimum of six screens, during prime-time period from 1pm to 11pm) to 40-50 percent of all showings. While the 2016 and 2019 bills did not pass, the National Assembly is likely to continue discussions on similarly restrictive amendments. Korea should avoid implementing

such restrictions, which impede the free market and have the unintended effect of encouraging piracy.

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

OTT Regulation – In May 2020, the National Assembly passed the Telecommunications Business Act Amendments (Articles 22-7), requiring content providers take responsibility for network stability and consumer demand. Depending on the final language of the Enforcement Decree, content providers may be obligated to pay a network usage fee which they are already compensating for in the form of a third-party or proprietary content delivery network, reducing the costs ISPs face from transmitting traffic over long distances.

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

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – As a major marketplace for locally-produced drama programming, Korea has a major stake in ensuring adequate and effective protection



SOUTH KOREA

of copyright online. Since 2011, the Korean government has put into place administrative mechanisms to disable access to infringing websites, and to-date has successfully disabled access to thousands of infringing domains.

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





MARKET ACCESS ISSUES

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

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

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

Content Ratings – In December 2016, the National Communications Commission (NCC) issued the

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

OTT Regulations – The NCC has proposed OTT regulations that would oblige foreign OTT service providers to register with the NCC and disclose sensitive commercial information. Further, the OTT regulations 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.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy remains a serious problem in Taiwan. The government has been more proactive combating piracy websites when the operations have a nexus to Taiwan. A remaining gap is the lack of enforcement to disable access to foreign structurally infringing sites.

Piracy Devices and Apps – Taiwan passed amendments to Article 87 and 93 of the Copyright Act in April 2019 confirming the illegality of piracy devices. These amendments impose criminal penalties on 1) the provision of software / apps which enable members of the public to access unauthorized copies of films and television programs on the Internet; 2) assisting members of the public to access such unauthorized copies of films and television programs; and 3) manufacturing or importing devices with such pre-loaded software/



apps. The penalties that may be imposed by a court are a sentence of up to 2 years imprisonment and/or a maximum fine of NT\$500,000.

Legislation

Copyright Amendments – Despite the recent legislative achievements related to piracy devices and apps, other important longstanding draft copyright amendments, including express protections for temporary reproductions, continue to languish before the Legislative Yuan. Taiwan should prioritize copyright reform and move the legislation forward. Taiwan should also extend term of protection to the international standard of life of the author plus 70 years (or 70 years from publication). Finally, as noted above, Taiwan should amend its law to provide no-fault actions against pirate sites.



MARKET ACCESS ISSUES

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

Screen Quota – Section 9(5) of the Motion Picture and Video Act (MPVA) allows the Film Board to establish ratios and quotas 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. MPA has urged the Ministry to delete Section 9(5) and the related Section 68, as such limitations, if implemented, could adversely affect Thai distributors and exhibitors, impede the development of the local film industry, limit the variety of entertainment available to Thai consumers, and exacerbate piracy.

Must Carry Requirements – In 2012, the NBTC hastily approved “must carry” provisions requiring all platforms to carry public and commercial free-to-air television channels nationally on an equal basis by all platforms. The regulations, which have not been clearly drafted, raise important intellectual property rights issues.

OTT Content Regulation – NBTC is considering regulations on OTT services, including requiring streaming operators to set up a local presence to

respond to government requests around content that the government finds objectionable (a form of mandatory content filtering). Such regulations, if passed, would create uncertainties for foreign investments and stifle innovation and growth of Thailand’s OTT sector.

OTT Proposed VAT - Thailand is proposing amendments to its Revenue Code that will require foreign e-commerce services to register for VAT payment. A tax rate of 10 percent is being proposed on non-resident business operators who employ electronic payment for e-commerce services, including digital online services. Under the 1992 VAT guidelines implemented, any person or entity supplying goods or providing services in Thailand with an annual turnover exceeding 1.8 million baht (\$55,000) is subject to VAT.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy is rampant in Thailand. Legitimate online services are harmed by the increasing threat from copyright infringing websites, and some longtime licensed operators have stopped doing business as a direct result of intractable piracy. Both U.S. producers and distributors, as well as local Thai producers and services, are profoundly harmed by internet pirate platforms that specifically target Thai users with Thai language sites.

Camcord Piracy – Thailand remains a risk for camcording in the region, and 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.



Enforcement

Copyright enforcement in Thailand remains generally weak. In late 2017, via amendment to the Computer Crime Act, the Thai government enacted a mechanism to disable access to infringing sites. Although a promising reform, the mechanism has met with mixed results, with court processes leading to orders to disable access to infringing websites, but sometimes spotty implementation as ISPs claim to have technical hurdles to properly comply with orders. The Department of Intellectual Property is proposing protocols to improve implementation of CCA orders going forward.

Legislation

Copyright Legislation – MPA urges the Thai Government to amend the Copyright Act to ensure that intellectual property infringement becomes a non-compoundable state offense, thus enabling the police to act on their own initiative without any requirement of a formal complaint from rights holders.

Unfortunately, the September 2019 draft copyright amendments did not go far enough in strengthening copyright law. Prohibitions against the act of circumventing TPMs and the trafficking in devices and technologies used in circumvention of TPMs were watered down, and important provisions on notice and take down of infringing materials online were deferred to future regulations. As of July 2020, the revised copyright amendments remain pending following a debate in Parliament. As weak copyright and TPM protections create de facto barriers to trade, Thailand should make meaningful efforts to strengthen such protections and effectively reduce such barriers.

WIPO Internet Treaty Implementation – Thailand has indicated its intention to accede to the 1996 WIPO Copyright Treaty to provide the global

minimum standard against online piracy, in conjunction with amendments to the Copyright Law. As noted above, the 2019 draft copyright amendments regarding protection for TPMs and ISP liability fell short of international expectations.

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





MARKET ACCESS ISSUES

Screen Quotas – Under Cinema Law/Decree 54, Vietnam requires that at least 20 percent of total screen time be devoted to Vietnamese feature films. Domestic films in recent years have accounted for a growing share of the market and greater investment. Vietnam should remove any quota reference in proposed amendments to the Cinema Law, targeted for 2021 completion.

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 air time to Vietnamese feature films. These restrictions limit U.S. exports of film and television content.

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

Pay-TV Regulation – In March 2016, Vietnam enacted pay-TV regulations (Decree 06/2016/ND-CP) requiring the number of foreign channels on pay-TV services be capped at 30 percent of the total number of channels the service carries. These regulations also require operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Furthermore, most foreign programming is required to be edited and translated by an approved licensed press agent. The regulations also

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

OTT Content Regulations – In August 2018, the Ministry of Information and Communications issued draft amendments to Decree 06 to expand the decree’s scope to include OTT services. There are several provisions of the draft Decree that would impose significant barriers to foreign investment, stunt the growth of Vietnam’s e-commerce market, and limit consumer choice and access to information. Of most concern is a licensing scheme that would require a local presence through forced joint venture. In addition, the proposed revisions include onerous censorship requirements.

Cybersecurity Regulations – In September 2020, Vietnam’s Ministry of Public Security (MPS) released a revised decree that would implement the 2018 Cybersecurity Law. This revised decree, which contains onerous data localization requirements, is intended to be the final version and will be promulgated soon. Vietnam should remove such a requirement to facilitate a dynamic and market-driven responsiveness to cybersecurity threats.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy is rampant in Vietnam, and increasingly, Vietnam is host to some of the most egregious piracy sites and services in the world. These piracy sites inflict damage not only on the nascent local marketplace but are often



aimed at international markets.

Enforcement

Ineffective copyright enforcement in Vietnam is a serious concern. Regardless of extensive evidence of serious infringement provided by rights owners, there is 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. It is critical for 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), to follow through on infringement complaints, take meaningful and effective enforcement actions, and impose deterrent sanctions against infringing websites.

It appears that the ABEI/MIC has begun to enforce a decree allowing 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 overseas markets, including the U.S. market.

Legislation

Vietnam has indicated intentions to amend its IP legislation. However, the government has been slow in drafting amendments. Important changes must be made to the IP Code and the new Criminal Code to ensure Vietnam is in full compliance with its international obligations, including the CPTPP definition of commercial scale. Vietnam should accede to and implement the WIPO Internet Treaties and extend the term of protection for all copyrighted works to 70 years after the death of the author or at least 75 years for films, as required by the Bilateral Trade Agreement (BTA) with the U.S.



NATIONAL TRADE ESTIMATE



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President Von der Leyen and Internal Market Commissioner Thierry Breton have announced the European Commission's intention to publish a legislative proposal for a Digital Services Act (DSA) by the end of 2020 or in the first quarter of 2021. MPA is concerned that upcoming changes in the DSA would erode online copyright enforcement in member states.

Meanwhile, EU national governments are busy implementing the three EU Digital Single Market directives of the 2014-2019 Juncker Commission (DSM Copyright, SatCab, and Audiovisual Media Services). MPA, working closely with the European audiovisual and creative sectors, seeks to limit initiatives aimed at mandating cross-border access to audiovisual content, as such initiatives would damage the principle of contractual freedom, affect the value of rights, and deter future investments in the production of audiovisual works.

MARKET ACCESS ISSUES

European Content Quotas – The updated Audiovisual Media Services Directive (AVMSD) entered into force in December 2018. While the directive's implementation deadline is September 19, 2020, the majority of Member States will not complete implementation before the end of 2020. The 2018 AVMSD updates the 2010 and 2007 AVMS directives, which in turn replaced the 1986 Television Without Frontier Directive (TWFD). The TWFD was the first EU legal instrument to establish European Content quotas and create restrictive provisions for foreign program suppliers.

