



MOTION PICTURE ASSOCIATION

# **MPA Comments Regarding the 2024 National Trade Estimate Report on Foreign Trade Barriers**

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

---

October 2023

October 23, 2023

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

Laura Buffo  
Chair of the Trade Policy Staff Committee  
United States Trade Representative  
600 17th Street, NW  
Washington, D.C. 20508

Re: MPA Response to USTR's Request for Comments on Significant Foreign Trade Barriers for the 2024 National Trade Estimate Report (Docket: USTR-2023-0010)

Dear Ms. Buffo:

The Motion Picture Association (MPA) proudly represents one of our nation's most vibrant industries – the American motion picture, television, and streaming sector. Here, at home, and around the world, our industry delivers enormous economic value, drives innovation, promotes free expression, and serves as a global ambassador for the nation's creativity and dynamism. To that end, please find in the enclosed submission our industry's observations on significant trade barriers in priority foreign markets. MPA's submission is organized by region and includes specific comments on Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Malaysia, Mexico, The Netherlands, New Zealand, Philippines, Poland, Russia, South Africa, South Korea, Spain, Switzerland, Taiwan, Thailand, UK, and Vietnam.

The American motion picture, television, and streaming industry is a major U.S. employer that supported 2.4 million jobs and \$186 billion in total wages in 2021. Nearly 336,000 jobs were in the core business of producing, marketing, and manufacturing of motion pictures and television shows. Another nearly 486,000 jobs were engaged in the distribution of motion pictures and television shows to consumers, including people employed at movie theaters, video retail and rental operations, television broadcasters, cable companies, and online video services. The industry also supports indirect jobs in the hundreds of thousands of largely small companies that do business with the industry, such as caterers, dry cleaners, florists, hardware and lumber suppliers, and retailers.

In 2021, the enduring value and global appeal of U.S. entertainment earned \$14.4 billion in audiovisual exports. Moreover, this industry is one of the few that consistently generates a positive balance of trade. In 2021, that services trade surplus was \$7 billion, or 3% of the total U.S. private-sector trade surplus in services.

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

barriers that jeopardize the growth of legitimate commerce and impair U.S. global competitiveness.

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

MPA aims to expand the legitimate market and protect our member companies' content as it flows to consumers through a variety of traditional and new distribution channels. Legitimate online services allow global audiences to enjoy creative entertainment wherever, whenever, and on whatever device they choose. Consumer demand for high-quality content is driving this global digital trade, which helps support millions of American workers and thousands of jobs overseas.

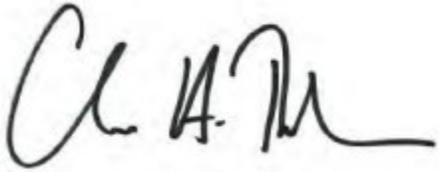
However, as countries increasingly propose and implement barriers to digitally enabled services, the widespread availability of MPA member content through legitimate channels is placed in jeopardy. Open, free, and reciprocal digital trade is key to our industry's ability to compete globally and to continue offering billions of consumers access to content of their choice. Addressing and dissuading our international trading partners from adopting restrictive and often discriminatory measures is not only beneficial to U.S. industry but underpins good governance practices, global rule of law, and the exchange of information and ideas.

Further, to ensure the continued existence of a thriving, open online marketplace, it is imperative that the U.S. government encourage countries seeking to regulate digital industry to use a light-touch regulatory approach, as heavy-handed measures can pose a threat to business development and act as a market access barrier. Further impeding MPA member companies' ability to operate in many important overseas markets is the global proliferation of content theft. The theft and illegal dissemination of content deprives creators of millions of dollars in fair remuneration that they would otherwise use to produce new content and to employ American workers.

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Ch. H. Rivkin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Charles H. Rivkin  
Chairman & CEO, Motion Picture Association

# REPORTING FORMAT

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

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



# ABOUT THE MPA

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

For further information about this report, contact Charlie Schonberger, 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.



# TABLE OF CONTENTS

Introduction by CEO Charles H. Rivkin.....	2
Reporting Format.....	5
About the MPA .....	6

## **Trade Barriers by Region**

<b>Africa.....</b>	<b>8</b>
Africa Overview.....	9
Kenya.....	11
South Africa .....	12
<b>Asia Pacific.....</b>	<b>14</b>
Asia Pacific Overview .....	15
Australia .....	18
China .....	20
Hong Kong .....	26
India.....	27
Indonesia .....	31
Japan.....	33
Malaysia .....	34
New Zealand.....	35
Philippines.....	36
South Korea.....	38
Taiwan .....	40
Thailand.....	42
Vietnam .....	44
<b>Europe.....</b>	<b>46</b>
Europe Overview.....	47
Belgium .....	52
France .....	54
Germany.....	56
Hungary.....	58
Italy.....	59
The Netherlands .....	61
Poland.....	63
Russia .....	65
Spain.....	67
Switzerland.....	69
United Kingdom.....	71
<b>Middle East.....</b>	<b>72</b>
Israel.....	73

<b>Western Hemisphere.....</b>	<b>74</b>
Western Hemisphere Overview.....	75
Brazil.....	79
Canada.....	82
Mexico.....	85



# NATIONAL TRADE ESTIMATE



# AFRICA

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

Pirated copies of movies are widely available. With growing internet speeds, online piracy is an exponentially increasing problem in Africa. An important factor is the social acceptance of the sale of pirated movies. Rather than an illegal act, it is perceived as a way to earn a living like any other. In addition, consumers are attracted to cheap pirated copies given their low purchasing power and unfamiliarity with the law. Digital piracy— via Internet Protocol Television (IPTV), BitTorrent and other peer-to-peer (P2P) linking sites – is widespread and aims to target mainly French-speaking markets with several services operated and run by operators in Morocco.

To spur foreign investment and better enable local creators to capitalize on their works, countries in the region should seek to update their copyright frameworks to help address both the opportunities and the challenges of today’s digital marketplace. As a first step, governments should be encouraged to adopt and fully implement the World Intellectual Property Organization (WIPO) digital treaties. These treaties are foundational to the legal infrastructure of digital trade, providing copyright holders with the full panoply of exclusive rights for the digital marketplace, as well as protections for technological protection measures which enable the range of online digital services and help guard against piracy. Notably, Uganda joined the WIPO treaties in 2022.

To date, Nigeria has not fully implemented the WIPO digital treaties. A copyright bill that passed the National Assembly in 2022 was signed by the

President in March 2023. While this law should helpfully improve online enforcement procedures, it contains several highly problematic provisions including a compulsory license for public interest that would allow the Nigerian Copyright Committee to bypass the copyright owner and authorize use of a copyrighted work to promote public interest. This provision undermines contractual freedom and is incompatible with Nigeria’s Berne and WIPO Copyright Treaty (WCT) obligations.

Kenya has still not fully implemented the WIPO digital treaties, though it has over the past several years indicated its intention to do so. Kenya should amend the 2020 Intellectual Property Bill to implement the treaties including through express incorporation of the three-step test, adequate and effective protections for technological protection measures (TPMs) and ensuring that the exclusive rights of both making available and communication to the public are clearly defined. In early 2022, a bill seeking to repeal online enforcement provisions was withdrawn following strong opposition by national and international creative industries, as well as the Kenyan Copyright Board. In January 2023, the 2018 Anti-Counterfeit Act entered into force. Unfortunately, this legislation imposes a mandatory IP recordation system for any goods protected by IP, including copyrighted works, and implicates both importation and distribution. This mandatory regime is incompatible with the Berne Convention as it creates a formality.

In South Africa, the highly concerning Copyright Amendment Bill and Performers’ Protection Amendment Bill passed the National Council of Provinces in September 2023 and will proceed to the National Assembly. These bills have drawn strenuous objections from domestic and foreign rightsholder alike because they would weaken protections for creative works, undermine creators’ contractual freedoms, restrict rightsholders’ ability to produce and operate in the South African market, and bring South Africa out of compliance with international IP norms.

# AFRICA

The African Continental Free Trade Area (AfCFTA) has the potential to support and bolster local creators and artists across the continent by promoting robust copyright protections and effective and modern enforcement tools. Unfortunately, the IP Protocol was adopted in February 2023 without transparency or prior consultation with copyright stakeholders and MPA is concerned, based on leaked versions, that the IP Protocol may not seize its full potential to bolster Africa's creative industries. Notably, the Annexes related to the IP Protocol have not yet been adopted, which presents an opportunity to coordinate with stakeholders.





## MARKET ACCESS ISSUES

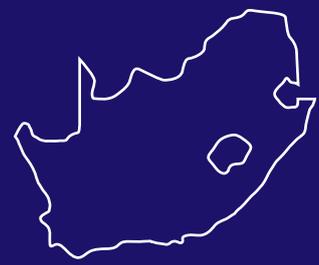
Family Protection Bill – In 2023, the Kenyan Parliament published the Family Protection Bill, which prohibits homosexuality, same-sex marriage, and “unnatural sexual acts,” and criminalizes the promotion, encouragement, advocacy, or funding of such activities. Notably, the legislation imposes significant penalties on both individuals and corporate entities involved in producing, marketing, advertising, or distributing materials that endorse or promote these activities and courts may, upon conviction, suspend an entity’s license for up to one year or even cancel it entirely. Furthermore, if the prohibited activities target underage audiences, the penalties increase significantly.

## INTELLECTUAL PROPERTY PROTECTION

### Legislation

While Kenya has indicated its intention to ratify the WIPO digital treaties, it has yet to do so.

Mandatory Recordation System – In January 2023, Kenya’s mandatory recordation system entered into force. The recordation process is cumbersome, introduces additional complexities and costs, and does not offer appropriate redress mechanisms. Notably, mandatory recordation is a formality incompatible with Kenya’s obligations under the Berne Convention.



## MARKET ACCESS ISSUES

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

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

VOD Quotas – For several years, the Department of Communications and Digital Technologies (DCDT) has considered how to adapt South Africa’s content regulatory framework to the online marketplace. The DCDT has issued a couple of Draft White Papers (DWP), the most recent in July 2023, that, among other things, recommends the imposition of local content quotas (up to 30% of the catalogue). The DCDT also envisions expanding the regulatory powers of ICASA to regulate On-Demand Content Services (OCS) and OTT services within the same regulatory framework as traditional broadcasters, to level the playing field. This creates the threat of competing regulatory oversight between the Films

and Publication Board, which was also recently tasked to regulate OCS and ICASA. The DWP also recommends imposing a 2% turnover tax on digital platforms that would be payable into a fund dedicated to producing more local and original South African content production projects. The DWP helpfully recommends a streamlined process for removal of infringing content and site blocking.

Online Value Added Tax (VAT) – South Africa currently levies a 15% VAT on the online selling of content, including films and television programming. As of April 2019, income on B2B services provided to South African businesses by foreign providers is also subject to VAT.

Digital Services Tax (DST) – In July 2023 South Africa published a Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety that proposed a unilateral DST. The measure would impose a 2% turnover tax on digital platforms operating in the audiovisual sector or a levy to fund the production of South African audiovisual content. Such a unilateral DST conflicts with the OECD multilateral tax convention.

## INTELLECTUAL PROPERTY PROTECTION

### Enforcement

South Africa lacks the tools to meaningfully enforce against online piracy. Three main enforcement deficiencies are the inability to act against foreign infringers who do not own assets in South Africa, the lack of no-fault injunctions to stop activity that facilitates piracy, and the lack of statutory and punitive damages for infringing parties. However, as mentioned above, we are encouraged by the DCDT proposal for a site blocking mechanism to be introduced under the Electronic Communications and Transactions Act (2002).

### Legislation

Copyright Amendments – The Copyright Amendment Bill and the Performers’ Protection

# SOUTH AFRICA

Amendment Bill contain a number of concerning provisions that would introduce legal uncertainty on key issues and impose severe limitations on contractual freedom, deterring foreign investment in the film and television production industry. Moreover, several of the provisions would place South Africa in violation of international copyright norms, and the bills' online enforcement remedies are inadequate. South Africa's creative industries have overwhelmingly and consistently opposed these bills from their initial adoption by South Africa's Parliament in 2019. After several failed attempts to improve the bills, they are now headed back to the National Assembly and, once passed, will go to the President. The bills remain fundamentally flawed and, to date, have never been impact assessed.

The Cybercrimes Act – The Cybercrimes Act (CBA), No. 19 of 2020, was signed by the President in May 2021, though only certain sections have entered into force. The CBA defines an Electronic Communication and Service Provider (ESCP) very broadly and imposes an obligation on ESCPs to report cyber offenses within 72 hours of becoming aware of them – failing to do so makes them liable to a fine – as well as extensive data retention requirements. The government should continue to consult on the scope and impact of the law.

The Films and Publications Amendment Act No. 19 of 2019 (FPAA) – The FPAA entered into force in March 2022, amending the Films and Publications Act No. 65 of 1996. The FPAA expands the Film and Publication Board's (FPB) mandate to that of a content regulator. This means that the FPB now has the authority to issue, renew, and revoke licenses for commercial online content distribution and to adjudicate consumers' content complaints. It is encouraging that the FPAA enables the FPB to accredit foreign classification systems and allows distributors to self-classify. However, the FPB is advancing proposals to vastly increase the current "per content title tariff cap" and to implement a new tariff which would dramatically increase annual license fees, potentially discouraging increased online content distribution in South Africa.

Indigenous Knowledge Act No. 6 of 2019 – The Government invited public comments on draft regulations to implement the Protection, Promotion, Development and Management of Indigenous Knowledge Act No. 6 of 2019 (IK Act) in February 2023. Questions remain around how it would be practically implementable and key problematic areas remain unaddressed, most notably in respect of the registration process, the impact on existing IP laws and rights, and whether it applies to pre-existing works. The penalties are completely disproportionate and do not provide meaningful guidance on what would constitute infringement. Such uncertainty could discourage and disincentivize the commercial use of IK works in South Africa. We encourage further engagement and consultation on the IK Act and draft regulations.



# NATIONAL TRADE ESTIMATE



## ASIA PACIFIC

# ASIA PACIFIC

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

Market access barriers for the region's theatrical, television, and streaming industries take several forms, including content quotas, foreign investment limitations, and dubbing and advertising restrictions. Local screen and content quotas applied to theatrical and/or pay-TV businesses in Australia, China, Indonesia, Malaysia, South Korea, Taiwan, and Vietnam limit consumer choice and often contribute to piracy by restricting the licensed supply of content. 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, dubbing restrictions and burdensome censorship with strict anti-tobacco messaging throughout the region make it more difficult for U.S. companies to monetize and distribute content.

Governments in the region have applied content quotas and other restrictive regulations to traditional distribution channels for decades and have proposed such restrictions for the online OTT/VOD marketplace. The application of these restrictions to the OTT/VOD marketplace will limit consumer choice, stifle business development, and add a burdensome barrier to market entry in this fast-growing segment. Some governments in the region – such as the Australian government – are considering mandating that VOD services invest in local content, which would contravene Australia's bilateral trade obligations to the U.S. Several governments in the region—including the governments of Taiwan, Thailand, Vietnam, and Indonesia—are considering or have already implemented local presence requirements. Furthermore, the governments of Indonesia and India have repeatedly expressed reservations about

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

MPA strongly opposes the imposition of network usage fees on content service providers. Such fees, currently under consideration by South Korea's National Assembly, would undermine freedom of contract, prejudice the interests of content providers operating in the market, and violate Korea's bilateral trade obligations to the U.S. Thailand's National Broadcasting and Telecommunications Commission has also expressed interest in imposing such fees on content providers. Moreover, there have been calls to establish a network fee by some Indian internet service providers (ISPs) and Australian telcos.

