

## EFFECTIVE ANTI-PIRACY IN VIETNAM: A JOURNEY THROUGH SITE BLOCKING

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**Abstract:** The dawn of the Internet has created significant challenges to protecting copyrighted materials from piracy. In the past, copyright protection was mainly concerned with the threat of infringement from the sale of counterfeit goods, like pirated CDs and optical media. However, the Internet has now allowed for online piracy where infringing materials can be accessed online or copied with even greater ease. Vietnam has recently become a jurisdiction that is a hotbed for online piracy and copyright infringement globally. This is largely because Vietnam's current statutory and regulatory regime fail to effectively create an effective anti-piracy regime in accordance with its WTO TRIPS obligations. Furthermore, Vietnam's recent accession of various treaties like the CPTPP and WCT further galvanizes a need for change in Vietnam's intellectual property regime. Thus far, Vietnam's attempts at fashioning an effective site-blocking regime have not succeeded. This paper will look at other effective site-blocking regimes, namely Singapore, India, and France, to look prospectively at what may be possible in Vietnam.

**Keywords:** Vietnam, Copyright, TRIPS, CPTPP, Site-blocking

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## INTRODUCTION

The dawn of the internet has created significant challenges to the protection of copyrighted materials from piracy.<sup>1</sup> In the past, copyright protection was mostly concerned with the threat of infringement from the sale of counterfeit goods, like pirated CDs and optical media.<sup>2</sup> However, the internet has now allowed for a form of online piracy where infringing materials can be accessed online or copied with an easy click of a button or tap of a screen.<sup>3</sup> One of the most promising attempts at addressing online piracy is the practice of site blocking.<sup>4</sup> While not always the case, numerous nations have outlined a framework for site blocking as a part of safe harbor provisions.<sup>5</sup> Broadly, these safe harbor provisions broker a compromise between internet service providers (ISPs) and rights holders, by indemnifying ISPs in exchange for allowing rights-holders to get ISPs to block domestic access to sites that are known to host or distribute large amounts of pirated material.<sup>6</sup> While effective, many of these measures have still have not reached many jurisdictions in Asia which have growing numbers of their population joining the internet. There is no place where this is truer than Vietnam.

Vietnam has one of the fastest growing online piracy cultures in Asia and already has many online users that openly admit to frequently using infringing sites.<sup>7</sup> Moreover, it seems that the combination of unclear laws, poor enforcement mechanisms, and restricted market access has resulted in a weak copyright regime that is susceptible to rampant online infringement.<sup>8</sup> The Office of the United States Trade Representative (USTR), recognizing the threat that Vietnam poses to intellectual property (IP) protection and enforcement among U.S. trading partners, elevated Vietnam to the watch list.<sup>9</sup>

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<sup>1</sup> Advisory Committee on Enforcement, Study on IP Enforcement Measures, Especially Anti-piracy Measures in the Digital Environment, WIPO, July 23, 2019.

<sup>2</sup> Id. at 1.

<sup>3</sup> Id. at 1.

<sup>4</sup> Justin Hughes, Copyright Law in Foreign Jurisdictions: How are other countries handling digital piracy? Hearing Before the United States Senate Judiciary Committee Subcommittee on Intellectual Property, 10 March 2020.

<sup>5</sup> Id. at 4.

<sup>6</sup> Nigel Cory, The Normalization of Website Blocking Around the World in the Fight Against Piracy Online, June 12, 2018, <https://itif.org/publications/2018/06/12/normalization-website-blocking-around-world-fight-against-piracy-online/>.

<sup>7</sup> New survey shows Vietnam among highest in online piracy in Southeast Asia., AVIA, May 17, 2021, <https://avia.org/new-survey-shows-vietnam-among-highest-in-online-piracy-in-southeast-asia/>.

<sup>8</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, IIPA, 106 (January 28, 2021).