The 2018 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 anchored in the 2007 AVMSD, which means that each EU Member State will determine the quota for VOD services under their jurisdiction. The directive also allows EU Member States to oblige media service providers (linear or 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 (MSP) falls under the jurisdiction of another Member State. Several EU Member States have indicated that they will apply such a financial contribution obligation and oblige non-domestic MSPs targeting their territory to either invest in the production of domestic works and/or to contribute with a percentage of their turnover to a national film fund. Countries such as France, Italy, Spain, Portugal, Belgium, Slovakia, Poland, Greece, and Croatia are currently in the process of implementing such a financial contribution obligation. 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. The new directive also allows for the circumvention of the country-of-origin principle for public interest and safety reasons. Video-sharing platforms are included in the scope for the protection of minors and public safety if the provision of user-generated videos constitutes an essential functionality of their service.

Electronic Commerce VAT – EU Member States impose a value-added tax (VAT) on companies established in a third country that sell and deliver products within the EU over the internet, including movies, pay broadcasting, and music. The measure does not apply to business-to-business transactions. Since January 1, 2015, companies established in the EU are now subject to VAT in the country of



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consumption.

INTELLECTUAL PROPERTY PROTECTION

Overall, the EU IP Directives provide a satisfactory level of protection for rights holders. 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 reduce differences among national copyright regimes to allow wider online access to works by users across the EU, and to address the function of the marketplace.

A “regulation on ensuring the cross-border portability of online content services in the internal market” became applicable in all EU Member States on April 1, 2018. A year later, in May 2019, the EU adopted a new directive on “Copyright in the Digital Single Market” (DSM Copyright Directive) which includes (i) new rules to ensure wider access to content; (ii) new exceptions to the digital and cross-border environment; (iii) new provisions addressing the use of protected content by online content-sharing service providers; and (iv) provisions for the fair remuneration of authors and performers. EU Member States are in the process of implementing the new EU copyright directive and the transposition process shall be completed by June 2021 (see more details below under EU Copyright Directive).

Also in April 2019, the EU adopted a new directive, “laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes,” as a complement to the existing

Satellite and Cable Directive. This new directive addresses the alleged difficulties related to rights clearance procedures for broadcasters.

Enforcement Directive – This instrument establishes an EU-wide minimum standard for certain civil procedures, including the right to ask ISPs for information and the availability of injunctive relief against such intermediaries to prevent and stop infringement. These tools are invaluable for combating internet piracy. However, the CJEU’s recent 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 rightsowners 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 for the release of this information.

The Directive provides a number of other benefits, including asset-freezing injunctions, search and seizure orders, presumptions of ownership for holders of related rights, and publication of judgments. Member States are free to apply more stringent provisions in civil law and/or to impose criminal or administrative sanctions.

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

Electronic Commerce Directive – The 2000 E-Commerce Directive provides a general legal framework for internet services in the Internal Market. All EU countries have implemented the Directive. The Directive establishes rules on commercial communications, establishment of



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service providers, electronic contracts, liability of service providers, codes of conduct, out-of-court dispute settlements, and enforcement. The Directive fully recognizes the country-of-origin principle and expressly requires Member States not to restrict the freedom to provide information society services from a company established in another Member State. The Directive requires that information society providers offer clear details about their business and whereabouts. However, many online services, in particular those that infringe IP rights, disregard these requirements. The anonymity issue also emerges in online intermediaries' providing services to businesses while not "knowing your business customer," a standard practice in many other regulated environments.

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

The European Court of Justice has developed a workable test for attributing liability based on whether the intermediary is "active" or "passive". This test and the underpinning legal basis (Article 12 to 14 Directive) are just as relevant today as 20 years ago. The clear and essential distinction between active and passive services lies at the heart of this success. The test is under discussion by the CJEU with several important cases pending. The Directive has proven to be sufficiently flexible to deal with the emergence of new services. At the same time, the potential reopening of the E-Commerce Directive as part of the legislative proposal for the DSA (see above) may jeopardize the clarifications already established by the CJEU.

Further, many national courts accept arguments from platforms that they are passive with regard to the content made available on their sites, despite the essential role they play in selecting, promoting, ranking, and optimizing such content. And, some countries' implementations create limitations on liability for service providers that go beyond what is allowed under the Directive, thus making anti-piracy efforts more difficult.

The Directive's ban on "general monitoring" (Article 15(1)) has interfered with injunction proceedings. Although the Directive allows monitoring obligations in specific cases, differentiating between general and specific monitoring has proven difficult. Specific monitoring obligations are permitted (see Recital 47 Directive), as is monitoring pursuant to an order by national authorities in accordance with national legislation. Further, Recital 48 permits Member States to impose duties of care on online services in order to detect and prevent certain types of illegal activity. The Court provided helpful clarification in its recent Facebook case (C-18/18). The Court ruled that Article 15 (ban on general monitoring) does not preclude an injunction requiring Facebook to remove content (i) identical and (ii) equivalent to the defamatory content in question and on a worldwide basis. It remains to be seen how national courts will apply these principles.

The Commission published a Communication in September 2017 on 'tackling illegal content online.' The Commission promised to monitor progress and assess whether additional measures are needed to ensure the swift and proactive detection and removal of illegal content online, including possible legislative measures to complement the existing regulatory framework. This Communication contained some positive (although non-binding) principles encouraging platforms to be more proactive and to take down and keep down illegal content. As a follow-up, in March 2018 the European Commission adopted a non-binding



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Recommendation on ‘measures to effectively tackle illegal content online,’ but focused primarily on terrorist content.

In 2019, the new Commission announced an evaluation of the 2000 E-Commerce Directive with a series of public consultations in 2020. The Commission is due to publish legislative proposals in December 2020. While the Commission announced that the intention is to upgrade the existing liability rules, there is a concern that the ultimate result might be less ambitious—or worse, with the potential creation of new or broader safe harbors.

EU Copyright Directives (2001 and 2019)/WIPO Implementation – The principal objectives of the 2001 Information Society Directive (also ‘Infosoc directive’) were the harmonization and modernization 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. All EU Member States have implemented the 2001 Information Society Directive (2001/29/EC) which ratifies certain aspects of the WIPO Internet Treaties.

Notably, the Information Society Directive contains an exception for digital private copying that, if interpreted incorrectly (as per the so-called Darmstadt case), could violate the TRIPS/Berne 3-Step test. In some countries, the provisions regarding the private copy exception are too broad and could allow the making of copies for the benefit of third parties, thereby contributing to the illegal transmission of works on the internet. Of specific concern is the German private copy exception, which expressly permits the beneficiary of an exception to use a third party to make the copy.

The Directive also establishes legal protection for technological protection measures (TPMs) necessary for the protection of copyrighted material

in the digital environment. However, this protection is threatened 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. Finland and Sweden do not provide adequate protection against the act of circumvention. Belgium, the United Kingdom, Spain, and France establish broad power for national authorities to intervene and dictate to rights holders how to make their works available. Germany also provides a right of action for individuals and associations against rights holders who fail to accommodate certain exceptions. 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.”

The Infosoc directive also requires the provision of injunctions against intermediaries whose services are used by a third party to infringe copyright even where an intermediary’s activities may be exempt from liability under the E-Commerce Directive. Despite complaints by local rightholders, not all EU member states have implemented Article 8.3 of the InfoSoc Directive (which allows for no-fault injunctions) correctly. Poland is a prominent example where Art. 8.3 has not been implemented in national legislation. Whereas in Germany the courts ruled that the urgency requirements for obtaining preliminary injunctions are not available for sites of which are known to the applicant longer than one month. Consistent implementation of existing EU law by all Member States is critical, especially for a provision as key to enforcement as Article 8.3.



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In April 2019, the European Union adopted a new Directive (2019/790), referred to as the Digital Single Market Copyright Directive. Member States have until June 2021 to implement this Directive. The Directive significantly changes European Copyright law. The Directive introduces two new exceptions to the reproduction right to enable text and data mining tools to crawl content: one covering journals for the purpose of scientific research and the other covering content that is made freely available online. The Directive also includes two updates to existing exceptions: one extends the illustration for teaching exception to cover digital uses and the other extends acts of preservation to include digitization.

In addition, the Directive contains a provision facilitating the licensing of works considered to be out of commerce through an extended collective licensing (ECL) mechanism. The mechanism enables a collective management organization (CMO) to license on behalf of rights holders, which did not mandate the CMO. The CMO represents a specific group of rights holders and provides an opt-out mechanism for rights holders that do not want to be represented by the CMO. There is also a more general 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. However, content sharing platforms are deemed not to be liable for copyright infringement if, in the absence of authorization from rightsholders, they can demonstrate that they have made their ‘best efforts’ to prevent the accessibility of pre-identified content, take down notified content, and ensure that such content stays down. This provision also provides for lesser ‘best effort’ obligations depending on the size, age, and

popularity of the service.

The Directive also introduces several provisions that heavily interfere with contractual freedom. For example, it provides that authors and performers are entitled to appropriate and proportionate remuneration for the exploitation of works they contributed to; it imposes onto licensees an obligation to report annually on revenues to authors and performers; and, it gives the latter a so-called contract adjustment mechanism whereby they can claim for an adjustment of their contract if the remuneration originally agreed turns out disproportionately low compared to the project’s 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.

In transposing this Directive, national governments should bear in mind the importance of preserving exclusive rights, limiting interference with contractual freedom, and ensuring that content protection efforts are not jeopardized.