Tax issues also pose challenges in the region's theatrical sector. For example, the entertainment tax in Malaysia and the Indian Local Body Taxes on theater admissions (above and beyond Goods and Services Tax) have resulted in ticket price disparities, limiting the growth of the theatrical industry in those markets.

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

In addition to market access issues, intellectual property theft is a constantly evolving threat to MPA's member companies in the Asia-Pacific region, particularly given the rapid proliferation of operators of pirate online streaming and pirate IPTV services, as well as "Piracy-as-a-Service" (PaaS) offerings from Asia-Pacific based operators. PaaS constitutes a suite of off-the-shelf services



that make it easy for would-be pirates without any technical knowledge to create, operate, and monetize a fully functioning pirate operation, such as website templates, databases of infringing content, and hosting providers specialized in servicing infringers. The development of PaaS services is evidence of the scale, sophistication, and profitability of modern online commercial copyright infringement. The emergence and development of PaaS services have become a key concern of the motion picture industry and a top priority for its anti-piracy efforts.

Another related and major problem is the proliferation of illicit streaming devices (ISDs) and apps, sold by resellers in physical marketplaces and online through e-commerce platforms, often misleading consumers into thinking their offerings are legitimate. ISDs and apps offer unauthorized access to dozens of pay-TV channels or streaming services, large volumes of on-demand movies and television series, and/or live streaming events that are made available without authorization. Because there may not always be indicia on the devices themselves that the manufacturers had an unlawful purpose in making them, other criteria (such as the way they are marketed by distributors resellers) is often the key to addressing this problem, and copyright and enforcement laws in some markets are not well equipped to tackle these devices and apps. Malaysia, Singapore, and Taiwan have helpfully outlawed the manufacture of and trafficking in ISDs and apps. However, continued collaboration among rightsholders, governments, and other stakeholders in the online ecosystem will be necessary to address this growing regional problem. MPA supports efforts by Asia-Pacific Economic Cooperation (APEC) economies to discuss and address this persistent challenge.

MPA urges governments in the region to enact effective laws and regulations to protect copyrighted content on the internet. This includes provisions designed to encourage meaningful removal of piracy listings and content by intermediaries participating in and profiting from the use of their online services to locate pirated materials. Payment processors and online advertising services should do their part by restricting money flows

and advertising revenues to piracy services, which would essentially eliminate their sources of income.

Site blocking, often through no-fault injunctive relief, is an established best practice to reduce online copyright infringement. This highly effective anti-piracy tool allows governments to disable access to copyright infringing websites, thereby reducing piracy site visits, and increasing access to legal services. Administrative site blocking is currently available as a remedy in more than a half dozen jurisdictions in APAC and is under consideration in other major markets, including the Philippines, Vietnam, Japan, and Taiwan. It is worth noting that the Philippines government and local ISPs recently agreed on the first voluntary site blocking regime in the Asia Pacific region. In addition, visits to piracy sites have been further reduced through voluntary arrangements with certain search engines to remove from their search results listings for sites blocked by a court order.

The 1996 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 used for the circumvention of tools that protect works in the online market. To this end, MPA encourages Thailand to finalize its accession to the WIPO Performances and Phonograms Treaty (WPPT) and fully implement these important protections for copyrighted works. India has acceded to the WPPT and WCT treaties and should take steps to fully implement these foundational treaties, notably by strengthening protections against circumvention of access and copy control technological protection measures.

With the rise and increasingly wide usage of generative AI technologies, certain Asia Pacific markets, notably Japan and Singapore, have passed expansive text and data mining (TDM) exceptions in their copyright laws. These exceptions allow use of online data (including from copyrighted works) to train AI datasets, including both commercial and non-commercial uses, in an overly broad manner (i.e., inconsistent with the Berne three-step test). These amendments also do not provide clear opt-out



# ASIA PACIFIC

provisions for rightsholders. Japan should clarify its position around lawful access of copyrighted works with respect to its TDM exception, while Singapore should clarify the ability of rightsholders to contract-out via user terms and conditions.

The global norm for the term of copyright is 70 years after the death of the last surviving author, and 70 years for subject matter in which term is determined from date of publication. More than 90 countries throughout the world have adopted terms of protection in this range. As countries throughout the Asia-Pacific region look to bolster their creative industries, attract foreign direct investment, and avoid discriminatory treatment of their own works, they should extend their terms of protection in line with international best practice. 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. Australia, Japan, Philippines, and Sri Lanka are parties to the convention and New Zealand and South Korea are observers.

Some Asia Pacific markets, including Korea and Philippines, are considering proposals that would legislate or implement statutory additional remuneration rights in copyright law for authors, directors, performers, and screenwriters. Such proposals would create considerable uncertainty around individual market compensation practices and future costs, curtail freedom of contract, and have a potentially significant chilling effect on investment in the screen sector, leading to negative outcomes for consumers (including harming the diversity of content and higher prices for end-users). Korea and the Philippines should avoid further consideration of such problematic provisions in

their proposed revisions of copyright laws.

Illicit camcording is no longer the problem that it used to be in the Asia-Pacific region, although it remains problematic in certain markets. In 2011, APEC Members agreed on Best Practices that encourage the enactment of effective policies and laws to address camcorder piracy, including legislation that criminalizes unauthorized camcording in theaters and encourages cooperation among cinema owners to detect and interdict those engaged in this highly damaging activity. Implementation of these APEC recommendations would continue to help many of these markets curb illicit camcording in the Asia-Pacific region.

Pay-TV piracy, a longtime challenge in and of itself, is now often interconnected with other forms of online piracy in the Asia-Pacific region. Some illegal websites now specialize in the unauthorized online retransmission of a slate of television channels through pirate web portals. Increasingly, many rightsholders face the theft of their live broadcast's signals, including live sporting events. Laws should be updated to address this new threat.

U.S. free trade agreements (FTAs) with Australia, Singapore, and South Korea have provided an important means to enhance intellectual property rights protection with key Asia-Pacific trading partners. These agreements have historically tended to eliminate burdensome market access barriers, benefitting both U.S. industry and the local creative economy. Further, these binding and enforceable agreements have been essential to warding off harmful policy proposals and ensuring that U.S. companies continue to be able to enjoy a fair and level playing field. MPA takes note of the strong intellectual property disciplines codified in new trade agreements forged by New Zealand with the government of the United Kingdom and separately with the EU, including novel but important provisions on no-fault "injunctive relief" against third parties over whose services infringement occurs. MPA strongly supports the negotiation of trade agreements that improve the protection and enforcement of copyright, augment market access, and foster a healthy online marketplace for copyright materials.





## 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% of all free-to-air television programming broadcast between 6:00 a.m. and midnight must be of Australian origin. In addition, under Section 102 of the Broadcasting Services Amendment Act, pay television channels that include more than 50% drama programs in their schedules are required to spend 10% of their total drama programming expenditures on new Australian/New Zealand programs. Although the U.S.-Australia FTA capped broadcast quotas for analog TV at the existing 55% 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/VOD Local Content Obligations – There have been several reviews in recent 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. In 2019, the Australian Competition and Consumer Commission, through its Digital Platforms Inquiry Final Report, recommended “harmonization” of content regulation across broadcast and VOD, introducing the possibility of local content obligations extending to VOD services. The Albanese Government in its 2023 National Cultural Policy outlined a commitment to introduce an investment obligation for VOD services by July 2024. This raises concerns regarding Australia’s compliance with its obligations under the US-Australia FTA. As of late 2023, data on investment in Australian

content for streaming services fails to support any assertion of a market failure, indicating a high level of production investment and wide availability of, and access to, Australian content for subscribers, without the need for consideration of quotas or obligations to invest in local content.

Network Usage Fees – Australian telco Optus has publicly urged digital platforms to make a fair contribution to telecommunication capacity and costs. This could take the form of a fee, a commercially negotiated arrangement, or a levy to a central infrastructure fund. If implemented by the government, such proposals would restrict trade and freedom of contract.

## INTELLECTUAL PROPERTY PROTECTION

### Enforcement

Australia has developed excellent tools to fight online piracy, including effective laws allowing for no-fault injunctive relief against ISPs and search engine providers. Rightsholders have succeeded in obtaining court orders directing ISPs to disable access to thousands of piracy domains, resulting in significant reductions of visits to pirate sites and increases in visits to legitimate VOD services. Australian courts have now also ordered the disabling of access to infamous pirate brands like *ThePirateBay*, and to content delivery services like pirate cyberlockers. The efficacy of this approach is evident in the migration of heavy piracy users to legal paid VOD services and the voluntary cooperation of online search engine providers to delist piracy sites from their search results.

### Legislation

Copyright – Following the May 2022 change in government, the “Copyright Access Reform”



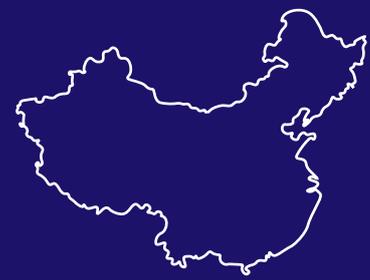
# AUSTRALIA

agenda and other major copyright initiatives (e.g., an orphan works proposal and proposed worrisome broad exceptions) will not proceed. Australia's Attorney-General initiated a series of roundtables to explore some of the issues of that review. The Albanese Government has identified five areas for possible reform: orphan works, remote and online learning, a quotation exception, a possible amendment to the definition of "broadcast" in the Copyright Act and the copyright implications of AI. The Attorney-General will convene a further roundtable on December 4 to announce the next steps across these five priority areas. Separately, the Government has conducted consultation on improving Australia's copyright enforcement. Out of that process it has announced an intention to focus immediate copyright enforcement reform efforts on areas such as reducing barriers to the use of the legal system to enforce copyright and improving understanding and awareness about copyright.

Anti-Camcording Legislation – While local incidents of illicit camcording have trended downward in recent years, Australia should nonetheless 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 – Australia's anti-piracy laws, while generally effective, are not specifically targeted to address the growing problem of illicit IPTV services, ISDs and apps, or PaaS To better protect rightsholders, the government should take steps to strengthen its laws to address PaaS and deter the manufacture, distribution/dissemination, and trafficking of illicit services, devices, and apps.





## MARKET ACCESS ISSUES

Import Quotas/Revenue Share – Notwithstanding China’s commitment under the 2012 U.S.-China Film Memorandum of Understanding (MOU) to permit an additional 14 “enhanced format” foreign revenue-sharing films into its market annually, China still maintains an official quota of 34 foreign revenue-sharing films per year. Furthermore, China committed that in 2017 the country would make a meaningful increase to compensation, as the current 25% U.S. share of revenue is far below comparable markets and the international norm. To date, a new MOU has yet to be concluded.

Government Film Importation and Distribution Monopoly – The China Film Administration (CFA), which formed in 2018 and replaced the State Administration of Press, Publication, Radio, Film and TV (SAPPRFT), still permits only one film importer and two distributors of foreign films, both of which are state-owned companies: China Film Group and HuaXia Film Distribution Company Ltd. While China affirmed in the Film MOU that any properly licensed Chinese enterprise may distribute imported films, CFA has yet to approve any new private distributors. China Film Group also determines the release dates and length of theatrical runs of foreign films, often restricting the ability of U.S. producers to obtain the full commercial value of films.

Blackout Periods During Peak Seasons – In order to prevent competition against domestic films released during peak movie-going periods, the Chinese government has historically implemented a “blackout” during which no new foreign imported films may be released. Such blackouts typically occur either during national, school, and summer holidays, or coincide with political events. Restricting the release of new foreign imported

titles during peak season and preventing titles from releasing in China day-and-date with the rest of the world drives down theatrical revenues and contributes to increased unauthorized consumption with consumers visiting piracy websites and services for foreign blockbuster titles.

Screen Quota – Under State Council regulations, public screening of foreign films must not exceed one-third of total annual screen time.

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

Online Video Restrictions – The Chinese Government has issued several regulations that further restrict the online media space. Websites must obtain permits and limit online distribution of foreign content to 30%. The 30% foreign content cap is further limited by country and genre, so effectively, U.S. content is restricted to around 10 to 13% in real market terms. The content review process allows only two windows each year for online distributors to submit content for registration and censorship review and prohibits content review by provincial authorities. Further, it requires foreign TV series to be submitted as complete seasons, versus the global market practice of per-episode submissions. These rules have substantially reduced the number of U.S. TV programs licensed in China



and have resulted in delays in the availability of TV series, effectively curtailing day-and-date releases; the lack of availability can exacerbate piracy because piracy services are not hampered by delays. China's online video policies increasingly create uncertainties and barriers and have disrupted the growth of and access to the country's online video market.

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

Foreign Investment Restrictions – China maintains a prohibition on foreign investment

in film importation, distribution, and production companies, despite the pledge by the Chinese Government, as part of their Five-Year Plan on Economic Development (aimed at attracting foreign investment), to widen market access and promote fair competition. China also prohibits foreign investment in pay-TV/online audio-visual program services and television, including in television production companies. Foreign investment partnerships are also prohibited in online video platforms. China's revised Negative Investment List, which came into effect in January 2022, failed to relax these investment restrictions. Such foreign investment restrictions limit the ability of U.S. content creators and distributors to compete in China's audiovisual market.

Television Quotas – If the proposed September 2018 administrative provision on the importation and dissemination of foreign audiovisual programs on broadcast television is passed, it will replace the 2004 regulations and raise the limits on foreign TV and film programming from 25 to 30% 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 are generally limited to 50 episodes per year. China restricts foreign animation to no more than 40% 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% 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 provisions and proposals in NRTA's ongoing implementation plans.

National Security – In April 2023, the Standing Committee of the National People's Congress passed the revised Anti-Espionage Law, which was first introduced in November 2014. This revised law came into effect in July 2023. The revisions



significantly broaden the scope of what constitutes “espionage” and give the relevant authorities new powers to investigate and prosecute suspected espionage activities. Many of these provisions were already present in other existing rules, such as the Anti-Espionage Law’s Implementing Rules, released in 2017, which dealt with enforcement procedures, and the Provisions on Anti-Espionage Security Precautions, from 2021, which have now largely been copied in the revised Espionage Law. Still, the consolidation of these amendments into a single, powerful Anti-Espionage Law with broad applicability is significant. The most notable change is the broadened definition of “espionage,” which can now involve the collection, storage, or transfer of any information deemed to be relevant to national security interests, including “documents, data materials, or items.” The definition was previously more limited to classified information and state secrets. The broadened definition potentially raises uncertainties even under friendly collaborations.

Local Printing/Duplication Requirement – China continues to require that digital film “prints” be replicated in local laboratories. This scenario impedes U.S. rightsholders’ ability to control the print quality and to trace sources of camcording piracy.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Illegal downloading and streaming of MPA member company films remains a serious concern in China. The National Copyright Administration of China (NCAC) has initiated special enforcement campaigns every year since 2005. These campaigns have resulted in some positive results in the video-hosting landscape and helped pave the way for a legitimate digital economy in China. However, rightsholders would welcome increased transparency and clarity regarding the progress of enforcement efforts against targets referred to in the NCAC campaign.