<sup>9</sup> USTR, 2021 Special 301 Report, USTR, 84; IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 106; See also USTR, USTR Releases Annual Special 301 Report on Intellectual Property Protection and Review of Notorious Markets for Counterfeiting and Piracy, 29 April 2020, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/ustr-releases-annual-special-301-report-intellectual-property-protection-and-review-notorious> (“The Special 301 Report identifies trading partners that do not adequately or effectively protect and enforce intellectual property (IP) rights or otherwise deny market access to U.S. innovators and creators that rely on protection of their IP rights... These trading partners will be the subject of increased bilateral engagement with USTR to address IP concerns. Over the coming weeks, USTR will review the developments against the benchmarks established in the Special 301 action plans for those countries. For countries failing to address U.S. concerns, USTR will take appropriate actions, which may include enforcement actions under Section 301 of the Trade Act or pursuant to World Trade Organization (WTO) or other trade agreement dispute settlement procedures.”)

Moreover, Vietnam is a member of the World Trade Organization (WTO)<sup>10</sup> and a signatory to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>11</sup> The TRIPS agreement requires Vietnam to “criminalize copyright piracy on a commercial scale”<sup>12</sup> and “make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right”.<sup>13</sup> This means that Vietnam is legally obligated to ensure that there are available enforcement procedures for effective action against all forms of copyright infringement covered in the treaty<sup>14</sup>, including the kind of piracy happening online in Vietnam daily. However, it seems like Vietnam has yet to do so.<sup>15</sup> Further, Vietnam’s recent accession of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)<sup>16</sup> and the World Intellectual Property Organization Copyright Treaty (WCT)<sup>17</sup> further galvanize and impose obligations for effective copyright enforcement on Vietnam.<sup>18</sup> Hence, the topic of effective Vietnamese measures against online piracy is becoming increasingly relevant. The international experience has shown that many nations with a variety of legal traditions have managed to create effective copyright regimes that have aspects of site blocking.<sup>19</sup>

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<sup>10</sup> World Trade Organization, Members and Observers,

[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm/](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm/).

<sup>11</sup> World Trade Organization, Frequently asked questions about TRIPS [trade-related aspects of intellectual property rights] in the WTO,

[https://www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm#Who'sSigned/](https://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Who'sSigned/).

<sup>12</sup> TRIPS Agreement, Part III, Section 5, Article 61,

[https://www.wto.org/english/docs\\_e/legal\\_e/31bis\\_trips\\_05\\_e.htm#5/](https://www.wto.org/english/docs_e/legal_e/31bis_trips_05_e.htm#5/).

<sup>13</sup> TRIPS Agreement, Part III, Section 1, Article 41,

[https://www.wto.org/english/docs\\_e/legal\\_e/31bis\\_trips\\_05\\_e.htm#1/](https://www.wto.org/english/docs_e/legal_e/31bis_trips_05_e.htm#1/).

<sup>14</sup> WIPO Lex, WIPO Copyright Treaty, Article 14(2).

<sup>15</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, IIPA, 110, 112 (January 28, 2021).

<sup>16</sup> Government of New Zealand, Viet Nam seventh nation to ratify CPTPP, 15 November 2018,

<https://www.beehive.govt.nz/release/viet-nam-seventh-nation-ratify-cptpp/>.

<sup>17</sup> Vietnam becomes signatory to WIPO Copyright Treaty, People’s Army Newspaper, 25 November 2021, <https://en.qdnd.vn/foreign-affairs/bilateral-relations/vietnam-becomes-signatory-to-wipo-copyright-treaty-536158/>; See also WIPO Lex, Contracting Parties > WIPO Copyright Treaty,

[https://wipolex.wipo.int/en/treaties/ShowResults?search\\_what=C&treaty\\_id=16/](https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=16/).

<sup>18</sup> See CPTPP, Chapter 18, Article 18.74, page 44-47, <https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/18.-Intellectual-Property-Chapter.pdf/>; WIPO Lex, WIPO Copyright Treaty, Article 14(2).