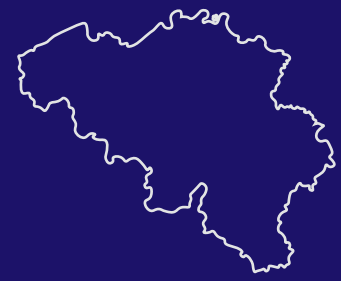
Data Protection Rules – The General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) was adopted in April 2016 and became enforceable in May 2018. It strengthens and unifies data protection for all individuals within the EU, but also addresses the export of personal data outside the EU. The GDPR raises concerns on the use of certain personal data in copyright enforcement. In the 1995 Data Protection Directive, rights holders relied on Article 13, which provided derogations to the rules on data processing, referring to the respect of the “rights and freedom of others.” 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, rights holders are not certain that this provision will be given any meaning in the future.



EUROPEAN UNION

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





MARKET ACCESS ISSUES

Broadcast and VOD quota – The Flemish region partially implemented the 2018 AVMSD and introduced a new obligation on non-domestic VOD services targeting the Flemish territory. The new law requests services to invest two percent of their annual turnover gained from the Flemish audience into the production of Flemish/European works.

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 rights holders.

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

INTELLECTUAL PROPERTY PROTECTION

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

Enforcement

Brussels police and customs agencies are confronted with a severe lack of personnel and resources, which negatively impacts the number of anti-piracy actions. 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 include tackling illegal content/counterfeiting in their objectives. However, none have led to a significant increase of resources dedicated to content protection. While the conviction success rate is relatively high, short-term sentences are not executed and it is difficult for rights holders to collect awarded damages. The Brussels prosecutor views the seizure of counterfeit goods and revenue to be a sufficient deterrent for infringers.

The Belgium Entertainment Association (BEA) and the four main Internet Service Providers in Belgium collaborate to a certain extent to facilitate the blocking of copyright infringing websites.



MARKET ACCESS ISSUES

Broadcast Quotas – French broadcast quotas exceed the requirements established by the EU AVMS Directive. Forty percent of the total number of feature films and the total transmission time allocated to audiovisual works must be of French origin. In addition, 60 percent of feature films and audiovisual works must be of EU origin. Thus, 40 percent must be exclusively of French origin, and an additional 20 percent must be of EU origin. France also imposes a cap of 192 movies per channel, per year, for feature films of non-domestic origin (and hourly sub-quota).

A new decree (Decree n° 2020-984 of 5 August 2020), published and entered into force on August 7, 2020, modifies the system of broadcasting of cinematographic works on television services and relaxes the rules of the January 1990 decree. The new decree relaxes the programming schedule for cinematographic works applicable to “non cinema” channels: films can now be shown on Wednesday and Friday evenings and on Saturdays and Sundays during the day. The broadcasting ban will nevertheless be maintained on 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. The French national audiovisual regulator CSA will assess these relaxations no later than 18 months after their entry into force.

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

Video-on-Demand (VOD) – The National Center of Cinematography (CNC), is encouraging regulation of VOD through inter-industry

agreements. These agreements include required release windows, minimum pricing levels and artist remuneration, investment requirements, and other constraints. Release window constraints include: 1) a 4-month waiting period before movies can be commercialized on transactional VOD (TVOD, i.e., pay per film) platforms, 2) a 36-month waiting period for subscription VOD platforms, and 3) a 48-month waiting period on free VOD platforms.

Implementation process of the EU 2018 AVMS Directive – According to recent media reports, the new French audiovisual law will oblige non-domestic VOD services to contribute financially to the production of French/European works, with at least 16 percent (for TVOD services) and up to 25 percent (for subscription VOD services) of their net annual revenues made in France. The new law will also impose obligations to contribute to independent production.

Subsidies – The French government provides extensive aid and subsidies to assist local film producers. The film industry continues to contribute to subsidy funds through 1) dues levied on distributors, exhibitors, exporters, newsreel producers, dubbing studios, broadcasters, and, as of January 1, 2019, international streaming platforms financially registered abroad; 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.

Ban on Advertising Feature Films on Television – Decree No. 2020-983, which entered into force on August 7, 2020, authorizes addressable advertising

(a system which uses data to maximize advertising effectiveness on linear services) and advertising for movies on television. There is a trial phase of 18 months during which TV advertising for movies is allowed as an exception to the prohibition from Article 15-1 of the Decree of March 27, 1992. By the end of the year, the government will publish an impact assessment of the reform on the film industry, as well as on radio stations, print media, and billboard industry.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – 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 highly popular.

Enforcement

In 2009, the Government adopted the HADOPI legislation to address online piracy, mainly targeting the then-dominant use of P2P protocol, through a graduated response. 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.



MARKET ACCESS ISSUES

Film Levy – Pursuant to the Film Support Act (FFG), companies exploiting feature films must pay a portion of their revenues to the German Federal Film Board to fund local film and television production. A revision of the FFG is imminent and only minimal changes are proposed. As regards the film levy, a threefold increase for pay-TV operators is earmarked.

Production Incentives – The mandatory requirement of an exclusive theatrical window as regulated in the FFG also applies to productions supported by the German Federal Film Fund (DFFF I and II), thus providing an obstacle to effective exploitation of the produced work. Little flexibility in deviating from the strict rules poses a risk for international investments and productions in Germany.

Taxation- License Fees – The addition of license fees under trade tax law 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 – For about two years now, film co-productions have been treated as co-productions for local tax audits. This new interpretation from the so-called media decree of 2001 could cause lasting damage to German film production. Since then, co-productions have been treated as separate tax subjects and are no longer included in the overall annual results of the individual production companies. This leads to considerable additional bureaucratic expenditure and results in a minimum taxation of loss-making productions, thus resulting in a capping of loss offsetting possibilities. This regulation thwarts the Federal Government and the Länder's film funding efforts and makes Germany increasingly

unappealing as a coproduction location.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet exchange of illegal copies, direct download, streaming and P2P are the primary online piracy concerns in Germany. Several German domain name registrars remain uncooperative, and as such, create a safe haven for internet access through notoriously rogue domain names, such as The Pirate Bay domain names. Even when domains are disconnected by registrars, they fail to “freeze” the domain, thus enabling the infringers to transfer the domain to a new registrar and continue the illicit activities.

Camcording – 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 original source of illegal German material that is mass distributed via the internet and facilitated by portal sites.

Enforcement

German law enforcement authorities, especially the police and public prosecutors, are aware of piracy problems and, over the last few years, have committed resources to a number of successful investigations and prosecutions. Helpfully, the judiciary has imposed deterrent sentences. These copyright infringements are on a commercial scale and German officials recognize them as organized criminal activities.

While it is possible for rights holders to obtain an injunction under civil law, injunctions against



website operators and hosting providers are title-specific, which is of limited use against online sites that facilitate copyright infringement on a massive scale.

Furthermore, the German courts ruled that the urgency requirements for obtaining preliminary injunctions are site-specific rather than title-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 rights holders' protection and the threat of unreasonably delayed 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.

In August 2019, the “Roundtable DNS (Domain Name System) Blocks” launched between rights holders and ISPs, aimed at finding common ground for self-regulation in Germany for DNS site blocking. As of October 2020, these discussions are ongoing.

Legislation

Copyright Act Revision – The transposition of the EU DSM Copyright Directive into German legislation risks changes to the German Copyright Act (GCA), which will likely weaken exclusive rights or copyright protection. In an April 2019 statement at the EU Council, the German Government announced the implementation of the Directive by “preventing ‘upload filters’ wherever possible”. Following a consultation process, the German government is in the process of finalizing the draft legislation along these lines. The draft legislation proposes the introduction of broad new exceptions for copyright protected works on Online Content Sharing Service Providers (OCSSPs), in violation of international copyright treaties and the EU InfoSoc Directive, and thus interferes with legitimate exploitation of works.

More generally, Germany’s private copy exception (PCE) is too broad. There is no exclusion of copying by third parties, and therefore, the exception may violate the TRIPS three-step test.

The legal framework for technological protection measures (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 – During 2012, the German Supreme Court corrected a previous failure with the implementation of the Directive’s right of information, restricting it to cases of infringements committed on a commercial scale (April 19, 2012, IZB 80/11). Under the German implementation, however, rights holders contemplating legal action against internet pirates still face difficulties in identifying infringers due to restrictions imposed by Germany’s data protection law. Further, the right of information is circumscribed in practice because many ISPs reject information requests, asserting that the data is simply not available and that they are not permitted to retain the data. The July 2020 CJEU decision on C-264/19 Constantin Film Verleih further impedes enforcement with a very narrow interpretation on the right of information, as discussed in the EU overview.

During 2013, the German legislature dramatically restricted attorneys’ fees for legal claims against infringers to limit the number of remand cases. Fees incentivize attorneys to take rights holders’ cases. Such a severe limit on attorneys’ fees creates another obstacle for rights holders when they pursue legitimate claims of infringement. However, the courts subsequently established case law minimizing harmful impact, still allowing for cease and desist letters directed at end users. In the meantime, the Federal Finance Court (BFH) ruled

GERMANY

that copyright related cease and desist letters are subject to VAT. The Ministry of Finance (BMF) is preparing a circular to implement the judgment, which would further impair the possibility to send warning letters.

In June 2017, the Bundestag passed a reform of the country's Telemedia Act (TMG) that aimed to end the principle called 'Störerhaftung,' under which private and business WiFi hotspot providers could be held liable for their users' illegal online activities. This reform rendered virtually impossible any IP enforcement for infringements via (public) WiFi hotspots. The German Federal Court of Justice (BGH) decided that the TMG provision, which implemented Art. 8 (3) Copyright Directive into German law for WiFi-providers only, applies mutatis mutandis to all other access providers, and 'Störerhaftung' would no longer apply. As a result, website blocking in Germany must now be undertaken using Section 7 of the TMG. Finally, Art. 8 (3) of the EU Copyright Directive has been implemented into German law, but through the back door of analogue application.