Furthermore, the NCAC’s administrative sanctions are not enough to deter persistent piracy through websites, apps, and related services. Piracy over cloud storage services (or cyberlockers), such as *Baidu Pan*, remains rife with links to unauthorized content disseminated through popular Chinese social media platforms, piracy linking sites, and e-commerce platforms. China’s authorities should continue to focus on infringing websites and ISDs and apps – including the facilitation of infringing content being distributed on social media and cloud storage platforms – which threaten the continued growth of legitimate business. Enforcement against unauthorized content made available through social media and e-commerce platforms is also challenging, with many such platforms imposing burdensome and onerous procedural and documentary requirements. Such requirements, coupled with the voluminous number of listings and slow processing of complaints, create practical difficulties for rightsholders in removing such unauthorized listings.

Camcord Piracy – Despite a reduction in reported levels of camcord piracy post-COVID-19, camcording remains a challenge in China. A related and growing concern is the live streaming of theatrical showings of films online. China should enact a specific criminal law against using or attempting to use an audiovisual recording device to make or transmit a copy, in whole or in part, of audio and/or video of an audiovisual work from a performance in an exhibition facility. The Copyright Law should also be strengthened to prohibit the unauthorized retransmission of content online.

ISDs and Apps – China is a leading source for the manufacture and trafficking/export of devices that permit the installation of third-party, pre-loaded, or post-purchase infringing applications. This illegal business practice allows consumers to easily access pirated content. Many of the illegal IPTV services advertised to customers worldwide

are bundled or pre-loaded on devices originating from China. Because of China's enforcement deficiencies, including unsettled application of the "server jurisdiction principle" that bars judicial action concerning content hosted outside of China, rightsholders are sometimes deterred from bringing action against pirate services. In addition, enforcement against pirate apps is a challenge, due to their availability on various third-party app stores. These stores are not as amenable to intermediary outreach efforts by rightsholders, when compared with more reputable app repositories.

Mini-VOD Cinemas and Chains – Despite China imposing regulations on mini-VOD cinemas and chains in March 2018, an estimated 5,000 mini-VOD cinemas and chains, which own about 70,000 screens, continue to operate in different cities across the country without proper licenses and are routinely screening U.S. content without authorization. During a 2019 Chinese government crackdown, four illegal camcording syndicates were uncovered, and subsequent criminal investigations revealed that most illegal camcorded copies were destined for mini-VOD theaters. In August 2019, the China Film Administration clarified that mini-VOD cinemas and chains are classified as entertainment premises and licensing is based on screening rights (not online VOD rights). Rather than trying to legitimize the operations of these facilities, China should penalize or shut down these businesses if they are found to have violated the Copyright Law.

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

## Enforcement

MPA members and other stakeholders have brought actions against the pirate operators of *RenRen ShiPin*. These cases, in which the plaintiffs have prevailed to date, have resulted in the largest property preservation orders in a copyright case to date. In November 2021, the Shanghai Intermediate People's Court sentenced the founder of the China-based, multi-million user site *YYeTs.com* (also operating as *Rrys*) to 42 months' imprisonment and a major fine (RMB1.5 million, approximately USD214,286) following a guilty plea for copyright infringement offenses, in a case jointly referred by MPA and a local Chinese rightsholder. In addition to another case brought criminally against the *Diyidan* piracy service, government action is pending against *dygod* and *dytt* piracy services. A further action in 2023 by criminal authorities led to the shutdown of *B9Good* piracy services, which was one of the largest-scale piracy services in Japan.

On the administrative side, China has been operating its annual "Sword Net" anti-piracy campaign for over 17 years. While these administrative enforcement campaigns have been important, on their own, they are not enough to deter widescale piracy. The 2023 campaign, which was set to run from late August to November, focuses on live sports events, VOD mini-theaters, cultural and creative products (associated with museums, art galleries and libraries), video-streaming websites and apps, online news reports, audio books, e-commerce platforms, browsers, and search engines. While China has stated its intention to increase administrative enforcement efforts, penalties remain low, and unless the source of the piracy can be definitively established in China, deterrence has been difficult to achieve. In the meantime, rightsholders have continued to take steps to protect their rights in China where possible, including through voluntary outreach with e-commerce platforms.



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

## Legislation

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

Copyright Law amendments entered into force in June 2021, introducing several general enforcement improvements, including by increasing maximum statutory damages and creating stronger presumptions against infringement defendants. Meanwhile, judicial documents (including new legal interpretations and procedural guidelines) from the Supreme People’s Court coming into force from 2020-22 also improve the position of rightsholders generally by clarifying, strengthening and/or streamlining the application of copyright and other IP laws with respect to civil and criminal enforcement actions brought in Chinese courts.

China should also eliminate the distinction between crimes of entities and individuals. A draft judicial interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate released in early 2023 for public comments eliminated the distinction between entities and individuals, and we look forward to the final version entering into force. China should also criminalize internet offenses that may lack a demonstrable profit motive but nonetheless damage rightsholders on a commercial scale; more fairly balance criminal liability with the greater harms caused by online piracy by lowering the 500-title threshold for internet piracy such that a single episode in a television / VOD series is counted as one title; and extend the term of protection in line with the global norm. The government should also make the act of illegal camcording in cinemas subject to civil, administrative, and criminal remedies.

E-Commerce Law – In August 2018, the Standing Committee of the National People’s Congress passed the final version of the China E-Commerce Law that took effect in January 2019, providing a broad legal framework to regulate China’s fast-growing e-commerce sector. The new Law applies to online transactions of physical goods and/or provision of services. The required standard of knowledge for a platform operator to act is that the platform “knows or should know” that the good is infringing. It is critical that the new E-Commerce Law supports rightsholder action to prevent the illegal trafficking of piracy and circumvention devices on e-commerce platforms.

In November 2020, the State Administration of Market Regulation (SAMR) issued a Guiding Opinion on strengthening regulatory standards and compliance of online live marketing practices, including compliance with the E-commerce Law, to protect consumer rights against infringing activities. In August 2021, the SAMR proposed a draft amendment to the E-Commerce Law for

# CHINA

public comments, which allowed the revocation of platforms' licenses if they fail to take necessary measures against vendors that are found to have infringed intellectual property rights. China should include unauthorized online broadcasting of movies, TV dramas, TV programming, sports events, other audio-visual works, and sale of audio-visual products and/or provision of services that enable unauthorized access to copyrighted audio-visual works as part of the scope of illegal activities of online marketing practices.





## INTELLECTUAL PROPERTY PROTECTION

### Enforcement

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

### Legislation

In December 2022, the Hong Kong Special Administrative Region Government amended and updated its Copyright Ordinance, including improvements to combat online infringement. MPA urges the HKSAR Government to continue its efforts to strengthen copyright protections.

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



## MARKET ACCESS ISSUES

Broadcast Regulations – The Indian government regulates the uplink and downlink of satellite signals beaming into India. Foreign broadcasters are required to set up offices in India licensed by the government and must pay prescribed fees per channel beaming into India.

More generally, India’s Telecom Regulatory Authority (TRAI) imposes an onerous set of economic regulations on the broadcast sector, thus stifling innovation and hindering competition. For example, TRAI has issued tariff orders that prescribe price ceilings for channels which broadcaster’s bundle into bouquets and then charge to consumers (these orders were upheld by India’s Supreme Court in 2018), creating regulatory uncertainty around pricing of pay-TV channels. Despite some helpful moves in late 2022, TRAI has not done away with prescriptive pricing and packaging restrictions and has not moved towards forbearance despite several requests from content providers/broadcasters. Despite the lifting of many foreign direct investment restrictions in 2015, the government’s attempt at price controls and prescriptive economic regulations reduces the sector’s competitiveness to attract foreign direct investment (FDI) in the sector.

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 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 FDI cap for Indian news channels from 26% to 49%, foreign investments above 49% for news channels require government approval. Further, FDI in digital news sites is restricted to the earlier limit of 26%. Recently, the Indian government helpfully clarified that the 26% cap does not apply to OTT platforms, so those platforms can carry news from any news channel that has uplinking/downlinking permission and would not require FDI approval for hosting news feeds.

Network Usage Fees – ISPs in India have issued public calls to mandate content providers pay a network usage fee to ISPs, such as via a licensing framework under an anticipated Telecommunication Bill. If implemented, such proposals would restrict trade and freedom of contract. Helpfully, as of September 2023, Indian government officials have signaled that they intend to exclude content providers (e.g., OTT/VOD service providers) from the scope of the new Telecommunication Bill, leaving the commercial relationship between content providers and ISPs to market dynamics. However, ISPs and trusted service providers continue to call for network usage fees and TRAI’s intervention in the OTT market.

Taxes – India established a national Goods and Services Tax (GST) in 2017. Currently, cinema tickets are subject to between a 12 and 18% 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 (particularly cinema tickets) 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 patchwork of high, differing tax regimes). India should subsume all local taxes

into the national GST system.

Customs Duties on Electronic Transmissions – The Government of India has expressed reservations about renewing the WTO e-commerce moratorium. If so, customs duties would likely raise prices for consumers, place India out of step with regional and international best practices and stifle the growth of India’s expansive market for creative digital content and related services.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy is widely regarded as the greatest threat to the growth of the film and television industry in India. The scale of internet piracy in India is very large, with some of the world’s most egregious cyberlockers, streaming and torrent sites being controlled and operated from within India.

Camcording Piracy – Unauthorized camcording of films is an ongoing challenge for rightsholders in India, and criminal referrals against suspects have not resulted in meaningful steps to deter such activities. The passage of the Cinematograph (Amendment) Act in 2023 which introduces enhanced penalties against camcording, is a step in the right direction. The new law should be properly implemented throughout India.

### 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. Intellectual property crimes remain a low priority for national and state enforcement agencies. The primary challenge from a rights owner’s perspective is the lack of trained enforcement resources and government will.

The Maharashtra IP Crime Unit (MIPCU),

formerly the Maharashtra Cyber Crime Unit, has been active since 2017. However, other than one enforcement action in July 2021 against pirate service Thop TV, there do not appear to have been other similar actions undertaken by the MIPCU (if any). It is hoped that the MIPCU sees an influx of trained personnel and that anti-piracy actions are given greater priority within Maharashtra Cyber, the larger entity under which the MIPCU operates. Having similarly focused cyber-crime units in other states would be a major step forward toward protecting the country’s creative industries and reducing rampant levels of online piracy.

The seminal April 2019 Delhi High Court decision establishing permanent site blocking as a reasonable and proportionate remedy to curtail online infringement in India has been followed up with many recent court decisions resulting in the blocking of thousands of domains and with improved speed of implementation and breadth of coverage. The 2019 orders were later that year made “doubly dynamic,” meaning variations of the same piracy service can be blocked quickly and efficiently. In 2022, rightsholders achieved a new milestone in India, obtaining orders allowing for a domain to be blocked because of its association with a pirate brand. Therefore, rights holders are now able to obtain orders directing the disabling of access to pirate brands like ThePirateBay, as well as the disabling of access to content delivery services like pirate cyberlockers. Rights holders have also obtained the cooperation of online search engine providers to delist piracy sites from their search results, which creates a bonus impact on further reducing piracy. Finally, the Delhi High Court is beginning to grant orders to address two of the latest and virulent forms of piracy of audiovisual content: pirate IPTV services and live sports piracy streaming sites.

Also in 2020, in a case involving copyright in educational videos, the court directed Telegram to disclose details of users uploading pirated content



– a precedent that may aid the film and television industries. And, in another case, the court directed intermediaries who had transacted with a movie piracy app to submit details of the piracy app operators they had transacted with. Earlier this year, the Delhi High Court issued a new positive precedent making it easier to enforce against cyberlockers, pirate brands, and to obtain domain suspensions.

## Legislation

Anti-Camcording Legislation – The Parliament passed the Cinematograph (Amendment) Bill, 2023 in July and the Cinematograph Act, 1952, was subsequently amended. The Bill introduces penalties against unauthorized recording in an exhibition hall of a film or part of a film, including transmission of an infringing copy of a film/part of a film or abetting of such activity. This will now be punishable by imprisonment of between three months to three years; and a fine of between INR 3 lakhs (US\$3,640) to up to 5% of the audited gross production cost. MPA applauds passage of the Bill and looks forward to its implementation.

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

Copyright Legislation – The Ministry of Commerce and Industry published the 2019 Copyright (Amendment) Rules, which would have extended statutory licenses to online transmissions. This was met with stakeholder opposition as the draft Rules were beyond the powers granted by the Copyright Act, 1957, although this proposal was later dropped in March 2021. In August 2021, the Department for the Promotion of Industry and International Trade (DPIIT) held a stakeholder consultation on a proposed amendment to Section 31D of the Copyright Act to extend the

existing statutory license for radio and television broadcasting of literary and musical works to “internet or digital broadcasters.” This was done in narrow response to the Parliamentary Standing Committee on Commerce’s 161st Report on “Review of the Intellectual Property Rights Regime in India” (paragraph 14.8(ii)), which recommended an amendment of the Copyright Act to ensure a “level playing field... for traditional and internet broadcasters alike.” U.S. motion picture studios are also affected by these licensing rules, as local films almost always feature musical content that have a substantial stand-alone monetization value. After several industry stakeholder discussions, it appears that the proposed amendment has been kept in abeyance. India should abandon the proposed amendments because if adopted, they would violate India’s obligations under international copyright treaties and TRIPS.

Delhi High Court and Madras High Court Intellectual Property Rights Division Rules – The Delhi High Court Intellectual Property Rights Division Rules entered into force in February 2022, followed by similar rules being notified in the Madras High Court in April 2023. The rules establish an IP Division in the High Courts of Delhi and Chennai that seeks to ensure that the judges hearing IP cases are well versed in intellectual property laws and practice. These rules have had a positive impact on the adjudication of IP cases to date and could provide a model for other states.

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

# INDIA

Section 63 that could still lead to conflict with this Supreme Court judgment.





## MARKET ACCESS ISSUES

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

Film Law – The Indonesian government has expressed its intention to amend the 2009 Film Law, which contains a 60% local screen quota and prohibits imported films from being dubbed into local language. In September 2019, without official notice or industry consultation, “Ministerial Regulation (MR34/2019) Concerning the Procedure for the Distribution, Exhibition, Export, and Import of Film” was issued. While these regulations have yet to be enforced, they maintain the 60% local screen quota and dubbing restrictions and add 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 May 2016 decision to remove the film sector from its Negative Investment List. Indonesia should amend the Film Law to remove such barriers and incorporate international best practices.

Customs Duties on Electronic Transmissions – The Ministry of Finance issued a new regulation

(Regulation No. 190/PMK.04/2022) requiring importers to file a Customs declaration to be made for any import of intangible goods through electronic transmission. This burdensome requirement severely disadvantages creative content seeking to enter the Indonesian market. In addition, by creating new tariff lines for digital products that are transmitted electronically, which includes the threat of imposing customs duties on those products, Indonesia has set a troubling precedent that raises serious concerns with respect to the WTO e-commerce moratorium on customs duties for electronic transmissions. Heightening this concern, the Government of Indonesia has expressed some reservations about permanently extending the e-commerce moratorium. Such duties would likely raise prices for consumers, place Indonesia out of step with regional and international best practices and stifle the growth of Indonesia’s market for creative digital content and related services.

Censorship Restrictions – In October 2015, the KPI notified platform operators regarding pre-censorship and classification requirements for programs on all TV channels. KPI suggested that non-compliance may violate the Broadcasting Ethics and Broadcast Program Standard, thus subjecting operators to fines and imprisonment. If implemented, these requirements would negatively impact the pay-TV industry by raising costs, creating new barriers to entry, and reducing consumer choice. There is ongoing speculation that KPI will subject OTT/VOD providers to its strict censorship and classification requirements.