<sup>19</sup> Nigel Cory, *supra* note 6; See Australia, Copyright Amendment (Online Infringement) Act 2015, Section 115A; United Kingdom, Copyright, Designs and Patents Act 1988, Section 97A; EU 2001 Information Society Directive, Article 8(3); Singapore, Copyright Act (Chapter 63 of Singapore Laws), Article 193DDA(1)(b) (revised 31st January 2006). See also Hugh Stephens, Disabling Access to Large-Scale Pirate Sites (Site Blocking)—It Works!, Hugh Stephens Blog, 18 April 2017, <https://hughstephensblog.net/2017/04/18/disabling-access-to-large-scale-pirate-sites-site-blocking-it-works/>;

Furthermore, the case of India<sup>20</sup> and Singapore<sup>21</sup>, show that even in Asia site blocking is a viable and effective means of containing online piracy. Thus, this paper through the study and analysis of site blocking regimes in Singapore, India, and France shall show that a clear and effective Vietnamese site blocking regime which solves online piracy and fulfils treaty obligations, is possible.

Part II of this paper describes the practice of site blocking generally. Part III of this paper analyzes and looks at Singapore's site blocking regime as an example of how a country in the same region as Vietnam has tackled the issue of site blocking via statute. Part IV of the paper will look at India's common law site blocking regime and discusses commonalities in various site blocking regimes. Part V of the paper looks at the French civil law site blocking regime given Vietnam's civil law system. Finally, Part VI will look at what an effective site blocking regime might look like in Vietnam.

## I. SITE BLOCKING: AN OVERVIEW

The age of the internet has enabled electronic copying and sharing of content across many geographic and jurisdictional borders.<sup>22</sup> This often can include protected copyrighted material.<sup>23</sup> However, IP laws and regulations are usually limited jurisdictionally to the countries in which they are enacted, while the domain of the internet is borderless.<sup>24</sup> Thus, site blocking is generally seen as a response to limitations faced by domestic copyright regimes against a borderless internet.<sup>25</sup> Site blocking operates by allowing rights-holders to get internet service providers (ISPs) to block domestic access to sites that are known to host or distribute large amounts of pirated or infringing material.<sup>26</sup> Research has generally shown that efficient and prolific site blocking leads to

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<sup>20</sup> Indian courts have been ordering ISPs to block pirate websites to protect new releases of Indian films for many years. See Delhi HC restrains 30 torrent sites from hosting copyrighted content, orders ISPs to block them, FINANCIAL EXPRESS, April 11, 2019, <https://www.financialexpress.com/india-news/delhi-hc-restrains-30-torrent-sites-from-hosting-copyrighted-content-orders-isps-to-block-them/1545480/>; Bill Toulas, ISPs in India Ordered to Block Pirate Bay, Torrentz2, YTS, and 1337x, TECHNADU, April 12, 2019, <https://www.technadu.com/isps-india-ordered-block-pirate-bay-torrentz2-yts-1337x/64592/>; Javed Anwer, 830 more websites blocked in India, many torrent links in list, INDIA TODAY, August 25, 2016 (“Blocking of hundreds of URLs at the behest of film producers is not new in India. It has become almost routine to for film producers to approach court before release of a film and take John Doe orders, leading to the blocking of the websites. Not only torrent sites have been blocked under such orders but also image hosts, file hosts and websites that share URLs”), <https://www.indiatoday.in/technology/news/story/830-more-websites-blocked-in-india-many-torrent-links-in-list-337177-2016-08-25>; Anupam Saxena, ISP Wise List Of Blocked Sites #IndiaBlocks, MEDIANAMA, May 17, 2012, <https://www.medianama.com/2012/05/223-isp-wise-list-of-blocked-sites-indiablocks/>.