MARKET ACCESS ISSUES

A number of new quotas are coming into effect that impact both programming and investment for linear and non-linear services. These quotas have myriad sub-quotas that are highly prescriptive and complicated. These quotas unduly restrict the commercial freedom of local industry players and limit consumer choice.

Broadcast content quotas - The percentage of European content that broadcasters must air is unchanged, meaning that 50% of eligible 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. The new rules require commercial Italian TV channels to devote at least 16.6 percent of eligible hours to Italian works with additional sub-quotas regarding programs for minors. This broadcast content quota percentage has temporarily been reduced to 10 percent in 2020.

The Public Service Broadcaster, RAI, has different quotas. For example, at least 12 percent of eligible hours (transmission time excepting the time used for news, sports, and advertising) must be devoted to Italian fiction, animation, and original documentaries. Further, 25 percent of that must be devoted to Italian cinematographic works during prime time each week.

VOD content quotas - 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 must give prominence to EU works.

Broadcast investment quotas – Italy maintains investment quotas whereby broadcasters must annually invest 11.5 percent of their revenues in 2020—and 12.5 percent of their revenues from 2021 forward—to the independent production of European works. Half of this quota is reserved for Italian works (produced within the past five years), and 3.5 percent of the 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. RAI is not subject to the same investment quotas.

VOD investment quotas - Non-linear providers must devote 12.5 percent of annual net revenues from Italy to European works produced by independent producers. This quota could be increased to 17 percent at certain conditions, i.e. if a service fails to comply with the rules, the investment obligation might be increased the following year. Fifty percent of the EU quota must be reserved for Italian works produced by independent producers within the past five years. A further sub-quota, ranging between 1.25 percent and 1.7 percent of the EU quota, must be reserved for Italian cinematographic works produced by independent producers, 75 percent of which must be devoted to works produced within the past five years.

INTELLECTUAL PROPERTY PROTECTION

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

Camcording Piracy – Italy is the source of significant audio source-theft, in which individuals record local soundtracks and then match them with video camcords to create unauthorized copies of films in theatrical release, localizing pirate content, and undermining legitimate commerce in the Italian market. From January to September 2019, ten illicit audio captures of MPA member films were traced to Italian theaters, a slight increase from the same period in 2018.

Enforcement

Italy's overall enforcement efforts show progress consistent with recent CJEU decisions. In recent years, rights holders have worked closely with Italian judicial and law enforcement authorities to share information about the scourge of piracy. This collaboration has led to better criminal enforcement. Despite Italy's lack of specialized personnel to investigate increasingly complex infringements committed online, some significant criminal cases have led to stiffer sentences for infringers.

On the administrative side, AGCOM is a key institution for siteblocking in Italy and a further upgrade of its online copyright protection regulation is expected this year. On the civil side, in June 2018, the District Court of Milan issued a first website specific (i.e. dynamic) civil siteblocking order. However, the court imposed the reimbursement of the implementation costs to the rights holders.

Enforcement against camcording received a boost in August 2019 when the Public Safety Consolidated Text was modified to provide for the installation of video surveillance systems in movie theaters to help identify those who illegally record films.

Legislation

E-Commerce Directive Implementation – Decree 70/2003 implementing the E-Commerce Directive

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





INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The Netherlands houses both locally-oriented pirate internet sites aimed at various language regions (e.g., Russian) and several international (English language) pirate sites. Dutch hosting providers host servers for illegal IPTV services internationally. Also, a number of notorious cyberlockers are hosted in the Netherlands, and hosting providers refuse to take them offline if they have a notice-and-takedown policy. Further, the Netherlands has the highest number of users of unauthorized IPTV services in Europe.

Enforcement – Dutch police and public prosecutors are reluctant to take action against internet piracy, although they do respond to official requests for assistance in criminal investigations by foreign law enforcement (they are obliged to do so by way of international treaty obligations). Government policy is that rights holders are responsible for civil enforcement and criminal enforcement will be considered only in case of organized crime involvement. Copyright infringement in itself, even in the case of for-profit uploaders/sellers, isn't enough. As a result, nearly all enforcement efforts are carried out by rights holders collectively through the BREIN foundation.

When it comes to civil enforcement, rights holders face strong opposition from intermediaries. Cases to obtain the contact details of commercial scale infringers are contested by ISPs. Dutch Filmworks (DFW) lost such a case and is appealing the decision in the Supreme Court. When it comes to shutting off access to infringing sites via website blocking, ISPs also vehemently oppose. Starting with the first siteblocking case in 2009, Dutch ISPs have consistently resisted taking any action. Following initial success at the District Court, the Dutch Appeals Court rejected blocking The Pirate Bay

web site in January 2014. The Supreme Court ruled in 2015 that the Appeals Court applied a much too broad effectiveness test, but then asked the CJEU to answer prejudicial questions of whether The Pirate Bay itself is infringing copyright. The CJEU confirmed this in June 2017 and, subsequently, Dutch ISPs in preliminary injunction proceedings were asked to block The Pirate Bay while the proceedings on the merits are pending. The Supreme Court referred the case back to the Appeals Court to rule on the proportionality of blocking, which is contested by the ISPs. The Appeals Court decided in favor of BREIN. The ISPs decided not to appeal that decision, bringing to an end more than a decade of determined resistance. And even still, some of the ISPs are contesting the Court of Appeals' decision on specific elements. Evidently, enforcement of copyright in the Netherlands is quite challenging.



MARKET ACCESS ISSUES

Broadcast Quotas – Poland’s broadcasters must dedicate at least 33 percent of their quarterly broadcasting time to programming produced originally in Polish.

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

In accordance with recently proposed amendments to the media legislation (not yet in force) the percentage rate is to be increased to 30 percent.

Tax Treatment of U.S. Audiovisual Works – The 2005 Cinematography Law includes taxes on box office, broadcasters’ and cable operators’ revenue, revenue of providers of VOD services, and DVD sales to finance subsidies for Polish and European films.

In accordance with recently proposed amendments to relevant legislation (in force as of July 1), the Polish government obliges non-domestic media service providers (MSPs) to contribute 1.5 percent of revenues derived from the Polish market to the Polish film fund. The government collects the levy on a quarterly basis.

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

INTELLECTUAL PROPERTY PROTECTION

Copyright Directive - Despite complaints by local

rightholders, Poland has not implemented Article 8.3 of the Copyright 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. This can be addressed by no-fault injunctions with intermediaries, a remedy made possible by Article 8.3 of the InfoSoc Directive (2001/29) 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 together with the lack of enforcement, piracy levels are at very concerning level in Poland and continue to grow (see below).

Internet Piracy – Internet piracy is a serious concern in Poland. APP Global’s December 2019 piracy landscape report observed that operators of well-known infringing websites in Poland are often overt and viewed positively by the public. The piracy landscape is dominated by streaming services, limiting growth of legitimate streaming services in-country. Internet piracy continues to grow, with 250 million visits to illegal sites in Poland in 2019, with most sites available in the Polish language. A 2017 Deloitte study concluded that online content piracy generated PLN 3 billion in GDP losses in Poland in 2016. There are over 1,200 piracy sites servicing the Polish audience, many of which operate in the open as if they are legitimate businesses.



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. MPA remains concerned that the police will lose interest in working with rights holders because of languishing court cases and disappointing sentences.





MARKET ACCESS ISSUES

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

Foreign Ownership Restrictions – The Mass Media Law, as amended, prohibits foreigners and Russian legal entities with foreign participation from establishing mass media activities, including broadcasters. In addition, foreigners and Russian legal entities with foreign participation are not permitted to own (including through a third party) more than 20 percent of the capital of an entity who participates in the establishment of a mass media entity or broadcaster. MPA opposes these types of restrictions, which reduce consumer choice and unreasonably favor domestic investors.

Similar restrictions apply to OTT services. Under the Law on Information, as amended on May 1, 2017, foreign ownership of audiovisual services shall be 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 the 20 percent threshold is subject to review and approval by the Government Commission on the coordination of ownership, management, or control concerning the audiovisual service owners.

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 rights holders 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 rights holders.

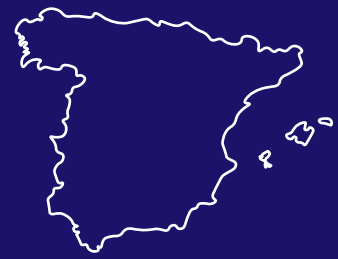
Camcord Piracy – Russia continues to be a significant source of illicit camcording. The total number of sourced audiovisual camcord copies from Russia decreased very slightly in 2019 with 45 (down from 48 in 2018). In 2019, there were 30 audio-only recordings sourced from Russia.



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. A critical element of the U.S.-Russia bilateral IPR agreement is Russia's obligation to provide effective enforcement of IPR online. Department K is no longer taking responsibility for online IP cases. Further, the increased monetary threshold for copyright cases is a severe challenge for rights holders and a barrier for proper enforcement.

Enforcement action against unauthorized camcorders is complicated by the law's broad rules on evidence fixation that are impossible to implement. Separate provisions related to illegal recording in theaters, tailored to that particular infringement, could enhance enforcement.



MARKET ACCESS ISSUES

Quotas and Investment Obligations – On-demand services shall reserve 30 percent of their catalogues for European works (half of these in an official Spanish language). The 2018 AVMSD directive is the process of being transposed. Linear services shall reserve 51% of their broadcasting time for European works, half of that 51% devoted to content in any of the official languages of Spain (Spanish, Catalan, Gallego, Basque) and 10% to independent producers. Half of that 10% of works must be 5 years old or less.