OTT/VOD Regulations – The Ministry of Communication and Information Technology (KOMINFO) issued Ministerial Regulation 5 (MR5), which came into effect in late 2020. MR5 requires domestic and foreign OTT/VOD service providers to register, comply with content

takedown requests from authorities, and grants law enforcement authority's access to electronic systems and data. In July 2022, KOMINFO temporarily blocked some platforms for failing to comply with MR5. The blocks were subsequently lifted when the firms registered with KOMINFO under MR5. Such requirements have the potential to stifle business development and add a significant barrier to market entry.

A 2020 constitutional court case brought by two Indonesian broadcasters arguing that VOD services should be regulated under the Broadcasting Act was unsuccessful. However, we understand that a long-anticipated revision of the Broadcasting Act could still be undertaken in the future. MPA remains concerned that a revision of the Broadcasting Act could seek to extend existing problematic content quotas, content censorship (conducted by KPI), and ownership restrictions to VOD services.

## INTELLECTUAL PROPERTY PROTECTION

### Enforcement

Internet Piracy—Digital piracy in Indonesia remains a serious concern, with the piracy landscape dominated by three crime groups: Indoxxi, LK21 and Bioskoperen. There has been a dearth of digital piracy enforcement from the authorities over the past few years and the government needs to improve the capacity and efficiency of law enforcement agencies to investigate and prosecute these major piracy syndicates. Piracy services targeting the local market, such as LokLok, are also a concern.

Under the revised Copyright Act, and Regulations Nos. 14 and 26 of 2015, rightsholders have successfully petitioned the Indonesian government to order ISPs to disable access to thousands of infringing domains, which has had a positive impact on the marketplace for legitimate services. The Regulations could be further improved by ensuring faster implementation of dynamic

site blocking. Syndicated piracy networks avoid government blocking orders by routinely changing domains.

### Legislation

MPA continues to urge Indonesia's Directorate General of Intellectual Property to undertake revisions of the Copyright Law and revisit several existing, highly problematic provisions that create legal and commercial uncertainty for the copyright industries. The requested actions include removing the 25-year reversion of rights provision; clarifying that copyright ownership for films resides with the producer unless there is an agreement to the contrary, in line with international norms and best practices; deleting an overbroad exception to the making available right; clarifying rights of making available and communication to the public; setting forth clear principles of secondary copyright liability; improving protections for TPMs and rights management information; clarifying that any collective management organization is governed by rightsholders, without interference by Indonesia's government; and extending the term of copyright protection for works to life of the author plus 70 years. The government should also issue clear guidelines and regulations on illegal camcording and live-streaming piracy, including expressly outlawing these activities and prioritizing a decrease in these illegal acts.





## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – In 2022, there were 1,290 piracy websites in Japan that featured anime, television programs, and films (not including manga), averaging 194 million monthly piracy visits between July 2022 and July 2023. In July 2022, the Ministry of Internal Affairs and Communications (MIC) released a Study Group Report which concluded that piracy in Japan continues to be rampant and the Content Overseas Distribution Association (CODA) in April 2023 estimated that the economic loss from online piracy in 2022 was between \$13.2 to \$14.9 billion USD, about five times the rate in 2019. The Intellectual Property Strategy Headquarters is examining further countermeasures to combat piracy.

### Legislation

Copyright Legislation – In May 2021, the Japanese Diet amended Article 63(5) of the Copyright Act to include a presumptive license for simultaneous/delayed transmission of broadcasts over the internet, as well as for services such as time-shifted or “catch-up” viewing, which cannot be considered as a retransmission and implicates the far more valuable exclusive right of making available. The amendment and implementing guidelines entered into force January 2022. The presumption of online simultaneous/delayed transmission of broadcasts over the internet and presumptive license of catch-up rights for such broadcasts is an inappropriate taking of rights (if the rightsholder does not specifically reserve such rights) and adversely impacts voluntary licensing and appropriate compensation, for each form of transmission, whether simultaneous, repeat broadcast, or making available services such as “catch-up.”

In May 2023, the Government unfortunately

also passed amendments to the Copyright Act to establish a system like extended collective licensing. The Agency for Cultural Affairs is now working on implementing regulations, and the new system must be implemented by 2026. MPA is opposed to the introduction of extended collective licensing as it interferes with freedom of contract and well-established licensing models for audiovisual works. The new system also does not leave any opt-out provision for rightsholders and several unclear definitions/conditions. The Government should address these concerns through further administrative regulations.

Text and Data Mining Exception – In 2019, the Japanese Diet passed amendments to the Copyright Law allowing use of online data (including from copyright works) as “inputs” in training foundational datasets used in emerging generative AI applications, including both commercial and non-commercial use and without a clear opt-out provision. The exception conflicts directly with the normal use of copyrighted works and/or unreasonably prejudices the legitimate interests of rights holders, with additional implications if such training data is used in further copyright-infringing acts. Even more problematic, since April 2023, the Japanese Government has publicly and privately stated that copyrighted works accessed via an infringing website may be used as “inputs” under the exception (i.e., no requirement for lawful access), raising the troubling possibility of intentionally fueling piracy demand in Japan. MPA strongly encourages the Japanese government to clarify its position around lawful access of copyrighted works with respect to its Text and Data Mining exception provisions.





## MARKET ACCESS ISSUES

Broadcast Quota – Malaysia requires that broadcast stations, through broadcast licensing agreements, devote 80% 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 (25% of the gross ticket price) is among the highest in the region and limits the growth of the theatrical industry by artificially increasing box office prices. Malaysia should remove the tax or reduce the rate.

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

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

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy and the use of ISDs and apps remain problematic in Malaysia. The ecosystem around ISDs and related apps, including illegal IPTV services such as “SVI Cloud,” continues to proliferate in Malaysia. Streaming devices that are preloaded with infringing apps and

enable subscription access to a wide array of live channels and VOD content are readily available via online and physical marketplaces. The government has made significant progress through with site blocking orders and we look forward to continued progress in 2024.

Camcording – There has been a reduction in camcord incidents in Malaysia, although a spate of camcords associated with the 1X Bet gambling network was identified in early 2022 and resulted in the apprehension of a foreign national.

## Enforcement

Beginning in 2016, rightsholders have successfully been able to obtain administrative orders directing ISPs to block access to thousands of pirate domains. There have additionally been some improvements in enforcement against ISDs and apps. In March 2022, new anti-ISD amendments to the Copyright Act came into force which have already been implemented by the government, although resultant enforcement action has been disappointing.



## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy in New Zealand remains a problem, with a recent study by NZ on Air showing an increase in the streaming and torrenting of TV series through overseas websites among the crucial 15-34-year-old cohort rising from 30% in 2021 to 47% in 2023. The absence of a website blocking remedy in New Zealand a possible contributor to this trend, although we note the promise of the new trade agreements forged with the United Kingdom (UK) and the European Union (EU), provide for a blocking mechanism like that in the UK. Also, ISDs such as 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. Several well-established distributors of these products cater specifically to the New Zealand market. MPA urges the government to enact legislation to deal with this increasingly threatening form of piracy.

### Legislation

Copyright Act Amendments – In recent years, the Ministry of Business, Innovation and Employment (MBIE) released several sets of objectives for copyright reform that would drastically undermine copyright and contractual freedoms and include overly broad exceptions to copyright. The momentum for this reform thankfully appears to have stalled and the focus has shifted to implementation of New Zealand's copyright obligations under its United Kingdom and European Union trade agreements. Both agreements provide that online service providers can be required to disable access to infringing content (see for instance Article 17.82 in UK NZ FTA). MPA strongly encourages the New Zealand government to implement these FTA obligations.





## 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% 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. Such restrictions should be removed.

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

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

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

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The Philippine government has recognized that online piracy is a major threat to both the local and international audiovisual sectors and has made noticeable efforts to implement a more robust intellectual property enforcement regime. The IP Office of the Philippines (IPOP HL) has spearheaded the passage of a legislative site-blocking regime (see below) and has rolled out the first voluntary site-blocking framework in the Asia Pacific region. The voluntary site blocking MOU was signed in September 2023 between IPOP HL and the country’s ISPs. It sets the rules and regulations for a voluntary administrative site blocking process with additional oversight from the National Telecommunications Commission.

### Legislation

IP Code Amendments – Draft IP Code amendment bills have been introduced in Congress, including a stand-alone site blocking bill (HB 7600) that allows for an administrative no-fault injunctive remedy to require ISPs to disable access to infringing websites. The bill passed its third reading earlier this year and has been elevated to the Senate. MPA encourages the government to enact this remedy so that rightsholders will be better positioned to enforce against online piracy and exercise their rights and to support the growth of the legitimate audiovisual industry.



# PHILIPPINES

Other draft IP legislation contains several problematic provisions, including an extended collective licensing mechanism that does not comply with the Berne three-step test, and a problematic provision on additional remuneration for performers for subsequent communications or broadcasts, which interferes with established contractual and licensing arrangements.





## MARKET ACCESS ISSUES

Screen Quotas – In 2006, prior to the KORUS FTA negotiations, the Korean government agreed to reduce its screen quota of requiring exhibition of Korean films to 73 days per year. Over 16 years later, amidst rapid development of its cultural industries and the success of many Korean film and television productions internationally, now is the time for Korea to show leadership in the region, trust the choices of its consumers, and further reduce or eliminate its screen quota particularly with respect to premium-format screens. Unfortunately, several bills have been introduced in the recent past that would further restrict the legitimate market.

Advertising Restrictions – Korea limits the maximum total duration of advertisements aired, regardless of the type of advertisement, to an average 17% of program duration and no more than 20% of any specific program’s duration. In-program advertising 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.

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

fees in network service contracts. If implemented, these proposed amendments would restrict trade and freedom of contract and raise US-Korea FTA compliance concerns. Korea should avoid unnecessary intervention with respect to the commercial relationship between content providers and ISPs, apply light-touch regulation to OTT/VOD services, and ensure consistency with its KORUS obligations.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Korea has a major stake in ensuring adequate and effective protection of copyright online. Over the past few years, the market has seen an increase in popular piracy streaming services such as Noonoo.tv. While Noonoo.tv itself has been shut down as the result of site blocking combined with a criminal investigation, the operators remain at large, and new piracy streaming services continue to surface. In addition to continuing its administrative site-blocking, search engines can also play an important part in delisting/removing search results for blocked piracy sites.

### Legislation

Korea should continue to ensure that its copyright law provides strong protection for content creators, while upholding the principle of freedom of contract. Since 2020, several legislators have proposed problematic amendments to Korea’s Copyright Law that would introduce portrait rights, extended collective licensing, and additional remuneration schemes that disrupt contractual freedoms. These proposals would undermine the freedom and sanctity of contracts and have a dramatic chilling effect on investment in the audiovisual industry, ultimately harming the diversity of content produced. A number of these problematic proposals remain on

# SOUTH KOREA

hold in the current term of the National Assembly. MPA urges the government not to weaken Korea's copyright framework and ensure consistency with Korea's international treaty obligations.





## MARKET ACCESS ISSUES

Foreign Investment Restrictions – The Cable Radio and Television Law limits foreign direct investment in a domestic cable television service to 20% of the operator’s total issued shares. Foreign investment in satellite television broadcasting services is also restricted to no more than 50%. 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, which has never been adjusted to keep up with inflation. This cap has hindered the development of the cable TV industry.

Local Content Quotas – Taiwan requires that terrestrial TV stations broadcast at least 50% locally produced drama programs between 8:00 pm and 10:00 pm, and that local satellite TV channels broadcast at least 25% locally produced children’s programs between 5:00 pm to 7:00 pm, as well as at least 25% locally produced drama, documentary, and variety programs between 8:00 pm and 10:00 pm. Further, a cable TV service must provide at least 20% local programming in its channel line-up. These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, and restrict U.S. exports.

OTT/VOD Regulations – The National Communications Commission (NCC) continues to actively consider a draft Internet Audiovisual Services Act (IAVSA). The draft IAVSA would obligate foreign OTT/VOD service providers to register with the NCC, appoint a local agent, comply with a content regulation system that is potentially inconsistent with international standards, and potentially disclose sensitive

commercial information. The draft also proposes local content prominence obligations and associated penalties for noncompliance. Such requirements, if implemented, would stifle business development, and add a burdensome barrier to market entry.

Draft Digital Information Services Act (DISA) – A DISA put forward by the NCC was met with widespread disapproval from stakeholders and was shelved in September 2022. The issues of greatest concern were the breadth of definitions, remedies proposed with respect to certain intermediaries (particularly with respect to online content regulation), and possible disclosure of sensitive commercial information. As of September 2023, the draft remains shelved, although we understand the DISA remains under active consideration and may be revived following Taiwan’s presidential elections in January 2024.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy remains a serious problem in Taiwan. The government has been more proactive in combating piracy websites and services when the operations have a nexus to Taiwan and have recently made positive pronouncements regarding the Taiwanese government’s determination to target such infringing sites and services, and some criminal raids and prosecutions have ensued. However, the remaining enforcement gap is the absence of a clear site blocking remedy; although the government has indicated “Response Policy Zone” orders can be sought as a substitution in the meantime.

### Enforcement

While the Taiwanese courts have delivered positive results in recent years, court cases can drag on, and sometimes the remedies and/or penalties meted out



are not sufficiently deterrent. While the government indicates site blocking may be available under the “Response Policy Zone” mechanism, this is an ancillary order to a criminal investigation and a standalone remedy should be adopted to provide greater clarity, certainty, and efficiency of approach.

## **Legislation**

Copyright Amendments – Draft amendments proposed by the Taiwan Intellectual Property Office (TIPO), which are now before the Legislative Yuan, propose many unfortunate changes that would weaken copyright protection. As of September 2023, most of the draft amendments remain under active consideration by the Legislative Yuan.

Taiwan should extend the term of protection to the international standard of life of the author plus 70 years (or 70 years from publication), provide clear guidelines that unauthorized camcording of motion pictures in theaters is illegal, and implement a no-fault remedy to disable access to infringing sites.



## MARKET ACCESS ISSUES

Foreign Ownership Restrictions – Foreign ownership of terrestrial broadcast networks is prohibited in Thailand. Further, rules established in 2015 require National Broadcasting and Telecommunications Commission (NBTC) approval when a television license holder seeks to either invest more than 25% directly or more than 50% indirectly in another licensed company. This rule severely limits investment and creates significant 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. The Ministry of Culture has considered amending the MPVA since 2017. MPA urges the Ministry to delete Section 9(5) and the related Section 68.

Censorship Restrictions – The MPVA also imposes onerous classification and censorship requirements on films. Thailand should remove these onerous requirements, including the 15-day period for obtaining ratings and censorship approval, the associated high costs for film ratings, and the severe penalties for failure to comply.

Television Must-Carry Requirements – Although recent media reports suggest the 2012 “must carry” rules, requiring that the programs aired on free-TV must be broadcast on any platforms (including satellite and IPTV) without conditions, will finally be reversed by the NBTC, until this is done the regulations raise important IPR issues, precluding the ability of rightsholders to enter exclusive distribution arrangements in Thailand.

OTT/VOD Regulation – Various government agencies, including the NBTC, have publicly noted their interest in regulating OTT services as recently as August 2023, including the possibility of 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 moderation) as well as to “promote” local content via local content investment obligations. These regulations, if enacted, would limit consumer choice, stifle business development, and add further burdensome barriers to market entry.