<sup>21</sup> Irene Tham, Solarmovie.ph is first piracy website to be blocked under amended Copyright Act, The Straits Times, 16 February 2016, <https://www.straitstimes.com/singapore/solarmovieph-is-first-piracy-website-to-be-blocked-under-amended-copyright-act/>; See also Motion Picture Association Asia Pacific, Singapore allows dynamic site blocking in landmark court ruling – Any Web address linking to blocked piracy sites can now be blocked as well, MPA APAC In The News, 19 July 2018, (“A spokesman for the Intellectual Property Office of Singapore said: “We are glad to see rights holders utili[z]ing the legal framework that we have put in place to protect their copyright works.””), [https://www.mpa-apac.org/in\\_the\\_news/singapore-allows-dynamic-site-blocking-in-landmark-court-ruling-any-web-address-linking-to-blocked-piracy-sites-can-now-be-blocked-as-well/](https://www.mpa-apac.org/in_the_news/singapore-allows-dynamic-site-blocking-in-landmark-court-ruling-any-web-address-linking-to-blocked-piracy-sites-can-now-be-blocked-as-well/).

<sup>22</sup> Nigel Cory, *supra* note 6.

<sup>23</sup> *Id.* at 22.

<sup>24</sup> *Id.* at 22.

<sup>25</sup> Nigel Cory, *supra* note 6.

<sup>26</sup> European Union Intellectual Property Office, Study on Dynamic Blocking Injunctions in the European Union, 16, March 2021.

real world decreases in total online piracy and increases in the use of paid legal streaming services.<sup>27</sup> Therefore, it should not be surprising that the creation of a domestic site blocking regime has been embraced in many jurisdictions, including Australia, many parts of the EU, Singapore, India, and the United Kingdom.<sup>28</sup>

However, the creation of a site blocking regime is not always so simple. Firstly, countries looking to implement such a regime must ensure that it only targets sites that can be identified as embracing online piracy or infringement.<sup>29</sup> This is difficult because infringing content is being posted online everyday by end users on a myriad of legitimate and illegitimate sites. If one does not adequately identify which sites should be blocked for embracing piracy, you run the risk of blocking even legitimate sites and stifling the internet, i.e. “over blocking”.<sup>30</sup> Secondly, the reality of online practice is that when infringing sites are blocked or taken down, infringing sites attempt to circumvent such orders by changing domain names, redirecting traffic, or having dynamic IP addresses.<sup>31</sup> This creates a situation where the original blocking order is essentially rendered useless and rights holders would have to begin the process all over again for every slight change in domain name or IP address. Hence, to ensure that site blocking regimes remain effective, courts in the France, Singapore, and India, have allowed for the creation of dynamic injunctions.<sup>32</sup> These dynamic injunctions allow for the blocking of IP addresses and multiple domain names to account for the common practice of redirecting or changing domain names.<sup>33</sup> These two issues have created similarities among countries with effective site blocking regimes around clear legal standards targeting online piracy and responsive enforcement measures to keep up with infringers.

While site blocking measures are effective at reducing traffic to infringing sites<sup>34</sup>, numerous concerns in various jurisdictions have been raised about site blocking’s ability to stifle free speech<sup>35</sup>, strangle internet freedom<sup>36</sup>, and the proportionality of such responses to internet piracy.<sup>37</sup> Hence, understanding how other Asian site blocking

<sup>27</sup> Brett Danaher et al., *Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior*, 16-19, 18 April 2016.

[https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID2766795\\_code986726.pdf?abstractid=2766795&mirid=1/](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2766795_code986726.pdf?abstractid=2766795&mirid=1/); Motion Picture Association, *Measuring the Effect of Piracy Website Blocking in Australia on Consumer Behavior: December 2018*, 6-8, January 2020, <https://www.mpa-apac.org/wp-content/uploads/2020/02/Australia-Site-Blocking-Summary-January-2020.pdf/>.

<sup>28</sup> Justin Hughes, *In response to questions from Senators Tillis, Coons, and Blumenthal, Senate Judiciary Committee / Intellectual Property Subcommittee*, 7, 14 April 2020.

<sup>29</sup> Justin Hughes, *supra* note 28 at 9.

<sup>30</sup> Peter Carstairs, *The Inevitable Actors: An Analysis of Australia’s Recent Anti-piracy Website Blocking Laws, Their Balancing of Rights and Overall Effectiveness*, (2021) 31 AIPJ 280, 286.