Film Dubbing (Catalonia) – In 2010, the Catalan regional government adopted language restrictions on films released in Catalonia but implementing measures have not been released. In September 2011, film distributors and exhibitors and the Catalan Government entered into a cooperation agreement that established a network of movie theaters exhibiting films dubbed in Catalan, with distributors committing to provide at least 25 films in Catalan for new films each year. The Catalan Administration committed to fund the dubbing and amend the law when possible. After the European Commission (EC) found Article 18 of the legislation discriminatory towards other European countries, the Catalan Government drafted an amendment in which they removed European works from the scope of the obligation and therefore left the quotas for non-European works. The law remains unamended to this date, and the case is still open at the EC.

Investment Obligation – Spain maintains investment provisions whereby audiovisual media service providers, including broadcasters, must annually invest five percent of their revenues in the production of European and Spanish films and audiovisual programs. In addition, 60 percent of this

allocation should be directed towards productions in any of Spain’s official languages. These investment obligations also apply to digital terrestrial channels.

Screen Quota – For every three days that a non-EU country film is screened, one European Union film must be shown. This quota is reduced to four to one if the cinema screens a film in an official language of Spain other than Castilian and shows the film at all sessions of the day in that language. Non-observance of the screen quotas is punishable by fines. These measures ignore market demand for U.S. and non-EU country films and stifle 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% quota in 2020, or—in the event they do not comply in 2020—can still access the subsidy in 2021 if they schedule 30% EU country films.

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

Public subsidy scheme for films and short films production – The method of awarding subsidies for films and short films consists of a points-based system with a series of metrics to distribute a total of 100 points, after which subsidies are granted on the basis of how many points each film is awarded. This scale has recently been modified as to award an extra-point to producers who choose to distribute their movies through independent film companies. Even if one point out of one hundred does not seem

much, a single point (even half a point) makes a big difference (€1 M in films of €2 or 3 M average budget) as the point rankings are quite tight (i.e. in the 2019 contest, a film with 85,66 points gets €1 M and the following with 85 gets zero). The new scheme discriminates against non-independent distributors (i.e. American) who, historically, distribute the most successful Spanish movies, and invest a lot in the Spanish film industry.

INTELLECTUAL PROPERTY PROTECTION

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

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

Enforcement

In general, judicial action in Spain is difficult to predict in terms of timing, but this is even more the case in relation to IP-related crimes. The Ministry of Justice recently announced its goal to set up a public prosecutor’s office focusing solely on IP crimes. Currently, no budget exists for this initiative. Helpfully, Spanish courts have recently handed down positive decisions against administrators of pirate websites, including site blocking orders. Under the civil law perspective, some recent judicial rulings may lead to a more dynamic fight against piracy, obliging telecommunication operators to block access not only to piracy sites, but also to the new pages identical to those previously closed with no need of any further judiciary intervention.

Legislation

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

Enforcement Directive – Spain’s recent IP law amendments, specifically Article 256, correct Spain’s earlier improper implementation of the right to information. Judges can now grant right of information while limiting its application to cases involving an “appreciable” Spanish audience and a “relevant” number of copyrighted works.

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

Royal Decree-Law 2/2018 that modifies Spanish Copyright Act – This Royal Decree-Law significantly modifies the administrative proceeding before the Intellectual Property Commission (IPC). The changes aim to reduce latency by eliminating the obligation for a “judicial decision” to close the infringing websites and by granting the IPC with powers to suspend the internet service to the infringing website, if such website does not provide the relevant information. This system has been recently improved by the Law 2/2019 amending the Spanish Copyright Act. This latest reform establishes that in the event of repeated

SPAIN

non-compliance with content removal requirements, the competent body (IPC) may require the necessary collaboration of internet providers to guarantee this measure without the need for judicial authorization, thus speeding up the procedure for closing web sites that infringe intellectual property rights.





INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Sweden is a major contributor to worldwide internet piracy. Significant source piracy infrastructure and group memberships have flourished in the country due to Sweden’s reputation as a safe haven. Annual studies from Mediavision show that Sweden has more digital pirates than any other Nordic country. Out of 315 million illegally streamed and downloaded movies and episodes in the region, 138 million (44 percent) were downloaded and streamed in Sweden. This is 3.5 times larger than the legal market. However, these figures have declined slightly since 2018, due to several actions from rights holders, together with police and prosecutors, against illegal services. Moreover, in June 2020 the Patents and Market Court of Appeal issued the first-ever site-specific siteblocking precedent (“dynamic siteblocking”) whereby rights holders can notify Telia, a major ISP, to block additional domains of the infringing sites laid down in the court’s decision.

Illegal streaming in Sweden remains a serious threat to the motion picture industry. While Swedish law is clear that downloading from an illegal source is illegal, the government still has not clarified that it is illegal to make temporary copies from an illegal source. In addition, topsites (highly specialized servers with massive storage and extremely high bandwidth) are used by release groups for the first release of pirate content on the internet. This stolen source content is then passed down via a series of couriers from topsites to Internet Relay Chats, Newsgroups, and P2P networks; this is known as the “Scene.” The Scene was substantially disrupted in August 2020 via a global action. However, the opportunity for new groups to take their place remains, and the MPA continues to monitor the landscape to confirm that the group does not resurface.

Further, in recent times, the number of illegal IPTV services in Sweden has grown rapidly. The European Union Intellectual Property Office (EUIPO) shows in its report “Illegal IPTV in the European Union” (November 2019) that Sweden has the second largest number of users of unauthorized IPTV services in Europe.

Enforcement

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

In September 2020, new legislation on serious IP crimes went into force. The legislation introduces penalties from six months to six years for serious cases, in comparison to the two years maximum penalty previously for copyright crimes. The changes also give the police the option to use other measures, such as covert surveillance of electronic communication. The statute of limitation was also extended to ten years.

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

Legislation

In light of the exponential growth of illegal streaming, Swedish law must provide clarity on the issue of temporary copies from illegal sources. The

SWEDEN

current legal framework provides little deterrence.

Swedish law must also change in order to curb organized commercial piracy, as evidenced by the difficulties thwarting The Pirate Bay – an operation the court system has already deemed illegal. These necessary changes should include better tools for the police and aim to stop illegal sites that keep running after being raided by the police, and even after being convicted by a court of law.

There is also a need for clear “Know Your Business Customer” (KYBC) obligations for everyone who knowingly or unknowingly conducts business that contributes to piracy.





MARKET ACCESS ISSUES

Film Act Amendment – Effective since 2016, a Film Act provision known as the “unique distributor clause” has been extended to all forms of exploitation, including DVD/physical home entertainment and all forms of VOD/online distribution, with the exception only of linear television (broadcasters’ ancillary on-demand rights are excepted only for 7-day catch-up). Exploitation of a film in any media in Switzerland now requires exclusive control over all language versions in Switzerland (to the extent actually exploited) in the hands of a single distributor. This is accompanied by laborious registration and reporting duties, which address foreign entities owning and exploiting rights in Switzerland. The provision still lacks clarity (despite a revised guideline published by the Federal Office in 2020) regarding the extent of “grandfathering” protection for existing contractual fragmentation of film rights (output deals made prior to 2016 lost “grandfathering” treatment as of 2019). In sum, this amendment interferes with internationally established licensing practices.

Copyright Act – A new provision, effective since April 2020, interferes with VOD licensing by imposing a mandatory, inalienable collective author and performance rights remuneration on VOD services available in Switzerland for films produced in Switzerland or in countries practicing similar remuneration schemes. Films from other countries are not affected; however, the provision lacks clarity, as to qualifying countries or remuneration schemes and co-productions

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Switzerland lacks meaningful remedies and effective enforcement against online

copyright infringement, in particular against the cross-border accessibility of infringing offers to a broad public in Switzerland. This is fostered by the doctrine of legal private use of illegal sources and a lack of action on behalf of access providers to block access to such offers. Both practices were ultimately confirmed in a 2019 Federal Supreme Court decision that absolved access providers of the responsibility to block access to infringing sites. Despite a recent legislative reform, Switzerland’s legal framework remains inadequate. This is particularly concerning, as Switzerland’s robust technical infrastructure has made it an attractive host for sharehosting 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. Where new provisions were introduced (such as the “stay-down” provision), it will likely require court proceedings lasting several years and high costs to remove the ambiguities of the new rules and make them applicable.

Enforcement

Attempts to enforce access blocking and cessation of sharehosting operations in Switzerland have failed thus far. Enforcement under the new stay-down provision may require substantial efforts to pass the vaguely defined tests in the law. Also, the scope of data processing permitted under the new legal justification will need to be specified with authorities and possibly the courts. Enforcement against the distribution of illicit streaming devices has not yet succeeded, possibly also due to the uncertainties created by the private use exception.

Legislation

Copyright Legislation – A recent legislative reform, in effect since April 2020, ultimately introduced two

SWITZERLAND

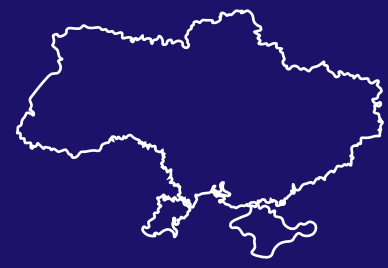
enforcement instruments into copyright: a stay-down duty imposed on hosting providers “creating particular infringement risks” (targeting Swiss-based sharehosters); and a specific legal justification for processing personal data, such as IP addresses, for purposes of criminal prosecution of copyright infringements. Both provisions contain vague legal concepts, lack clarity, and may therefore require court decisions to 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.