Network Usage Fees – The NBTC has publicly commented on the need for content providers to pay network usage fees. Such fees, if implemented, would undermine freedom of contract, and prejudice the interests of content providers operating in the market.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Internet piracy remains a serious problem in Thailand, with several websites continuing to operate with impunity. U.S. producers and distributors, the local Thai audiovisual industry, and increasingly other international rightsholders face continuous challenges from infringing websites and services in Thailand that amass staggering levels of traffic.

Camcord Piracy – Despite concerning levels of camcording in 2019, post COVID-19, there have been few camcording incidents linked to Thai theatres. However, audio recordings remain common and need to be continually addressed.



## Enforcement

In late 2017, the Royal Thai Government amended the Computer Crime Act (CCA) including to establish a mechanism to disable access to copyright infringing sites. While that specific copyright site-blocking provision was a promising reform, it has met with mixed results and mostly only URL-specific blocking. The piracy situation is serious enough to require a clear remedy to disable access to notorious piracy sites and services and ensure that these orders are timely and effectively implemented by the appropriate intermediaries.

Coordinated enforcement action against piracy sites has improved but the absence of subsequent prosecutions with deterrent effect has overshadowed these efforts. As a result, piracy sites and services continue to operate largely with impunity, although rights holders are taking self-help measures working with authorities. It is imperative that Thai authorities prioritize and expedite the prosecution process ensuring that pirate website operators face timely and appropriate legal ramifications. A commitment to robust enforcement, timely prosecutions and appropriate deterrent penalties are essential to curtail current levels of piracy in the country.

## Legislation

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

Copyright Act amendments entered into force in August 2022. The amendments include improvements to Thailand's intermediary liability framework, including the reinstatement

of a procedure for notice and take down, and the protection of TPMs. Unfortunately, they do not include a standalone provision allowing the court to order an ISP to suspend access to a specific online location with the primary purpose/effect of infringing or facilitating the infringement of copyright. While the CCA includes a site blocking provision, it would be useful for the Copyright Act to include a remedy for no-fault injunctive relief for copyright infringement which allows ISPs to disable access to third party infringing sites, consistent with global best practice.

The amendments to the Copyright Act also do not change the term of copyright protection, which remains at 50 years. Thailand should extend its term of copyright protection to align it with the international trend of life plus 70 years.

Anti-Camcording Legislation – Thailand enacted anti-camcording legislation in 2014. However, the law falls short because it requires a link between the act of camcording and copyright infringement, instead of simply criminalizing the camcording act itself. Criminalizing the act of camcording, including audio-only captures, would empower law enforcement to intercept illegal recordings before they enter the online pirate ecosystem. Preferably, these provisions will be revised to ensure that the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both) is prohibited, and that exhibition facilities are given standing to bring complaints. Those engaging in the act proscribed should be subject to interdiction by the police, immediate seizure and forfeiture of the equipment used and any unlawful copies made, as well as civil and criminal penalties.



## MARKET ACCESS ISSUES

Screen Quotas – Under Cinema Law/Decree 54 (2008), Vietnam requires that at least 20% of total screen time be devoted to Vietnamese feature films. In June 2022, Vietnam passed Cinema Law amendments that entered into force in January 2023, replacing Decree 54. Instead of the 20% screen quota, which was never implemented, the amended Law/Decree 54 introduces a gradual phasing-in of the screen time requirement, with 15% of annual screen time to be allocated for Vietnamese feature films from January 2023 to December 2025; and 20% from January 2026 onwards. While the policy of a gradual phasing-in offers some flexibility, Vietnam should nonetheless remove all screen quotas for the long-term development of the industry.

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

Foreign Investment Restrictions – The June 2022 Cinema Law reaffirmed that foreign 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% ownership ceiling. Such restrictions are an unnecessary market access barrier for US film producers and distributors and should be eliminated.

Pay-TV Regulation – Vietnam requires that foreign channels on pay-TV services be capped at 30% of

the total number of channels the service carries. Vietnam also requires operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Furthermore, most foreign programming is required to be edited and translated by an approved licensed press agent, and all commercial advertisements airing on such channels in Vietnam must be produced or otherwise “conducted” in Vietnam. All channels are subject to Vietnam’s censorship requirements and international channels are subject to “editing fees.” These measures are unduly restrictive and continue to severely impede the growth and development of Vietnam’s pay-TV industry.

OTT/VOD Regulations – In October 2022, amendments to Decree 06 were promulgated as Decree 71, expanding the scope of existing pay-TV regulations to include OTT services. Most concerning is a licensing scheme that could require a local presence or joint venture in addition to onerous censorship provisions for any VOD service that offers content not considered to be “films” (which would be regulated under the Cinema Law). This This licensing scheme is short of industry expectations and could indirectly contribute to online infringement.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy is rampant in Vietnam, and increasingly, the country is host to some of the most egregious and popular piracy sites and services in the world that target a global and English-speaking audience. These piracy sites cause significant damage to both the domestic and international market and their continued operation with impunity has made Vietnam a haven for piracy. Of the top 13 linking and streaming piracy websites listed by MPA in its Notorious Markets filing to



USTR, three are based in Vietnam.

## **Enforcement**

Ineffective copyright enforcement in Vietnam is a serious concern and serves as a significant de facto barrier to trade and foreign investment. Regardless of extensive evidence of serious infringement provided by rightsholders, there has traditionally been a lack of coordination and transparency among related ministries and agencies and a seeming lack of government commitment to ensure effective enforcement of copyright protection. Despite amendments to the Criminal Code in 2017 that criminalized copyright offenses and numerous pirate operators located in-country, there has yet to be a single criminal conviction for copyright offenses. Vietnamese authorities' action in August 2021 against the infamous Phimmoi piracy website has still not led to any charges being laid nor any communication with the complainants as to the status of this case. There are currently several criminal cases pending before the Ministry of Public Security against Vietnamese operators of some of the world's biggest piracy sites and services. Vietnamese authorities should set a precedent in these specific cases and establish clarity of evidential process, criminal jurisprudence, and appropriate deterrent penalties.

It appears that the Authority of Broadcasting and Electronic Information/Ministry of Information and Communications has begun to enforce a decree granting it the authority to order ISPs to disable access to infringing websites in Vietnam. While a useful step forward, unfortunately, disablement in Vietnam does not stop these Vietnam-based services from harming the overseas markets they target, including the U.S. market. There also remain procedural difficulties with the system that make it challenging for U.S. rightsholders to employ.

Vietnam can best address this barrier to trade and

investment by providing a commitment to robust criminal enforcement, timely prosecutions, and appropriate deterrent penalties.

## **Legislation**

Vietnam passed amendments to the IP Law in June 2022, and which entered into force in January 2023. The latest amendments contain improvements for rightsholders, including clarifying that the illegal uploading and streaming of a cinematographic work is a violation of the communication right; and the copying of part of a work is a violation of the reproduction right (thereby creating additional opportunities for rightsholders to seek civil or criminal relief against online infringers). Nevertheless, the amendments leave some issues and questions unresolved. The amended IP Code retains an inadequate term of protection for copyrighted works and does not provide for a term of protection for all copyrighted works in line with the international trend of 70 years after the death of the author. The amendments also include certain definitions that depart from the WPPT and may cause unnecessary confusion. The introduction of an ISP liability regime is welcome, but the safe harbors are too broad and the protections for TPMs fall short.



# NATIONAL TRADE ESTIMATE



# EUROPE

The European Commission (EC) recently adopted two legislative initiatives to update the rules governing digital services in the EU: the Digital Services Act (DSA) and the Digital Markets Act. Together, these regulations form a single set of new rules applicable across the EU, with the aim of creating a safer and more open digital space. In 2021, the EC launched an audiovisual stakeholder dialog to enhance availability and cross-border access to audiovisual content. In 2023, the European Commission started audiovisual stakeholder dialogs, notably focusing on how intellectual property rights are retained and exploited by European producers and authors.

Meanwhile, many EU national governments are still working to implement the three EU Digital Single Market directives of the 2014-2019 Commission (Copyright, SatCab, and Audiovisual Media Services).

## MARKET ACCESS ISSUES

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

The updated AVMSD requires VOD services to reserve at least a 30% share in their catalogues for European works and ensure prominent placement of those works on services targeting EU audiences. This new quota provision maintains the country-of-origin principle, which means that VOD services must comply with the rules of the jurisdiction in which they are established in the EU. The directive also allows EU Member States to require media service providers (linear and non-linear) targeting

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

Network Fees – In February 2023, the European Commission launched a consultation on “the future of the electronic communications sector and its infrastructure,” asking stakeholders for their views on a mandatory mechanism of direct payments from content and application providers to telecommunication companies to help finance network deployment. In October 2023, EU Commissioner Breton announced work on a future “Digital Network Act”, aimed at boosting the telecommunications sector’s competitiveness. It is unclear whether such legislation will include network fees. If included, such network usage fees would ignore both net neutrality rules and the significant contribution of content providers to the internet ecosystem, likely harming competition,

and distorting market incentives.

## INTELLECTUAL PROPERTY PROTECTION

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

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

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

Electronic Commerce Directive/Digital Services Act – The 2000 E-Commerce Directive (ECD) provides a general legal framework for internet services in the Internal Market. The Directive establishes rules on commercial communications, establishment of service providers, electronic contracts, liability of service providers, codes of conduct, out-of-court dispute settlements, and enforcement. The Directive fully recognizes the country-of-origin principle and expressly requires Member States not to restrict the freedom to provide information society services from a company established in another Member State. Article 5 of the ECD requires that information society providers identify themselves by providing clear details about their business and whereabouts on their website. However, the Article is essentially unenforceable and businesses that have the intention of profiting from illegal content and infringing IP rights do not comply with this obligation and do not suffer any consequences.

The DSA will enter fully into force in February 2024, replacing all the ECD’s liability provisions and complementing them with new due diligence obligations for online intermediaries. The European Court of Justice has developed a workable test for attributing liability based on whether the intermediary is “active” or “passive,” and this test was codified in a DSA recital. Regrettably, the DSA failed to include a stay down mechanism, and its Know Your Business Customer provision failed to provide a meaningful tool to fight the broad range of illegal activities online.

Although the ECD and DSA allow monitoring obligations in specific cases, differentiating between general and specific monitoring has proven difficult. It would be helpful to codify the Court’s decision in C-18/18 – *Glawischnig-Piesczek* – that a ban on general monitoring does not preclude an injunction to remove content identical and equivalent to the

content in question, and on a worldwide basis. It remains to be seen how national courts will apply these principles.

NIS2 Directive – The Network and Information Security (NIS) Directive was the first piece of EU-wide legislation with the goal of achieving a higher common level of cybersecurity across Member States. Its implementation proved difficult, and in January 2023 the legislation was expanded by NIS2 to oblige more entities and sectors to take measures improving cybersecurity across the EU. The NIS2 Directive includes new obligations for top-level domain name registries and entities providing domain name registration services to collect and maintain accurate and complete domain name registration data. While the Directive’s recitals state that their verification processes should reflect current industry best practices, further guarantees are needed during national transposition to make sure that the verification obligation is sufficiently effective.

Recommendation on Live Piracy (LPR) – In May 2023, the Commission adopted a recommendation on combating online piracy of sports and other live events. The LPR confirms not only the need for dynamic and effective tools to address online piracy, but also encourages Member States to increase the actions rightsholders can take with a broad range of intermediaries. The LPR seeks to foster collaboration between different stakeholders in the online ecosystem and increase national authorities’ expertise. The EUIPO has drafted key performance indicators to monitor the application of the LPR in 2024 and will assess its impact by November 2025.

EU Copyright Directives (2001 and 2019) – The principal objectives of the 2001 Information Society Directive (InfoSoc) were the harmonization and modernization of certain aspects of copyright law in the digital age. This included the implementation

and ratification by the European Union and its Member States of the 1996 WIPO Internet Treaties.

InfoSoc contains an exception for private copying that, if interpreted incorrectly, could violate the TRIPS/Berne 3-Step test. In some countries, the provisions regarding the private copy exception are too broad. Of specific concern is the German private copy exception, which expressly permits the beneficiary of an exception to use a third party to make the copy.

The InfoSoc Directive also establishes legal protection for TPMs necessary for the protection of copyrighted material in the digital environment. However, this protection is undermined by some Member State’s intervention in regulating 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. Article 6(4)(1) of the 2001 Copyright Directive provides that Member States can only put in place appropriate measures to ensure the benefit of the exception “in the absence of voluntary measures taken by rightsholders” and “to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.”

Article 8(3) of the Infosoc directive also requires availability of injunctive relief against intermediaries whose services are used by a third party to infringe copyright, even where an intermediary’s activities may be exempt from liability under the E-Commerce Directive. Some EU Member States have either not implemented Article 8.3 of the InfoSoc Directive or have done so incorrectly. Poland is a prominent example where Article 8.3 has not been implemented

in national legislation. In Germany the courts ruled that the urgency requirements for obtaining preliminary injunctions are not available for sites 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 central to effective enforcement as Article 8.3.

In April 2019, the European Union adopted a new Directive (2019/790) which is referred to as the Digital Single Market Copyright Directive. Member States had until June 2021 to implement this Directive, but as of September 2022, eleven Member States have yet to finalize the transposition. The Directive introduced two new exceptions to the reproduction right to enable text and data mining tools to crawl content: one covering academic content for the purpose of scientific research, and the second exception covering content that is made freely available online. The Directive also includes two updates to existing exceptions: one extends the illustration for teaching exception to cover digital and cross border uses and the other extends acts of preservation to include digitization.

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

Austria).

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

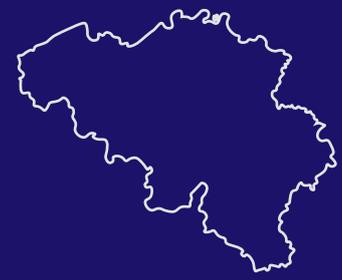
Data Protection Rules – The General Data Protection Regulation (GDPR) became enforceable in May 2018. It strengthens and unifies data protection for all individuals within the EU, but also addresses the export of personal data outside the EU. The GDPR raises concerns on the use of certain personal data in copyright enforcement. In the 1995 Data Protection Directive, rightsholders relied on Article 13, which provided derogations to the rules on data processing, referring to the respect of the “rights and freedom of others.” The GDPR still provides such a derogation to the rules on data processing (Article 23); however, it is subject to very strict and defined conditions. In 2021, the EC published guidelines on Article 23 which analyze the derogation criteria and observed that derogations must pass a necessity and proportionality test.

In 2016, the Commission adopted a directive on the processing of personal data by police and judicial authorities against criminal offenses in parallel to the GDPR. This directive aims to improve the exchange of information, help fight crime more effectively, and provide standards for the processing

# EUROPE

of data of people who are under investigation or have been convicted.





## MARKET ACCESS ISSUES

Broadcast Quotas – The Flemish community and the Federation Wallonia-Brussels (FWB) both transposed the 2010 AVMSD. Broadcasters reserve much of their transmission time for European works (excluding time allotted to news, sports events, games, advertising, teletext services, and teleshopping). Both regions mandate a 10% quota for independent production where possible and Wallonia has a 35% quota for French works.

Investment Obligations – In 2020, the Flemish community introduced a 2% investment obligation for non-domestic AV services targeting the Flemish territory as a direct contribution or contribution to the film fund. The FWB opted for a similar model. Both regions will soon approve a draft law that increases these investment obligations (4% for Flanders and a gradual contribution up to 9.5% for FWB) that would progressively enter into force beginning in 2024.