<sup>31</sup> Victor Loh, *Court order makes it easier for copyright owners to curb access to piracy websites*, <https://www.todayonline.com/singapore/court-order-makes-it-easier-copyright-owners-curb-access-piracy-websites/>.

<sup>32</sup> Justin Hughes, *supra* note 28 at 11-12.

<sup>33</sup> *Id.* at 32.

<sup>34</sup> Peter Carstairs, *supra* note 30 at 305; Brett Danaher et al., *supra* note 27 at 16-19; Motion Picture Association, *Measuring the Effect of Piracy Website Blocking in Australia on Consumer Behavior: December 2018*, *supra* note 27 at 6-8.

<sup>35</sup> Peter Carstairs, *supra* note 30 at 300; Grace Espinosa, *Internet Piracy: Is Protecting Intellectual Property Worth Government Censorship?*, 18 *Tex. Wesleyan L. Rev.* 309, 332-34 (2011).

<sup>36</sup> [CS(COMM) 724/2017 & I.As. 12269/2017, 12271/2017, 6985/2018, 8949/2018 AND 16781/2018], *Decision of 10 April 2019 at ¶55-56*; See also Nigel Cory, *India and Website Blocking: Courts Allow Dynamic Injunctions to Fight Digital Piracy*, May 29, 2019, <https://itif.org/publications/2019/05/29/india-and-website-blocking-courts-allow-dynamic-injunctions-fight-digital/>.

<sup>37</sup> Peter Carstairs, *supra* note 30 at 287.

regimes, like India and Singapore, have attempted to create an effective site blocking regime and balance the associated concerns can be informative in ascertaining what site blocking might need to look like in Vietnam.

## II. A STATUTORY FRAMEWORK: SITE BLOCKING IN SINGAPORE

Less than a three-hour plane ride away from Vietnam's capital Hanoi lies Singapore. Singapore inherited its common law tradition from the British and shares membership in the Association of South-East Asian Nations (ASEAN) with Vietnam.<sup>38</sup> Besides geographic proximity, Singapore also happens to be a party to many of the treaties that Vietnam has signed or is planning to sign, including the WCT<sup>39</sup> and the CPTPP<sup>40</sup>. These treaties are relevant because they stipulate that signatory nations have a responsibility to ensure effective enforcement mechanisms around all forms of copyright infringement covered by the WCT, which likely includes online piracy.<sup>41</sup> Further, both Singapore and Vietnam have been parties to numerous ASEAN treaties, including the ASEAN Framework Agreement on Intellectual Property Cooperation.<sup>42</sup> The ASEAN Framework Agreement on Intellectual Property Cooperation requires signatories to cooperate in areas around intellectual property legislation, particularly where it involves the implementation of international intellectual property treaties like the WCT.<sup>43</sup> Thus, Singapore's current site blocking regime is likely going to be relevant when Vietnam's government considers what should be implemented in Vietnam. In short, because of Singapore's geographic proximity and many shared multilateral treaties, a look at Singapore's site blocking regime can be informative and useful.

### A. Overview of Statutory Site Blocking in Singapore

The amendment to Singapore's Copyright Act which instituted its site blocking regime was passed without much opposition<sup>44</sup> in 2014.<sup>45</sup> The goal of Singapore's site blocking regime is to actively combat online piracy<sup>46</sup> and "empower rights owners to

<sup>38</sup> ASEAN, ASEAN Member States, <https://asean.org/about-asean/member-states/>.

<sup>39</sup> WIPO Lex, WIPO-Administered Treaties, Contracting Parties WIPO Copyright Treaty, [https://wipolex.wipo.int/en/treaties/ShowResults?search\\_what=C&treaty\\_id=16/](https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=16/).

<sup>40</sup> Singapore Ministry of Trade and Industry, Singapore ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 19 July 2018, <https://www.mti.gov.sg/-/media/MTI/improving-trade/multilateral-and-regional-forums/CPTPP/cptpp-ratification---19-july-2018.pdf/>.