MARKET ACCESS ISSUES

Compulsory Manufacturing of Film Prints – Ukrainian law requires the production of film prints locally as a prerequisite for the issuance of a state distribution certificate. Currently, the requirement to manufacture film prints and transfer them to the Ukrainian State Film Agency (Derzhkino) in order to obtain a distribution certificate applies only to owners of TV rights and owners of home video rights, who are obliged to provide film copies on all types of image carriers. Theatrical rights’ owners need only to provide Ukrainian licensing entities the option for a dubbed version of the film.

Customs Valuation – Royalties on imports are subject to duties in Ukraine. This methodology is out of step with global norms, burdensome, and amounts to double taxation. The courts include royalties in the customs value if the royalties are a condition for the sale of the goods and if the royalties are paid for the use of imported goods.

In 2017, the Government proposed to change the procedure for the inclusion of the amount of royalty and other license fees to the price actually paid or payable for the goods being valued. This bill was developed with consideration for Ukraine’s international obligations under GATT Article VII and for the positions of the Technical Committee on Customs Valuation at the World Customs Organization. However, the proposals have never been implemented.

Local Language Requirements (Dubbing/Quotas/VAT) – In July 2019, the Law “On Ensuring the Functioning of the Ukrainian Language as the State Language” entered into force. The rules will come into effect on July 16, 2021 and mandate, among other things, that foreign films distributed in Ukraine on home entertainment, television,

and VOD must be dubbed or voiced in the state language. In addition to the state language, foreign films may contain audio tracks in other languages. Movie theaters can also show foreign films in the original language, accompanied by subtitles in the Ukrainian language.

The total number of movie screening sessions in a non-national language may not exceed ten percent of the total number of movie screening sessions at a movie theater per month. Moreover, exhibition of foreign films in the original language, accompanied by Ukrainian subtitles, is subject to 20 percent VAT. While the exhibition of dubbed films is currently tax-exempt, dubbed films will be subject to the same 20 percent VAT in 2023. The state encourages the use of Ukrainian language in film distribution by establishing a 50 per cent discount on the distribution certificate fee for films dubbed/voiced/subtitled in Ukrainian.

Media Bill – In 2020, Ukraine is considering legislation that includes a series of problematic obligations including onerous provisions for non-domestic media service providers to register, as well as provisions allowing the National Council to revoke a registration and licenses. In addition, the legislation proposes a series of quotas on non-linear (VOD) and linear service – including European-origin content, Ukrainian language content, and independently produced content. Several of these provisions would run counter to Ukraine’s obligations under the US-Ukraine Bilateral Investment Treaty. Ukraine should ensure that this legislation comports with its international obligations.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The Government of Ukraine, as part of its effort to promote the rule of law, should



address its rampant internet piracy. Both P2P services and illegal hosting-sites targeting Western European and U.S. audiences are very serious problems in Ukraine.

Camcord Piracy – Source piracy from Ukraine remains a concern for MPA member companies. From January to September 2019, 4 illicit audio or video recordings of MPA member films were traced to Ukrainian theaters, down from 8 in the same period in 2018. In April 2017, a new law “On State Support of Cinematography in Ukraine” introduced criminal liability for camcording and card-sharing. Helpfully, in June 2019, a district court handed down the first court verdict against a camcorder. Another camcording case, opened in November 2019, is pending.

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

Illegal Film Screening – Small Ukrainian theaters screen pirate digital copies of films without a State Certificate. Helpfully, thus far in 2020, law enforcement agencies have investigated and shut down 35 illegal theaters for illegal film screening, 18 of which have been shut down and two theaters which were sanctioned based on the Administrative Code.

Enforcement

While Ukraine is making efforts to tackle piracy, including through criminal enforcement, challenges remain. The four most significant enforcement challenges in Ukraine are 1) the absence of criminal prosecutions and deterrent sentencing; 2) ineffective border enforcement, especially against large-scale pirate operation; 3) illicit camcording in theaters; and, 4) the lack of

civil remedies to address online piracy. Also, law enforcement practices requiring rights holders to provide damage estimations in every case filed is a serious challenge for rights holders and a de facto hurdle for proper enforcement. In addition, it should be noted that the delay between filing a criminal case and filing the case in court is very significant. In 2020, the cybercrime unit of the Ukraine police investigated and shut down five online services for illegal film screenings.

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

Legislation

Criminal Procedure Code –The Criminal Procedure Code does not grant police ex officio authority. Criminal cases related to the protection of intellectual property are considered “private accusation” cases. The Criminal Procedure Code should be amended to provide Ukraine’s enforcement authorities with ex officio authority.



MARKET ACCESS ISSUES

Video-on-Demand (VOD) Catalogue Quota –

The Government will transpose the minimum, mandatory requirements of the 2018 AVMSD into UK law for the purposes of future alignment with its closest trading partner. The necessary secondary legislation was laid on 30 September and is expected to enter into force on 1 November. This will include transposing into law the 30 per cent share of European Works in VOD catalogues and related prominence requirements. The Government’s formal response to the consultation on the 2018 AVMSD states that it does not intend to introduce a financial contribution obligation (“a levy”) but will keep this issue under review. UK content will continue to qualify for European Works status after EU exit as a country party to the Council of Europe’s Convention on Transfrontier Television, unless and until sufficient pressure is placed on the European Commission to remove this status as part of the next review of the AVMSD legislation in 2026.

Digital Services Tax (DST) – In April 2020 the UK introduced a new two percent tax on the revenues of search engines, social media platforms, and online marketplaces that derive value from UK users. In line with the European Commission and other EU Member States, the UK plans to introduce a DST 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 does recognise that the most sustainable long-term solution to the digitisation challenge is reform of the international corporate tax rules, and is backing G7, G20 and OECD talks on an international solution. The

current Government has therefore committed to adjusting the proposed DST once an appropriate global alternative is in place.

Freedom of Movement – The freedom of movement of people, goods and services currently enjoyed by European citizens moving between the UK and the EU will end on 1 January 2021 when the standstill transition period ends. This could add friction to the process of producing audiovisual content in the UK if an agreement on a future UK-EU relationship is not reached that covers the movement of cast, crew and equipment between the UK and the EU for productions.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy remains the prevalent form of film and TV piracy in the UK, with streaming of film, TV and sports content via 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 to deal with this problem.

NATIONAL TRADE ESTIMATE



MIDDLE EAST



MARKET ACCESS ISSUES

Administrative Fees to License Publishing Copyrighted Works – The UAE national Media Council imposes administrative fees to imported copyrighted works, ranging from 270 USD for theatrical releases to 108 USD for TV programming

INTELLECTUAL PROPERTY PROTECTION

Internet and Mobile Piracy – Several notorious online piracy sites are heavily accessed in the UAE, including 123movies.la, a streaming website that embeds popular movie and series content from third-party cyber-lockers.

Illicit Streaming Devices – The use of illicit streaming devices has increased in the UAE. The streaming devices can be used either to receive Free-To-Air channels—which is a legal act—or receive pirated TV channels by way of installing certain Internet Protocol TV (IPTV) applications. These devices and the channels or content they carry are illegally marketed, promoted, and sold to consumers in high volume through several sales channels such as door-to-door, small retailers, internet sales, or through social media accounts. As the hardware itself is not necessarily illegal, it is often difficult to prevent the importation and sale of these devices in the UAE.

Circumvention of Territorial Restrictions – Circumvention services, such as VPNs, DNS masks or Tor networks, are widely available in the UAE and are used to access and stream content from Internet-based TV and Video-On-Demand services that legitimately operate in different territories, but have not been licensed for the UAE. This poses a direct threat to legitimate platforms which are currently offering the same content in the UAE.

Enforcement

Administrative enforcement authorities in the UAE, such as Economic Development Departments, are requesting UAE copyright registration certificates in order to proceed with any action for copyright infringement. This detrimental formality is prohibited by Berne Article 5.2 and TRIPS Article 9.

Further, enforcement in Free Zone areas is limited to criminal actions by police based on complaints by the copyright owner. There is a high volume of goods imported into the Free Zone areas and the territory is often used as a regional hub for goods in transit. The administrative authorities in the UAE do not have jurisdictions over those areas, and there are no regular or random inspections of the facilities therein. The UAE should ramp up efforts to enforce against pirate and counterfeit traffickers with deterrent enforcement actions and enhanced customs controls.

Legislation

The UAE Federal Law No. 7 of the 2002 law concerning Copyrights and Neighboring Rights falls short of UAE’s obligations under the WIPO Internet Treaties and modern standards of protection. The law contains only rudimentary protections against the unauthorized act of circumvention of Technology Protection Measures (TPMs) and against the trafficking in of devices, technologies, components, and services that facilitate the circumvention of TPMs.

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. Meanwhile, emerging markets such as Colombia are embracing so-called Orange Economy reforms, aimed at promoting the creative industries and attracting foreign collaborations and investments. While most countries in this hemisphere are smaller markets for MPA member companies, negative government policies in these territories often proliferate, impacting the global policy framework.

Throughout the hemisphere, MPA members face domestic content quotas. In recent years, Brazil raised its screen quota, increasing the total number of domestic films that must be exhibited per year and the number of days they must be exhibited, while also requiring local content quotas for the pay-TV industry. Argentina also imposes local content quotas for movie theaters and free-to-air television. Canada maintains a web of discriminatory and outdated content quotas for broadcast and pay-TV which artificially inflate the total spend on Canadian programming. The Government of Canada is currently considering legislation and other regulatory measures imposing obligations on non-Canadian digital services delivered over the Internet, including those provided by MPA members. Further, a longstanding bill in Chile's legislature, if implemented, would impose screen quotas that appear inconsistent with Chile's FTA commitments.