## INTELLECTUAL PROPERTY PROTECTION

While P2P, also known as torrenting, is on the decline, illicit streaming sites, cyberlocker sites, and IPTV services remain a significant challenge for rightsholders.

### Enforcement

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

resources dedicated to content protection. While the conviction success rate is relatively high, short-term sentences are not executed and it is difficult for rightsholders to collect awarded damages.

### Legislation

EU Enforcement Directive – Belgium implemented the Enforcement Directive in May 2007. The implementation provides several benefits for civil action against piracy, but the right of information can only be applied after the judge has found that an infringement has been committed. In practice this requires hearings first on the merits. As a result, there are significant delays before the judge orders the provision of the information. Such losses of time and resources represent a significant burden for rightsholders.

InfoSoc Implementation – Belgium has implemented the Copyright Directive.

EU DSM Copyright Directive/SatCab – Belgium transposed the DSM Copyright and SatCab Directives in 2022. The existing author and performer unwaivable remuneration right was extended to the new definition of retransmission and is subject to mandatory collective rights management for cable retransmission and for direct injection when they transfer their rights to AV producers. This new definition includes simultaneous/live and unabridged retransmission of television or radio programs when carried out by a party other than the broadcaster, including via satellite, digital terrestrial, IPTV networks, and mobile networks. It also covers live retransmission if it takes place in a controlled and secure environment for authorized users. However, online on-demand, broadcasting, replay, or streaming, is excluded. Belgium went beyond what is prescribed in the Directive by introducing a mandatory unwaivable remuneration

# BELGIUM

right for performers and authors paid by audiovisual and music on-demand services and, unless there is a collective agreement, is subject to mandatory collective rights management (Articles 60-62). The new Belgian law implementing the DSM directive entered into force in August 2022. Some of the law's provisions are being challenged by some operators before the Belgian Constitutional Court.





## MARKET ACCESS ISSUES

Broadcast Quotas – French broadcast quotas exceed the requirements established by the EU 2010 AVMS Directive. 40% of the total number of feature films and the total transmission time allocated to audiovisual works must be of French origin. In addition, 60% of feature films and audiovisual works must be of EU origin. Thus, 40% must be exclusively of French origin, and an additional 20% must be of EU origin. France also imposes a cap of 192 movies per channel, per year, for feature films of non-domestic origin (and hourly sub-quota).

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

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

Release Windows – France mandates the chronology of how cinematographic content is released. The media chronology was last updated in January 2022. However, several international and local stakeholders have argued that the chronology lacks flexibility, that the mandated release windows are too long, and that such windows exacerbate piracy. There are ongoing discussions to re-update the media chronology. The current media chronology’s deadline is January 2025 with negotiations likely

to start soon.

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

Subsidies – The French government provides extensive aid and subsidies to assist local film productions and distribution. The film industry, domestic and foreign, must contribute to funds through dues levied on distributors, exhibitors, exporters, newsreel producers, dubbing studios, broadcasters, and, as of January 2019, international VOD platforms financially registered abroad targeting viewers in France.

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

Advertising Feature Films on Television – In August 2020, the Government of France temporarily permitted the advertising of feature films on TV for an 18-month trial period. With the closure of cinemas and the difficulties related to their reopening, the measure was extended until October 2022. The government published an impact assessment which revealed that the period was still too peculiar to fully

appreciate the consequences of the experiment on the distribution, cinemas audience, and diversity of films promoted. Consequently, the Ministry of Culture decided to extend the measure until April 2024. It is hoped that the government may potentially lift the ban permanently depending on the results of a new upcoming impact assessment.

Protection of Audiovisual Catalogues – In October 2021, France published a law which obliges anyone seeking to buy French cinematographic or AV works to seek continued exploitation so that French audiences and authors/performers will continue to benefit from the distribution of the work. In particular, the law includes a burdensome process for the transfer of audiovisual work and audiovisual catalogues. The obligation implies that long term licensing arrangements or transactions involving companies owning AV works could be in scope. France has tried to elevate the topic of European assets (e.g., AV catalogues, cinemas) being acquired by non-European players at EU level, but with no success so far.

## INTELLECTUAL PROPERTY PROTECTION

Internet piracy is a major source of concern in France, with illicit streaming being the most popular form of piracy.

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

## Enforcement

Siteblocking and delisting court orders have proven effective enforcement tools in France.

In January 2022, the audiovisual Regulator CSA, and the anti-piracy authority HADOPI merged. The new entity, ARCOM, is charged with fighting piracy. ARCOM assists rightsholders with court orders to combat the circumvention of measures and publishes a list of infringing services. ARCOM also plays an important role in updating and ensuring the effectiveness of siteblocking orders.



## MARKET ACCESS ISSUES

Film Fund Levy – Pursuant to the Film Support Act, companies exploiting feature films must pay a portion of their revenues to the German Federal Film Board to fund local film and television productions.

Investment Obligation – As part of the 2024 overhaul to the German film funding system, the Ministry of Culture proposed a 20% investment obligation for domestic and foreign VOD services and broadcasters based on their revenues in Germany (VOD services) or broadcasting costs (broadcasters, commercial and public). A 75% sub-quota for German language productions is proposed and further sub-quotas for cinematographic works and for independent producers are envisaged.

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

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

## INTELLECTUAL PROPERTY PROTECTION

Illicit streaming sites, ISDs, and IPTV subscription services are the primary piracy concerns in Germany.

## Enforcement

While it is possible for rightsholders to obtain an injunction under civil law, injunctions against website operators and hosting providers are title-specific, which is of limited use against online sites that facilitate copyright infringement on a massive scale.

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

The German Federal Court of Justice (BGH) confirmed in October 2022 that it considers the subsidiarity requirement as consistent with EU law, i.e., Article 8(3) and recital 59 of the 2001/29 Directive. According to the BGH, if it has no information on the infringer, the rightsholder must take action to obtain such information from any hosting provider based in the EU, either on a voluntary basis or by suing the EU hosting provider under German law. Also, the BGH rejects dynamic blocking requests as inadmissible. This ruling is also currently being challenged before the Federal Court of Justice.

The “Clearing Body on Copyright on the Internet” (CUII) is a self-regulatory body established by rightsholders and ISPs in 2019. The CUII works with the Bundesnetzagentur (the German networks regulator) as well as the German Federal Cartel Office

and aims to avoid unnecessary court proceedings, allowing DNS blocks to be implemented faster and more effectively.

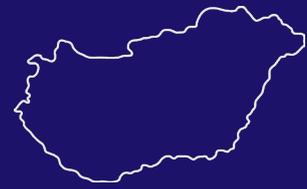
## Legislation

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

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

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

EU Enforcement Directive Implementation – Rightsholders contemplating legal action against internet pirate operators face difficulties in identifying the culpable parties due to restrictions imposed by Germany's data protection law. Further, the right of information is circumscribed in practice because many ISPs reject information requests, asserting that the data is simply not available and that they are not permitted to retain the data.



## MARKET ACCESS ISSUES

Broadcast Quotas – As permitted under EU law, Hungary has a minimum 30% European works quota for VOD services and at least 10% must be Hungarian works.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Piracy via direct download, streaming, and P2P platforms is the biggest piracy concern in Hungary.

### Enforcement

Although the provisions of the European Union’s copyright related Directives – including the 2001 Copyright Directive (Directive 2001/29/EC) and the 2004 Law Enforcement Directive (2004/48/EC) – have been incorporated into Hungarian copyright law, the effectiveness of copyright enforcement still leaves much to be desired. It remains to be seen whether the recently amended rules regarding the copyright liability of online content-sharing platforms (Act No. XXXVII of 2021) will result in a higher level of protection for rightsholders. To date, rules related to personal data protection have hindered law enforcement against individuals who upload pirated content. Moreover, Hungary’s copyright liability exemptions discourage rightsholders from initiating actions to obtain relief from ISPs.

Criminal enforcement is a persistent challenge for rightsholders in Hungary. The efficiency of criminal copyright procedures is hindered by the fact that the Tax Authority, which has the investigation competency in criminal online copyright proceedings, constantly changes the specialists dealing with these procedures and so there is no suitable team of investigators familiar

with copyright and online piracy and, thus far, law enforcement has mainly focused on cases involving significant tax losses.



## MARKET ACCESS ISSUES

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

Broadcast Quotas – As requested under EU law, 50% of eligible broadcast hours (i.e., the overall amount of broadcasting time, excluding time allotted to news, sports events, games, advertising, teletext services, and teleshopping) must be European content. Commercial Italian TV channels must devote at least 16.6% of eligible hours to Italian works (25% for the public service broadcaster) with additional sub-quotas regarding programs for minors.

VOD Quotas – Domestic non-linear providers must reserve at least 30% of their catalogues for European works produced within the past five years, with at least 15% 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, as requested under EU law, non-linear providers subject to Italian jurisdiction must give prominence to EU works.

Broadcast Investment Obligation – Commercial broadcasters must annually invest 12.5% of their revenues into the production of “independent” European works. 50% of this share (i.e., 6.25%) is reserved for Italian works produced within the past five years. In addition, 3.5% of that 12.5% of revenues is reserved for Italian cinematographic works produced by independent producers. Of this 3.5%, 75% must be devoted to feature films

produced within the past five years. The national public broadcaster RAI is not subject to the same investment quotas.

VOD Investment Obligation – In 2023, foreign and domestic VOD providers must devote 18% of their annual net revenues generated in Italy to the production of European works. This quota will increase to 20% in 2024, which makes it one of the highest quotas in the EU. 50% of the investment obligation must be reserved for Italian works produced by independent Italian producers within the past five years. A further sub-quota, ranging between 1.7% and 2% of the total investment obligation, must be reserved for cinematographic works of Italian original expression produced by independent producers.

Release Windows – In 2022, the Italian government considered extending a 90-day mandatory release window to all theatrical films, including foreign productions. The Italian government introduced a mandatory window for Italian subsidized motion pictures in 2018, which is currently set at 105 days. MPA is concerned about the impact of such an extension on a broad scale, as this mandatory window would have serious repercussions on producers' ability to adequately market their works. It remains unclear at this stage if the new government elected in October 2022 will further pursue plans to regulate theatrical release windows.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – The Italian market suffers from the excessive use of streaming piracy and torrent sites. In recent years, MPA members have witnessed an increase in unauthorized IPTV services and the distribution of infringing content links via instant messaging apps.

Camcording Piracy – Italy is a source of significant audio source-theft, in which individuals record local audio tracks and then match them with existing illegal video camcord copies to create unauthorized copies of films in theatrical release. Video source-theft has also become a significant issue, especially for day and date releases. It is extremely complex for law enforcement to seize an unauthorized live recording while it is being made in a theatre. As such, the audiovisual industry has consistently called for stronger and more effective enforcement of rules. Article 3 of Maccanti-Mollicone Anti-Piracy Law 93/2023 harmonized camcording penalties with copyright infringements penalties and requires public awareness and education efforts.

## Legislation

The Italian government’s transposition of the DSM copyright directive includes several concerning elements including on transparency and omission of important safeguards.

E-Commerce Directive Implementation – Decree 70/2003 implementing the E-Commerce Directive establishes that takedown procedures are subject to a prior notice by the “relevant authorities.” This reference to an intervention by an undefined judicial or administrative authority is contrary to the E-Commerce Directive. However, the Italian courts ruled that prior notice by the relevant authorities is only required for access and caching providers, but not for hosting providers.

Maccanti-Mollicone Anti-Piracy Law 93/2023 – The Anti-Piracy Law came into force in August 2023 and provides for full dynamic DNS and IP blocking via the administrative authority AGCOM. The law also provides for the possibility of delisting orders with search providers. In addition, it provides for abbreviated precautionary measures, disabling access to live piracy sites and services (before or during the live broadcast). AGCOM will consult on

the implementing regulation.

AGCOM Resolution No. 189/23/CONS – This Live Sports Regulation was approved in July 2023 and allows for the “immediate” blocking of illegally broadcasted live sports and assimilated events. Cinematographic/AV content is not covered by the Regulation, which was drafted before passage of the above discussed new Anti-Piracy Law 93/2023. Amendments to extend this regulation to audiovisual content are expected soon.



## MARKET ACCESS ISSUES

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

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

VOD Investment Obligation – In June 2023, the House of Representatives of the Netherlands passed a law mandating that domestic and non-domestic VOD services with an annual turnover generated in the Netherlands of at least €10 million must invest 5% of national revenues in Dutch works or in the Dutch film fund. The law also includes a 60% sub-quota for independent producers within the investment obligation and makes the presence of Dutch and Frisian language compulsory in all productions. Entry into force is likely January 2024.

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

and retransmission by means other than cable. The implementing law of 2021 also extends the beneficiaries of this right to “equitable remuneration” from the main authors and actors to all.

In spring 2022, the government launched a consultation on a revised draft Copyright Contract Act proposing to extend the proportional direct remuneration right to VOD exploitation. Following the consultation, the relevant Ministries modified the draft to replace this provision with an additional equitable remuneration right, subject to mandatory collective rights management, for whenever Dutch law applies to the underlying exploitation agreement. To date, the legislative text is still under discussion and has not been tabled in Parliament.

## INTELLECTUAL PROPERTY PROTECTION

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

### Enforcement

In practice, Dutch police and public prosecutors only consider acting against internet piracy when illegal turnover reaches a certain financial threshold, although they do respond to official requests for assistance in criminal investigations by foreign law enforcement. Government policy

# THE NETHERLANDS

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

When it comes to civil enforcement, BREIN continues to face opposition from intermediaries, particularly in cases that involve an attempt to obtain contact details of commercial scale infringers. However, after BREIN secured a final blocking order of The Pirate Bay after 11 years of proceedings in 2020, Dutch ISPs agreed in 2021 to a covenant whereby a court order for blocking an infringing website directed to one ISP will be executed voluntarily by the other ISPs. Blocking is dynamic, enabling updates by BREIN to address target websites changing domains without further court orders.





## MARKET ACCESS ISSUES

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

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

VOD Quotas – As prescribed under EU law, domestic on-demand services must allocate at least 30% of their catalogues to European works and ensure the prominence of those works.

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

Tax Treatment of U.S. Audiovisual Works – The 2005 Cinematography Law includes levies 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.

## INTELLECTUAL PROPERTY PROTECTION

Internet piracy is a serious concern in Poland. Operators of well-known infringing websites in Poland are often overt and readily identified by the

public.

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

### Enforcement

Law enforcement engagement on IP cases in Poland is extremely inconsistent and wholly inadequate. Many cases are stuck or dropped without justification. Polish courts are seriously backlogged, and sentences are not sufficiently deterrent.

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

### Legislation

InfoSoc Implementation – Poland has not implemented Article 8.3 of the InfoSoc Directive. Online service providers whose main purpose is to engage in or facilitate the infringement of intellectual property rights often establish their operations in countries outside the EU with less robust intellectual property law enforcement, or otherwise operate in complete anonymity, making it impossible to

locate them or tie them to a specific country. For example, the operator of the Polish infringing site Chomikuj.pl sold their assets to an entity located in Belize. Such situations can be addressed by no-fault injunctions with intermediaries, a remedy made possible by Article 8.3 of the InfoSoc Directive and confirmed by CJEU jurisprudence to be a proportionate and effective remedy (see CJEU, C 314/12, 27 March 2014, UPC Telekabel v. Constantin). Consistent implementation of existing EU law by all Member States is critical, especially for a provision as key to enforcement as Article 8.3. Lacking this 8.3 implementation, in conjunction with the lack of enforcement, is very problematic.