While countries throughout the region continue to pursue content quotas and similar protectionist measures targeting traditional distribution channels, such measures are now migrating to the online market, threatening the vitality of fast-growing business segments such as video on demand (VOD) and other online services. Earlier

this year, Colombia issued a decree regulating the visibility of local content on VOD platforms. In Mexico, a legislative proposal, as currently drafted, would impose local content quotas on OTT platforms in violation of Mexico's USMCA obligations and would expand Federal Telecommunications Institute (IFT) licensing requirements to cover OTT services. Argentina and Brazil are also exploring new quotas or regulations on over-the-top (OTT) platforms, which could inhibit market growth and limit consumer choice.

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

Beyond market access barriers, our industry also faces barriers in the form of widespread content theft. While hard goods piracy persists throughout the region, online piracy is the primary barrier and priority for our industry. Of particular concern is the proliferation of illicit streaming devices 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 gaining popularity throughout Latin America and becoming a leading vehicle for online piracy of audiovisual material. Another emerging regional threat is piracy from illegal internet protocol television (IPTV) services that provide stolen telecommunication signal/channels to a global audience via dedicated web portals, third party applications, and piracy devices configured to access the service. Furthermore, in 2020, the initial months of the COVID-19 pandemic saw a spike in the global trends of internet usage, including rising illegal access to unauthorized content. In



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Brazil, for instance, the monitoring of a database of two thousand online piracy platforms showed a 15% to 20% increase in terms of users' access between the months of February and April. MPA is working closely with law enforcement and other IP stakeholders on strategies to address these various challenges in the Americas and around the world. MPA has seen increasingly organized online piracy in the region and the formation of internet release groups. Internet release groups have been identified in Argentina, Brazil, Chile, Ecuador, Guatemala, Mexico, and Peru. These groups are overtly profit-driven and utilize different distribution channels to release illicit content. Rather than closely-held topsites, some of these groups operate public websites and work at the P2P level. In general, they also have a close association with hard goods operators. Moreover, in the last couple of years, Latin American release groups have extended their operations outside the region, recruiting operatives in the United States and Russia. It is imperative that countries' legal and enforcement frameworks promote accountability and the rule of law and create incentives for intermediaries to cooperate with rights holders in combating this serious, ongoing problem.

Camcording as source piracy is a persistent problem in Latin America, although progress against this crime is improving overall. Due to the global pandemic and ensuing physical distancing measures, movie theaters were closed for much of 2020, which restricted the use of camcording as a means of piracy. Also, in response to COVID-19, a surge of drive-in movie theaters opened across the region. In many cases, unfortunately, drive-in theaters are showing films that have not been licensed for public performance. In Brazil, enforcement agencies such as the National Cinema Agency undertook efforts to curb unauthorized exhibition at drive-in theaters.

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 rights holders' efforts to obtain cooperation from law enforcement and prosecutors. Meanwhile, Mexico recently 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.

MPA continues to monitor legislative and regulatory proposals in Latin America that introduce statutory remuneration rights for authors and performers in the audio-visual sector and subject those rights to mandatory collective rights management (MCRM) by collective management organizations (CMOs). Of greatest concern are MCRM initiatives aimed at rights of communication to the public (CTTP) exploitations, including interactive on-demand services that implicate making available rights. 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. A MCRM regime for CTTP rights has been in place in Argentina for many years, but CMOs in that country have recently begun to assert claims for making available exploitations, potentially undermining this new sector of the audio-visual business. Other countries in the region have introduced author and performer remuneration



WESTERN HEMISPHERE

rights subject to CRM into their national copyright laws, including Chile, Peru, Colombia, Brazil, and Mexico. Many of these initiatives contemplate voluntary CRM for CTPP rights, though 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 CTPP 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. Uncontrolled CRM, in particular MCRM, would likely have a negative impact on U.S. exports in the audio-visual sector through imposition of additional, unjustified increases in distribution and licensing costs, and resulting confusion in the marketplace for rights clearance.

Rights holders 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 South America, this phenomenon is particularly worrisome in Argentina, Chile, Colombia, Ecuador, Peru, and Uruguay, but the problem also persists in Central American and Caribbean markets, including Guatemala and Honduras, Trinidad and Tobago, Jamaica, Bahamas, Barbados, and Aruba. These rogue operators negatively affect investment and competition in local markets, impacting international programmers, as well as local distribution platforms. Enforcement authorities should revoke the licenses of operators that are infringing copyright.

Over the past couple of years, several 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 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 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 rights holders in deterring piracy. The framework also provides broad exceptions to copyright that remain untested. In 2018, Colombia took necessary steps to update its copyright law and significantly improved copyright protection through its legislative reform. In Argentina, copyright reform is stalled, and in Brazil, reform is underway. As governments consider reforms to address copyright in the digital age, it is critical for the U.S. government to continue to engage them on the need for these reforms to be consistent with both the international copyright framework, and, in the case of FTA partners, consistent with their bilateral obligations. 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 infringements, enable prosecution of camcording without proof of profit motive, and enhance IMPI's online enforcement capabilities. Unfortunately, Mexico has yet to introduce legislation to implement presumption of copyright, exceptions to the circumvention of TPMs, or provide civil remedies for satellite and signal piracy. Further, a legal challenge questioning the constitutionality of Mexico's reforms to implement its USMCA obligations on TPMs and ISP liability raises serious concerns about Mexico's USMCA compliance. 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 and may 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 are similar to prior years, requiring varying days of screening depending on the number of screens in an exhibitor group. For example, an exhibitor group with 201 or more screens is required to meet a 57-day quota, and all the screens in the exhibitor group’s complexes must individually meet this quota. These quotas are set to expire in September 2021 and may be renewed. Brazil’s screen quota is facing a constitutional challenge at the Supreme Court and competing legislative proposals have been introduced that would either loosen or tighten the restrictions. The MPA opposes local content quotas, which limit consumer choice and can push consumers toward illegitimate content sources.

Video on Demand (VOD) Tax/Regulatory

Framework – For six years, Brazilian leaders have contemplated how to both regulate and capture tax revenues from the fast-growing VOD marketplace. As of September 2020, on-demand platforms are not obligated to comply with any regulatory burden. However, the cinema regulator (ANCINE) has sought, through a 2012 normative ruling, to extend to VOD services the existing tax model for audiovisual works (Condecine), which is levied per title every five years on theatrical, Pay-TV, and home entertainment releases, and levied annually on audiovisual ads. Condecine would be burdensome if levied over VOD services, especially when charged on a per-title basis as prescribed in the current ANCINE ruling, and would limit the choices available to Brazilian consumers in the online content market. In recent years, a coalition of industry stakeholders has filed a request before ANCINE to annul the 2012 Normative Ruling and has warned against protectionist regulatory/ fiscal models that would impede local market development and investment. For the time being, the regulator has not reached a decision.

Media Cross-Ownership / OTT Regulation / Tax Discussions – Brazil’s legislature is about to examine policies of significant consequence to online A/V platforms: 1) potential change to the 2011 Pay-TV Law that would lift restrictions on cross-ownership between programmers/producers and operators of Pay-TV content; 2) discussions on regulatory and fiscal asymmetries between OTT and Pay-TV services; and 3) taxation over the digital space. First, lifting the current Pay-TV Law’s restriction on media cross-ownership would enable market verticalization, which would boost investment and allow businesses to innovate and freely compete. ANATEL (Brazil’s telecom regulator) and ANCINE (cinema regulator) have already decided favorably on the media cross-ownership issue and both suggest an amendment to the law, to be



scrutinized by the Congress. On the second point, if a programming company that distributes linear or live content on the Internet (OTT) were to be classified as a telecom service and then subjected to the Pay-TV Law, those OTT direct-to-consumer services would face severe regulatory burdens, including local content quotas, oversight by ANATEL, and additional tax that would be passed on to programmers. Helpfully, ANATEL rendered a decision in September 2020 that OTT services are value added services and therefore not subject to the Pay-TV regulatory framework; ANCINE, under its jurisdiction, decided likewise. The Supreme Court is also reviewing the matter. In parallel, tax reform discussions are gaining traction in Brazil, which may impact the digital space, including legislative bills that would impose taxes on OTT services. We urge USTR to support Brazil's legislative attempts to modernize the Pay-TV Law and encourage a prompt passage of the required reforms, and to discourage additional taxation and regulation that would hamper the growth of the OTT market in Brazil.

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. Use of piracy devices continues to rise in Brazil, exemplified by the increased market penetration of an illicit internet protocol (IPTV) box called HTV. HTV offers a grid of 170+ live pay-TV channels and a VOD service that offers TV shows and motion pictures, many sourced through illegal camcording activity. These piracy devices are available at retail in Brazilian

marketplaces but are increasingly being delivered to individual customers by mail, thus evading enforcement and seizure efforts at ports and in retail markets.

Camcord Piracy – Camcord piracy, while a persistent problem in Brazil, is trending in the right direction. In 2019, a total of 19 camcords of MPA-member films were traced to Brazilian theaters, down from 32 during the previous year. The COVID-19 pandemic, which necessitated the widespread closure of cinemas in Brazil for much of 2020, has temporarily halted camcording activity. However, as cinemas reopen to moviegoers, rights holders anticipate that this illicit activity will resume.

Enforcement

Brazil is demonstrating a new political will to combat piracy, as ANCINE recently created an anti-piracy chamber and the Ministry of Justice's National Council to Combat Piracy and Intellectual Property Crimes (CNCP) has pursued a number of helpful voluntary initiatives to fight illegal activity. However, Brazil has yet to establish a dedicated IP police department or an IP court, along with rules to reduce the timing and costs of inquiries and lawsuits. Brazil also needs to enshrine deterrent sentences for copyright theft.