DSM Copyright and SatCab Directives – Poland, in its transposition of DSM Copyright and SatCab Directives, goes beyond the Directive by extending the existing Article 70 of the Polish Copyright Law. Article 70 provides authors and performers with an unwaivable, unassignable remuneration right, subject to mandatory collective rights management, to additional remuneration for the on-demand use of AV works.



## MARKET ACCESS ISSUES

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

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

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

Advertising Ban on Pay-TV – Russia 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.

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 those 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% beginning in January 2019.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – While Russia remains host to several illicit sites that cater to English-speaking audiences, negatively impacting markets worldwide, many pirate sites have moved to foreign hosting locations after several legal reforms that allow rightsholders to seek injunctions through the Moscow City Court. Infringement on Russian social media platforms – such as VK and OK – remains a significant concern to rightsholders.

Illicit Theatrical Screenings – As a result of many companies’ decisions to suspend operations in Russia, the Russian legal theatrical market has collapsed. Beginning in April 2022, several regional theaters started offering unauthorized screenings of major motion pictures, renting out the screening rooms to third party operators. By August 2023, most theater chains include such screenings in their schedules and promote them along with legal exhibitions. The content shown at these illegal screenings are sourced from pirated Digital Cinema Packages that are illegally distributed online. The Ministry of Culture conducts sporadic raids in the theaters before big domestic releases, usually limiting them to warnings to suspend the illegal screenings for the first weekend. It appears that such raids happen under pressure from the local producers but do not convey any determination to prevent piracy.

## Enforcement

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

Also, at present, there are no legally mandated notice and takedown procedures to remove links to infringing content from search results. In lieu of laws mandating compliance with notice and takedown, the representatives of the largest Russian internet companies and Russian rightsholders signed the MOU for cooperation in intellectual property rights protection in the digital era in November 2018. The MOU introduced a procedure to remove the links to the infringing content from search results at the rightsholder's request. The MOU's objective was to develop a law that would regulate search engines' obligations to remove links to infringing websites from search results. However, the MOU is voluntary and applies only to its parties. The draft law that would replace the MOU and convert its provisions to obligatory requirements entered the parliamentary process in 2021.



## MARKET ACCESS ISSUES

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

VOD Quotas – On-demand services established in Spain must reserve at least 30% of their catalogues for European works, with half of these in any of the official languages of Spain. A minimum of 70% of this percentage must be allocated to audiovisual works produced by independent producers. Of this subquota, a minimum of 30% must be allocated to audiovisual works directed or created exclusively by women. A minimum of 40% of this 50% must be reserved for works in one of the official languages of Spain’s Autonomous Communities, taking into account their population weight and reserving at least 10% for each.

Investment Obligation – Spain maintains investment obligations for linear and on-demand services. If revenues are over €50 million, there is an obligation to invest 5% in European audiovisual works. Services can comply with this obligation through the direct finance of European works’ production, indirectly by buying the rights of finished works, as well as via a contribution to the national film fund or to the fund for the promotion of cinematography and audiovisual works in different co-official languages. There is also a 70% sub-quota for independent productions, of which 15% is reserved for official languages other than Spanish, taking into account their population weight and reserving at least 10% for each of them.

The new AV law also establishes that both domestic

and non-domestic linear and non-linear services shall contribute 1.5% of their annual gross turnover generated in Spain to the Spanish public broadcaster RTVE. This 1.5% contribution may not exceed 20% of the total income planned for each year for the RTVE Corporation. Free-to-air linear television AV communication service providers shall pay 3% of their annual gross turnover, not exceeding 15% of the total annual income anticipated by RTVE.

Film Dubbing in Catalonia – In June 2023, the Executive Council of Catalonia approved updates to the 2005 AV law which still need to pass through Parliament and are subject to amendment. The proposed law is applicable to audiovisual communication services aimed at the public in Catalonia and deviates from the EU country-of-origin principle. It would require that 5% of income received by VOD services in the previous year be invested in European works and that VOD services incorporate works in original expression or dubbed or subtitled in Catalan and Aranese. When income exceeds €50 million, a minimum of 45% of the 5% of income received by VOD services in these instances must be reserved for cinematographic films produced by independent producers. In addition, as programs in Catalan and Aranese are of “general interest,” audiovisual media service providers must guarantee the prominence of content in these languages through a quota that establishes that at least 50% of the 30% generally reserved for European works must be in Catalan or Aranese. The draft law defines independent audiovisual works as those in which the independent producer holds at least 50%, straying from the AVMSD.

Screen Quota – For every three days that a non-EU country film is screened, one European Union film must be shown. This quota is reduced from four to one if the cinema screens a film in an official language of Spain other than Castilian and shows

the film at all sessions of the day in that language. Non-observance of the screen quotas is punishable by fines. These measures ignore market demand for U.S. and non-EU country films and hinder the development of Spain's theatrical market. The Spanish Government increased the screen quota in March 2020 to 30%, linking it to subsidies for movie theatres. Both quotas concurrently exist.

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

## INTELLECTUAL PROPERTY PROTECTION

Illicit camcording remains a concern for rightsholders in Spain. Streaming piracy sites, IPTV subscription services, and torrent sites are commonly used in Spain to access infringing content.

### Enforcement

Spanish courts have recently handed down positive decisions against administrators of pirate websites. Spanish courts issue dynamic siteblocking decisions (including “pirate brand” decisions), with monthly updates sent directly to the ISPs. Enforcement against camcording has improved in recent years.

### Legislation

DSM Copyright Directive – The Spanish government transposed the DSM Copyright Directive in December 2021.

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 based on “effective knowledge.” In addition, Spain does not require ISPs to respond to any take-down request that is not accompanied by a court order.

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



## MARKET ACCESS ISSUES

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

VOD Investment Obligation – A revision of the Swiss Film Law established a new investment obligation for non-domestic VOD services targeting the Swiss market. The 4% investment obligation is based on Swiss revenues and shall be invested in Swiss filmmaking. In September 2023, the Federal Council adopted these amendments, as well as those that require compliance with a 30% European works quota. These obligations will enter into force in 2024.

VOD Quota – Switzerland will impose a 30% quota for European works for non-domestic VOD services targeting Switzerland beginning January 2024.

## INTELLECTUAL PROPERTY PROTECTION

Switzerland lacks meaningful remedies and effective enforcement against online copyright infringement, in particular against foreign-based piracy sites. This is fostered by the doctrine of legal private use of content from illegal sources, and a lack of action by access providers to block access to such offers. This is particularly concerning, as this dearth of enforcement coupled with Switzerland's robust technical infrastructure has made it an attractive host for sharehosting (wherein multiple website operators share a single server that hosts their websites, allowing a significant decrease in their monthly server rental costs compared to a private server) and hosting illegal sites. Recent amendments to the Swiss Copyright act enacted in April 2020 have not yet had a visible effect on such activities and may need to be tested in court cases

to become operative. Thus, overall, the legislative reform is a disappointment.

Unique Distributor Clause – Exploitation of a film in any media, including VOD, now requires a single distributor to maintain exclusive control over all language versions in Switzerland. This is accompanied by laborious registration and reporting duties. This “unique distributor clause” provision in the Film Act lacks clarity regarding the extent of “grandfathering” protection for existing contractual film rights. This heavy-handed amendment interferes with internationally well-established licensing practices.

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

## Enforcement

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

# SWITZERLAND

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

## Legislation

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

Swiss law also still allows circumvention of TPMs 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 ensuring broader liability under Swiss law for parties who facilitate, encourage, and profit from widespread infringement; engaging ISPs, including access providers, in the fight against online piracy; affirming that current law does not permit copying from unauthorized sources; and implementing adequate civil and criminal enforcement tools including access blocking.

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

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





## MARKET ACCESS ISSUES

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

Media Bill – In March 2023, the UK Government published its draft Media Bill. The Draft Bill contains provisions providing the communications regulator, Ofcom, with new regulatory powers to draft and enforce a Code for “Tier 1” VOD providers (those with a large UK audience). It extends regulation to providers that, while they may not be headquartered in the UK or make editorial decisions in the UK, are nonetheless made available to members of the public in the UK. It remains unclear the criteria for determining which services would be Tier 1.

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

## INTELLECTUAL PROPERTY PROTECTION

Online piracy of film, television, and sports in the UK occurs primarily via streaming piracy sites and apps, ISDs, and IPTV subscription services.

Organized criminal gangs are increasingly

involved in the importation, configuration, and marketing of ISDs and apps. MPA appreciates the Border Agency’s increased interest in tackling this problem.

## Legislation

TDM Exception – The UK Government recently considered introducing a broad exception for TDM that would have prejudiced the interests of rightsholders and placed the UK out of compliance with international copyright norms. Helpfully, this proposal was withdrawn. The government subsequently announced that it would instead pursue an agreement on a Code of Practice on Copyright and AI by the end of the year and that it could consider legislation if no agreement is reached. There is no evidence to suggest that the current licensing regime to facilitate TDM is failing, and the UK government should ensure that it does not restrict contractual freedom.



# **NATIONAL TRADE ESTIMATE**



# **MIDDLE EAST**



## MARKET ACCESS ISSUES

Draft Media Bill – In August 2023, Israel’s Minister of Communications published the “draft Memorandum of the Communications (Broadcasting) Law 2023.” The draft law maintains an unnecessary and problematic investment obligation on medium and large sized services (2% and 4% respectively). This requirement would be in violation of Israel’s obligations under the US-Israel FTA. The bill represents an unprecedented intervention into sports broadcasts that undermines exclusive property rights and restricts competition. The bill also prohibits news exclusivity. Moreover, the bill fails to properly protect and preserve copyright in content by mandating a compulsory license without compensation to rightsholders for the retransmission of broadcast channels. There is also potential for extreme and unlimited authorization to collect confidential commercial secrets without it being warranted and without proper reservation of rights.

# NATIONAL TRADE ESTIMATE



# WESTERN HEMISPHERE

# WESTERN HEMISPHERE

Our industry's largest foreign markets in the Americas – Canada, Brazil, and Mexico – each pose a unique set of challenges for U.S. media and entertainment exports. MPA has seen that protectionist and other policies impacting market access in these territories can sometimes proliferate across the region and beyond, impacting the global policy framework.

MPA members face domestic content quotas throughout the hemisphere. Brazil has raised its screen quota in recent years, increasing both the total number of domestic films that must be exhibited per year and the number of days they must be exhibited, as well as also requiring local content quotas for the pay-TV industry. While Brazil's theatrical and pay-TV quotas have recently expired, some legislators are pushing for renewal of both types of quotas. Argentina and Brazil are also exploring new quotas and regulations on OTT platforms, which, if implemented, could inhibit market growth and limit consumer choice. In Mexico, there have been legislative attempts to impose local content quotas on both theatrical and OTT distribution channels via the Federal Telecommunications and Broadcasting Law or the Federal Cinematographic Law. Further, a longstanding bill in Chile's legislature, if implemented, would impose screen quotas that appear inconsistent with Chile's FTA commitments.

Canada maintains a web of discriminatory and outdated content quotas for broadcast and pay-TV that artificially inflate the total spend on Canadian programming. In February 2022, legislation was reintroduced to reform the Broadcasting Act via Bill C-11 (Online Streaming Act), which received Royal Assent in April 2023, and now provides the Canadian Radio-television and Telecommunications Commission (CRTC) with the explicit power to regulate non-Canadian digital

services delivered over the internet, including those provided by MPA members. The Online Streaming Act also granted the CRTC the power to make regulations that would impose discoverability, financial, and reporting obligations to support the Canadian broadcasting system. In May 2023, the CRTC launched a series of public consultations over three phases to implement the Online Streaming Act as part of its regulatory plan that targets late 2024 as the timeframe for implementing its policy decisions stemming from the public consultations.

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

Beyond traditional market access barriers, our industry also faces *de facto* trade barriers in the form of widespread content theft. While hard goods piracy persists throughout the region, online piracy is the primary barrier and priority for the motion picture and television industry. Of particular concern is piracy from illegal IPTV services, such as MagisTV, that provide stolen telecommunication signals/channels and VOD content to a global audience. Although Brazilian enforcement authorities have deployed important raids against online content piracy in recent years, namely Operation 404 against illegal digital content, these raids have not sufficiently addressed the issue. MPA encourages Brazil to create an efficient administrative site-blocking system, which could help tackle online piracy on a larger scale.

Another regional threat in Latin America and Canada is the proliferation of ISDs. These devices are popular throughout the region and are a leading



# WESTERN HEMISPHERE

vehicle for the online piracy of audiovisual material, especially in Brazil, where ISDs continue to proliferate in the market despite several inspections and 1.5 million seizures in the past year.

Organized criminal online piracy and piracy release groups that release the first sources of pirated content have been identified in Argentina, Brazil, Chile, Ecuador, Guatemala, Mexico, and Peru. These groups are overtly profit-driven and use different distribution channels to release illicit content online. In general, they also have a close association with hard goods operators. Moreover, over the past several years, Latin American release groups have extended their operations outside the region, recruiting operatives in the United States and Russia. It is imperative that countries' legal and enforcement frameworks promote accountability and rule of law and create incentives for intermediaries to cooperate with rightsholders in combating this ongoing problem.

Camcording as a source of piracy is a persistent problem in Latin American cinemas, although progress against this crime is improving overall. 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 of piracy. Other territories, notably Peru and Brazil, suffer from the absence of a legislative framework specifically criminalizing the act of illicit camcording in theaters. However, helpful anti-camcording bills are currently under consideration in each of these markets. Until these bills become law, the lack of legal clarity to criminalize unauthorized movie recording complicates rightsholders' efforts to obtain cooperation from law enforcement and prosecutors. Meanwhile, in 2020, Mexico enacted U.S.-Mexico-Canada Agreement (USMCA) legal reforms that included changes to the criminal

code that provide new tools for the prosecution of camcording pirates, including the removal of the "proof of profit" requirement. This was an important legislative improvement that should be followed by other countries in the region. Nevertheless, Mexico remains a top location for illegal camcording activity.

Audiovisual Piracy is a rising concern in Central America and the Caribbean regions, particularly with unlawful retransmission of pay-TV and broadcasting signals, as well as online piracy. Local ISPs and pay-TV distributors often bundle unauthorized content with legitimately licensed content, hampering enforcement. Enforcement authorities, regulators, and private stakeholders should work together to protect IP rights and prevent unlicensed distribution of audiovisual content in the region, especially in Honduras, El Salvador, Guatemala, and the Caribbean Islands, using tools that are utilized in most countries around the world, such as cable retransmission takedown orders, site blocking, and legal proceedings, including cease-and-desist letters. As a starting point, cooperation agreements between government agencies should be prioritized on the agenda.

MPA continues to monitor legislative proposals in Latin America that would introduce unwaivable statutory remuneration rights for authors and performers in the audiovisual and music sectors, with particular attention to any proposals that would subject such rights to mandatory collective rights management (MCRM) by CMOs. Of greatest concern are MCRM initiatives aimed at making available and/or communication to the public (CTTP) exploitations, including interactive on-demand services targeting third party distributors of copyright works such as streaming services. Such a system is already in place in Argentina. These rights can be asserted by CMOs against other licensees who have no contractual relationship with authors or performers, including cinemas



# WESTERN HEMISPHERE

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. These unquantifiable back-end claims asserted against licensees significantly erode the value of the exclusive rights in copyright works, not only of the producers but also of the authors and performers of those works.

The Argentine regime imposing MCRM on CTTP remuneration rights has been in place for many years; the law in that country says nothing about such rights for making available exploitations. Nevertheless, CMOs in Argentina have begun to assert claims against making available exploitations, potentially undermining this new sector of the audiovisual business. Other countries in the region have introduced unwaivable author and performer remuneration rights, including Chile, Colombia, Peru, and Uruguay. Some systems (Colombia and Peru for performer remuneration rights) impose MCRM, while the role for CMOs in other countries (Uruguay) is not yet clear. In Chile, these rights are subject to voluntary CRM. In Brazil and Costa Rica, unwaivable remuneration rights subject to MCRM have been proposed but not yet legislated. It is noteworthy that none of these countries has a supervisory or robust regulatory framework for oversight of CMO claims and collections as exists for example in the EU (the Collective Rights Management Directive). Without strict oversight, claims from CMOs can be excessive by including untransparent mechanisms for tariff setting and distribution practices, with cumulating tariffs from multiple CMOs, potentially discriminatory distribution practices chilling local production, and causing disruption and confusion in local markets. CRM and MCRM have profoundly negative impacts on U.S. exports in the audiovisual sector, with knock-on effects on collectively bargained compensation payable to creative talent in U.S. audiovisual works, through the imposition of

additional, unjustified increases in distribution and licensing costs. This results in confusion in the marketplace for rights clearance as well as erosion of market value for all stakeholders.

For example, a worrisome bill is under consideration in Paraguay's legislature. The bill proposes a new unwaivable remuneration right for the making available of musical and audiovisual performers with payment obligations directed at users (i.e., platforms) who are not party to negotiations for compensation of performers or authors. As noted, a similar legislative proposal has recently been adopted in Uruguay. It is not clear whether these remuneration rights would/will be subject to MCRM. Costa Rica's legislature is entertaining a bill creating unwaivable remuneration rights subject to MCRM for performers. None of these countries – indeed no country in the Latin American region – has any oversight framework in place; the Uruguay legislation was passed as part of a national budget bill. Both initiatives would and will undermine the free exercise of exclusive rights and contractual freedom while imposing yet unknown back-end costs on platforms, even as producers of works to be made available have already negotiated compensation for authors and performers of streamed works. These bills will erode exploitation revenues that are key to compensation of creative talent, while diminishing the value of the exclusive rights of making available held by those authors and performers, converting those valuable rights into mere remuneration rights.

Over the past few years, several governments have amended their copyright frameworks or are actively considering amendments. The Canadian government passed long-awaited reforms to implement the WIPO Internet Treaties, but amendments to the *Copyright Act* are needed to appropriately deal with the new forms of online copyright infringement that were not present, dominant, or contemplated when the *Copyright Act* was last amended in 2012, including streaming sites,



# WESTERN HEMISPHERE

IPTV subscription services, and ISDs. In addition, there are aspects of the legal framework in Canada that do not provide appropriate legal incentives for intermediaries (e.g., ISPs, payment processors, online advertising networks, hosting providers, etc.) to cooperate with rightsholders in deterring online copyright infringement. The framework also provides broad exceptions to copyright that remain untested. In Argentina, copyright reform is stalled, and in Brazil, reform is underway. As governments in the region consider reforms to address copyright in the digital age, it is critical for the U.S. government to continue to engage them on the need for these reforms to be consistent with both the international copyright framework – especially regarding exceptions and limitations to copyright – and, in the case of FTA partners, consistent with their bilateral obligations.

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





## MARKET ACCESS ISSUES

Pay-TV Content Quotas – Effective September 2011, Law 12.485/2011 imposed 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 is also required 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 expired in September 2023 but could be renewed. Bill #3.696/2023, which would reinstate the pay-TV quotas until 2038, was recently approved by the Senate and will now be discussed by the House of Representatives.

Screen Quotas – Theatrical quotas were in force from 2001 to 2021 but have not been renewed since. However, the Brazilian Congress is discussing several draft bills that aim to reinstate these quotas for several years (Bills #3.696/2023, #5.092/2020, and #5.497/2019). The MPA opposes local content quotas, which limit consumer choice and can push consumers toward illegitimate content sources.

Release Window Regulation – Bill #3.696/2023 has contemplated the introduction of a mandatory 120-day period between theatrical exhibition and streaming distribution. As of now, this provision is not included in the bill’s wording, and discussions are at a preliminary stage, but it is possible that this issue will gain further traction in the near future. MPA opposes mandatory periods between audiovisual windows, as this practice limits competition in the audiovisual market and can

also push consumers toward illegitimate content sources.

VOD Tax and Regulatory Framework – Brazil currently applies a Condecine tax on a per-title basis to films, pay-TV, and “other segments.” This tax does not apply to VOD services. However, there are several bills pending in the Brazilian Congress that would extend the Condecine tax to VOD services and impose other obligations on VOD providers, such as mandatory investment, catalogue quotas and transparency obligations. These bills could undermine the viability of providers, chill investment, and reduce consumer choice.

Tax Issues – Brazil is currently undergoing a broad tax reform that will consolidate several consumption taxes into two new taxes (IBS and CBS). The tax rates are not yet defined, but there are estimates that IBS and CBS will collectively be around 25%.

Moreover, the Brazilian Congress is currently discussing several bills that aim to establish specific taxes for digital services, such as Bills #2358/2020, 131/2020, and 218/2020. Such tax increases would represent a burden to current taxpayers and a barrier to the entry of new competitors into the Brazilian market.

Accessibility Regulation – Obligations to offer audio description, closed-captioning, and sign language in Brazilian cinemas came into force in January 2023. Brazil is currently considering various legislative proposals that aim to compel programmers, broadcasters and OSPs (online service providers) to provide accessibility tools within their services. The U.S. film industry supports measures to broaden access to its productions and to better serve patrons with disabilities and is working closely with regulatory bodies and other stakeholders to ensure that the accessibility features are implemented with

a technological solution that is secure, efficient, and meets global best practices.

Network Usage Fees – In May 2023, the Brazilian Telecom Agency (Anatel) launched a public consultation that included a discussion on network usage fees to fund telecom infrastructure. While the discussions are at an early stage, the adoption of such fees would severely impair competition in the Brazilian market (especially considering that ISP companies frequently also offer audiovisual content), harm consumers, and negatively impact net neutrality.

## 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 or older in Brazil have used pirate sources to access audiovisual content, consuming 1.7 billion pirated full-length movies and TV show episodes in any given three-month period. Despite commendable actions by local enforcement authorities such as the Ministry of Justice CyberLab Task Force, Anatel, Ancine, Customs, and Operation 404, the market penetration and use of ISDs continues to rise.

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

### Enforcement

Brazil demonstrates, to some extent, a political will to combat piracy. For example, the Ministry of Justice’s National Council to Combat Piracy and Intellectual Property Crimes has pursued a number

of helpful voluntary initiatives to fight illegal activity. Additionally, the Ministry of Justice has consistently deployed enforcement actions against online content piracy, such as Operation 404, in recurrent waves, and regulatory agencies have recently improved their focus on the contraband of ISDs. Operation 404 is a model for effective and efficient criminal enforcement measures against piracy sites and services and should be replicated by other markets within the Western Hemisphere. However, Brazil has yet to establish an efficient administrative site-blocking system to curb the availability of piracy sites and services. Moreover, Brazil would benefit from a dedicated IP police department or an IP court, along with rules to reduce the timing and costs of inquiries and lawsuits, and deterrent sentences for copyright theft. Also cause for concern are recent public statements by the Ministry of Culture and Ancine indicating that anti-piracy actions should focus on protecting only national works.

### Legislation

Copyright Reform – Rightsholders are troubled by several legislative proposals (e.g., Bills #21/2020, 3133/2012, and 6117/2009) that create broad exceptions and limitations to copyright. These bills are inconsistent with Brazil’s international obligations and, if enacted, would deter investment in Brazil’s creative industries. Moreover, the latest wording of Bill # 2.370/2019 aims to reform the Copyright Act to create an additional remuneration layer affecting rightsholders of copyrighted works used online.

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

Site Blocking Legislation and Initiatives – In 2016, the Parliamentary Committee of Inquiry on Cybercrimes approved in its final report a bill on judicial site blocking, now Bill 5204/2016, which is under consideration by the Lower House Committee on Science and Technology. Applauded by rightsholders, this initiative would expressly authorize Brazilian courts to issue orders requiring ISPs to block access to websites hosted outside Brazil that are dedicated to copyright infringement. This initiative would enable Brazil to utilize a global best practice enforcement tool. In addition to judicial site blocking legislation, Ancine and Anatel have been working to implement an administrative site blocking system. However, Ancine’s recent posture against IP enforcement of non-Brazilian works has stalled the initiative. Furthermore, the 2021-2023 Action Plan of the National Intellectual Property Strategy includes administrative site-blocking as a proposed method to curb infringement of IP rights.

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

Subtitling and Dubbing of Audiovisual Works – The Lower House has started a debate on the nationality of professionals who dub and subtitle audiovisual works (Bill #1.376/2022), which could result in a protectionist policy that excludes work undertaken by foreign dubbing artists.



## MARKET ACCESS ISSUES

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

Second, per the Exhibition Quota, private conventional broadcasters must exhibit not less than 50% Canadian programming from 6 pm to midnight. Private English-language discretionary services (specialty and pay-TV) must exhibit not less than 35% Canadian programming overall.

Non-Canadian Signal and Service Restrictions – Canadian broadcasting distribution undertakings (BDUs), such as cable, IPTV, and direct-to-home satellite, must offer more Canadian than non-Canadian services. These protectionist measures inhibit the export of U.S. media and entertainment services.

First, BDUs must offer a “skinny basic” tier for not

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

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

Proposed Obligations on Non-Canadian Digital Services – Non-Canadian digital services delivered over the internet are currently exempt from most requirements under the Broadcasting Act. However,

with the Online Streaming Act receiving Royal Assent in April 2023, the CRTC now has the explicit power to regulate non-Canadian digital media services, including the power to make regulations that would impose financial, discoverability, and reporting obligations to support the Canadian broadcasting system. In May 2023, the CRTC launched a series of public consultations over three phases to implement the Online Streaming Act as part of its regulatory plan that targets late 2024 as the timeframe for implementing its policy decisions stemming from the public consultations.

Broadcasting Investment Limitations – The Broadcasting Act provides that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay, and specialty television) and distribution undertakings (cable and IPTV operators and satellite television distributors), must meet certain tests of Canadian ownership and control: 1) a licensee’s CEO must be Canadian; 2) at least 80% of a licensee’s Directors must be Canadian; and, 3) at least 80% of the licensee’s voting shares and votes must be beneficially owned and controlled by Canadians. If the licensee is a subsidiary corporation, its parent must be Canadian and at least two-thirds of the voting shares and votes of the 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% of the voting shares and votes, the CEO of the parent company is non-Canadian, or less than 80% of the directors of the parent corporation are Canadian. In such circumstances, the CRTC requires that an “independent programming committee” be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on

such independent programming committee. No other developed market in the world maintains such discriminatory foreign investment limitations.

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

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Canada’s digital marketplace remains hampered by widespread copyright infringement. Canada has seen an influx of operators, sellers, and resellers of infringing paid subscription piracy services (including IPTV and VOD services). Canadian operators 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, ISDs, and apps, remain readily available both online and in the 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, ISDs

configured to allow users to access unlicensed content, and illegal IPTV subscription services. In addition, there are aspects of the legal framework that do not provide appropriate legal incentives for intermediaries to cooperate with rightsholders in deterring piracy. The framework also provides broad exceptions to copyright that remain untested.

## **Enforcement**

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



## MARKET ACCESS BARRIERS

### Advertising on Broadcast and Pay-TV Services

– Mexico imposes advertising limitations and incentives that aim to promote domestically-made programming. Pay-TV channels, which are primarily operated by foreigners, are forced to abide by both daily and hourly advertising limits while their domestic and free-to-air counterparts are allowed almost twice the daily advertising limit and are not subject to hourly caps. For the past 20 years, channels have been allowed up to 12 minutes of advertising per hour under a practice known as “averaging,” so long as they did not exceed the 144-minute daily limit. This practice was adopted in 2000, approved by the regulator in 2011, and affirmed by Mexico’s Superior Court of Tax and Administrative Justice in 2014. 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, breaking with Mexican courts’ prior rulings and raising questions about USMCA compatibility.

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

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

Fate of Independent Regulators – The motion

picture industry remains concerned about Executive Branch attempts to hinder or silence the work of certain independent and autonomous regulators, including the Federal Telecommunications Institute (IFT), which has authority over OTT regulation. The President has vetoed any new IFT member appointments, and the regulator lacks the quorum necessary to hold sessions. The Supreme Court is pending the review of a case brought by the current commissioners to obligate the President to make the appointments.

## INTELLECTUAL PROPERTY PROTECTION

Internet Piracy – Online piracy is a serious, widespread problem in Mexico. ISDs and apps are increasingly present in Mexico’s electronic-hardware gray 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 increasingly sophisticated streaming piracy sites, illicit streaming devices, and IPTV subscription streaming services is ubiquitous. According to MPA data from March 2023, the second most visited VOD website for Mexican consumers was an illegal content site. Mexican authorities lack a comprehensive strategy for preventing digital piracy.

### **Enforcement**

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

landscape.

## Legislation

Traditional Cultural Expressions Initiative – Mexico’s Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities (Cultural Heritage Law) entered into force in January 2022. The law aims to protect traditional cultural expressions in a manner like copyrighted works, with the goal of combatting cultural appropriation and plagiarism of indigenous designs and expressions. The measure aims to register, classify, and document the traditional cultural expressions of indigenous communities while also broadening the scope of protection and economic rights for these expressions. The measures also introduced a strict enforcement scheme with criminal penalties. This initiative poses legal uncertainty for a range of creative industries, given the absence of guidelines for the granting of authorization, the lack of clarity as to which communities are associated with a particular expression, and the fact that some expressions could be removed from the public domain. Mexico’s Human Rights Commission, an autonomous government agency, recently filed a claim of unconstitutionality against the law, citing policymakers’ lack of consultation with indigenous communities during the law’s formulation, and the excessive nature of the penalties. The case is pending review at the Supreme Court.

Legislation to Implement USMCA Reforms – 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 TPMs, enable a notice-and-takedown system for the removal of infringing works online, provide higher administrative sanctions for copyright infringement, enable prosecution of camcording without proof of profit motive, and enhance the Mexican Institute

of Industrial Property’s online enforcement capabilities. Although these developments are positive, the growth of the legal digital marketplace in Mexico has been hampered by the indifference of the judicial authorities and the absence of secondary regulation to implement USMCA reforms adhering to the Mexican Copyright Act. Further amendments are also needed to the Copyright Law or Civil Code to cover cable systems, as well as to provide civil remedies for satellite and signal piracy. MPA looks forward to working with the U.S. government to ensure that the agreement is fully and effectively implemented.

In response to the reforms of July 2020, Mexico’s National Human Rights Commission filed a case in the Mexican Supreme Court seeking to void the copyright gains as unconstitutional, particularly the provisions regarding criminal sanctions for circumvention of TPMs and the provisions on notice and takedown. The Supreme Court was supposed to have determined the constitutionality of the reforms with a definitive and unappealable decision last year, but the decision remains pending.