Collective Management Organizations

Brazil's then Ministry of Culture, which was moved from the Ministry of Citizenship to the Ministry of Tourism in 2019, had granted the accreditation of three Collective Management Organizations (CMOs) prior to its abolition. These entities, representing directors, screenwriters, and artists of audiovisual works, will collect remuneration for the communication to the public of audiovisual works in every exploitation window, including theaters, free-to-air, Pay-TV, and digital distribution, provided that, according to those CMO's' interpretation of

the law, the rights that authorize such collection have not been assigned to the work's producer. This accreditation request, which MPA and other national and international industry stakeholders have appealed, was eventually granted. Despite this decision, the aforementioned industry stakeholders understand that the accreditation does not provide the CMOs the right to charge royalties once assigned. Regardless, a CMO representing directors has already sent a notice to theatrical exhibitors that a charge is forthcoming, which would likely affect U.S. industry. Further, there is potential harm to the audio-visual sector if the CMO demands are not limited in terms of cumulative impact, and if they are applied without consideration for contractual arrangements, e.g. remuneration obligations that already exist between producers and creative stakeholders.

Legislation

Copyright Reform – In July 2019, the Ministry of Citizenship launched a public consultation to solicit views on how to modernize the Copyright Law. In parallel, three legislative proposals (Bills 3133/2012, 6117/2009 and 3968/1997) remain concerning to rights holders, as the bills promote broad exceptions and limitations to copyright that are inconsistent with Brazil's international obligations and would likely deter investment in Brazil's creative industries.

Camcord Legislation – In May 2019, the head of the Committee of Justice and Constitutional Affairs released a helpful anti-camcording bill (2714/2019), which was unanimously approved at the Committee on Culture. MPA supports this initiative, which removes the requirement to prove a profit motive.

Intermediary (Advertising) Liability Bill – In 2018, the Brazilian National Congress introduced a proposal (Bill 9744) to increase enforcement over advertising intermediaries who contribute to

copyright infringement on local pirate sites. The bill was based on a report published by a renowned scientific institution, IBOPE, which revealed high ad-network revenues originating from rogue websites. The bill is pending in the House Committee on Constitutional Affairs and awaits a final report. The bill remains dormant pending progress on voluntary agreements among Federal Administration, copyright-holders associations, and advertising associations to curb online piracy.

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



MARKET ACCESS ISSUES

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

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

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

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

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

First, BDUs must offer a “skinny basic” tier for not more than \$25 per month that may include one set of “U.S. 4+1” (ABC, CBS, FOX, NBC and PBS) from the same time zone as the BDU’s headend, where available, if not, from another time zone. BDUs may also offer an alternative basic tier that includes the same set of U.S. 4+1 signals. A BDU may only offer a second set of U.S. 4+1 signals to its subscribers if it receives authorization by the CRTC pursuant to a condition of license. Unless otherwise authorized by condition of license, the second set of U.S. 4+1 signals may be offered only to cable or satellite subscribers who also receive at least one signal of each large multi-station Canadian broadcasting group originating from the same time zone as the second set of U.S. signals.

Second, except as permitted in a BDU’s license from the CRTC, all other non-Canadian signals and services may only be carried on a discretionary basis and must be selected from the list of non-Canadian programming services authorized for distribution (the Authorized List) approved by the CRTC and updated periodically. A service will not be added to the Authorized List if a competitive Canadian pay or specialty service (other than a national news service) has been licensed. Further, a service may be removed from the Authorized List if it changes formats and thereby becomes competitive with a Canadian pay or specialty service, if it solicits advertising in Canada, or if it does not conduct its negotiations and enter into agreements with BDUs in a manner that is “consistent with the intent and spirit of the Wholesale Code.” A principal purpose of the Wholesale Code is to prohibit contractual terms that discourage or penalize the offering of services on a stand-alone basis.

Proposed Obligations on Non-Canadian Digital Services – The Government of Canada is currently considering legislation and other regulatory measures imposing obligations on non-Canadian digital services delivered over the Internet, including the recommendations made by an external panel - the Broadcasting and Telecommunications Legislative Review Panel (BTLR) - in its final report issued January 29, 2020. These “digital media services” are currently exempt from most requirements under the Broadcasting Act. If certain of the recommendations of the BTLR are adopted, these digital media services could become subject to requirements to contribute financially to the creation of programming that qualifies under a narrow definition of “Canadian programs”. However, these rules would give non-Canadian digital services no credit towards their Canadian financial or discoverability contributions from their considerable investments in production activity carried on in Canada today.

Broadcasting Investment Limitations – The Broadcasting Act provides that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay and specialty television) and distribution undertakings (cable operators and satellite television distributors), must meet certain tests of Canadian ownership and control: 1) a licensee’s CEO must be Canadian; 2) at least 80 percent of a licensee’s Directors must be Canadian; and, 3) at least 80 percent of the licensee’s voting shares and votes must be beneficially owned and controlled by Canadians. If the licensee is a subsidiary corporation, its parent must be Canadian and at least two-thirds of the voting shares and votes of the parent must be beneficially owned and controlled by Canadians. The parent corporation or its directors cannot exercise control or influence over the programming decisions of its licensee

subsidiary where Canadians own and control less than 80 percent of the voting shares and votes, the CEO of the parent company is non-Canadian, or less than 80 percent of the directors of the parent corporation are Canadian. In such circumstances, the CRTC requires that an “independent programming committee” be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on such independent programming committee. No other developed market in the world maintains such discriminatory foreign investment limitations.

Québec Distribution Restrictions – The Québec Cinema Act severely restricts the ability of non-Québec-based film distributors to do business directly in Québec. Since 1986, MPA member companies may apply for a Special License for any film produced in English that meets the less restrictive requirements set out in an Agreement between the MPA and the Québec Minister of Culture. The Agreement was revisited in 2015 and was extended for seven years.

INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Canada’s digital marketplace remains hampered by widespread infringement. Canada has seen an influx of operators, sellers and resellers of infringing paid subscription piracy services [Internet Protocol Television (IPTV) and Video-on-Demand (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 (e.g. ISPs, payment processors, online advertising networks, hosting providers) to cooperate with rights holders in deterring piracy. The framework also provides broad exceptions to copyright that remain untested.

Copyright Term – 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). However, since 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, amendments are needed to the Copyright Act in order to give effect to the USMCA. In order to ensure that Canada extends the term of protection for copyrighted works in a manner that has a direct benefit to the creators of these works, consumers, and encourages investment in new creative works, Canada must not amend the Copyright Act in a manner that diminishes the extended term of copyright protection as agreed to under the USMCA, such as by adding a registration requirement on the additional 20-year period, introducing amendments related to reversion and/ or termination rights, or other such measures.

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. 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 and are less likely to exhibit domestically-made content, are forced to abide by both daily and hourly advertising limits while their domestic and free-to-air counterparts are allowed almost twice the daily advertising limit and are not subject to hourly caps. For the past 20 years, Pay-TV 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 6 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 crippling 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 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 recently permitted foreign entities to hold up to 100 percent of a broadcaster, subject to a case-by-case review.

Local Content Quotas – On a regular basis, and

more recently as Mexico undertakes a review of its Federal Cinematographic Law, some legislators have proposed the imposition of screen quotas and limits to the number of screens in which a given movie can be exhibited. If adopted, these protectionist measures would severely limit the exhibition of U.S. films in Mexico and run afoul of Mexico’s USMCA obligations. Furthermore, a separate legislative proposal (detailed below) to reform the Telecom Law would impose a 30 percent local content quota on over-the-top (OTT) services. These proposals are inconsistent with Mexico’s USMCA obligations and should be opposed.

INTELLECTUAL PROPERTY PROTECTION

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

Camcord Piracy – The number of MPA member films sourced from illicit camcords in Mexican theaters fell to 22 in 2019, down from 98 in 2018. This decline is in part due to rights holder activities with law enforcement and exhibitors to target some of the more active release groups. The COVID-19 pandemic, which necessitated the widespread closure of cinemas in Mexico for much of 2020, has temporarily halted camcording activity. However, as cinemas reopen to moviegoers, rights holders anticipate that this illicit camcording activity



will resume. The USMCA contains strong anti-camcording commitments that, if properly implemented, should greatly enhance enforcement against camcording in Mexican theaters.

Enforcement

The enforcement problems in Mexico are procedural and structural and further exacerbated by a lack of resources and gaps in expertise. The development and adoption of a high-level national anti-piracy plan to target major piracy and counterfeiting operations, coupled with coordination of federal, state, and municipal activities, would improve Mexico's enforcement landscape.

Legislation

OTT Bill on Content Quotas and IFT Authority – A bill pending in Mexico's Senate would amend the Federal Telecommunications Act to require a 30 percent local content quota for Over-the-Top (OTT) platforms operating in Mexico. A local content quota for OTT platforms would violate Mexico's commitments under USMCA (Articles 14.10 and 19.4.1), as well as limit free expression and consumer choice, distort the growing audiovisual market, and stifle investment and competitiveness. The draft bill would also extend the Federal Telecommunications Institute (IFT) licensing requirement for restricted TV and audio services to OTT services – even those operating from abroad. Imposing such onerous new licensing requirements on OTT services appears to be inconsistent with USMCA Article 18.14.1 on applying requirements of public telecommunications to value-added services which are not public telecom services.

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. However, despite the remarkable efforts to

implement USMCA, additional work is necessary in Mexico for proper implementation on matters such as presumption of copyright and exceptions to circumvention of 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 Mexican Congress will file a brief in opposition with its constitutional defense. In the slightly longer term, copyright holders can file amicus briefs to the Supreme Court, in support of the Congress. The Supreme Court will determine the constitutionality or unconstitutionality of the reforms with a definitive and unappealable decision in the coming months.