<sup>41</sup> WIPO Lex, WIPO Copyright Treaty, Article 14(2).

<sup>42</sup> ASEAN, ASEAN Framework Agreement on Intellectual Property Cooperation, 15 December 1995, <https://www.aseanip.org/Portals/0/PDF/ASEANFrameworkAgreementonIntellectualPropertyCooperation.pdf/>.

<sup>43</sup> ASEAN, *supra* note 42 at Article 3(3)

<sup>44</sup> There was little to no debate recorded in parliament surrounding the amendments to the Copyright Act creating the site blocking regime. See Parliament of Singapore, Second Reading of Copyright (Amendment) Bill 2014, 7 July 2014, <http://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-100>. Parliament of Singapore, Third Reading of Copyright (Amendment) Bill 2014, 8 July 2014, <http://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-337/>.

<sup>45</sup> Ashley Chia, Amendments to Copyright Act aim to stop online piracy, Today Online, July 08, 2014, <https://www.todayonline.com/singapore/amendments-copyright-act-aim-stop-online-piracy/>.

<sup>46</sup> Parliament of Singapore, Second Reading of Copyright (Amendment) Bill 2014, *supra* note 44, (Senior Minister of State for Law (Ms Indranee Rajah): "The prevalence of online piracy in Singapore turns customers away from legitimate content and adversely affects Singapore's creative sector. It can also undermine our reputation as a society that respects the protection of intellectual property... We, therefore, need to take stronger measures against online piracy.").

more effectively disable access to sites that flagrantly infringe copyright”.<sup>47</sup> The main statutory provision instituting Singapore’s site blocking is Article 193DDA. It works by allowing for a copyright holder or exclusive licensee to petition the court for a “blocking order” or injunction directing an ISP to block access to a “flagrantly infringing online location” (FIOL).<sup>48</sup> To obtain a site blocking order the copyright holder or exclusive licensee would have to prove that 1) the website has been used or is being used to commit or facilitate copyright infringement and 2) the website is a “flagrantly infringing online location”.<sup>49</sup> In Singapore, a “flagrantly infringing online location” is defined as a website which “flagrantly infringes or facilitates infringement of copyright materials”.<sup>50</sup> In determining whether an online location is a “flagrantly infringing online location”, courts consider non-exhaustive factors as set out in the statute:<sup>51</sup>

- (a) whether the primary purpose of the online location is to commit or facilitate copyright infringement;
- (b) whether the online location makes available or contains directories, indexes or categories of the means to commit or facilitate copyright infringement;
- (c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- (d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
- (e) whether the online location contains guides or instructions to circumvent measures, or any order of any court, that disables access to the online location on the ground of or related to copyright infringement;
- (f) the volume of traffic at or frequency of access to the online location.<sup>52</sup>

Considering Singapore’s Copyright Act has historically taken inspiration from the Australian and UK’s Copyright Acts,<sup>53</sup> it should not be surprising that the factors listed and the process of obtaining a site blocking order is similar to the Australian site blocking regime, which follows a similar two-step criterion and factor test.<sup>54</sup> The factors stated above help determine if a site is a FIOL.<sup>55</sup> They ensure that sites largely operated for

<sup>47</sup> Parliament of Singapore, Second Reading of Copyright (Amendment) Bill 2014, *supra* note 44.

<sup>48</sup> Article 193DDA, Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006). See also Parliament of Singapore, Explanatory Statement for the Copyright (Amendment) Bill 2014, <https://sso.agc.gov.sg/Bills-Supp/16-2014/Published/20140529?DocDate=20140529#xn->.

<sup>49</sup> Article 193DDA(1)(b), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006). See also Parliament of Singapore, Explanatory Statement for the Copyright (Amendment) Bill 2014, *supra* note 48.

<sup>50</sup> Parliament of Singapore, *supra* note 49.

<sup>51</sup> *Id.* at 50.

<sup>52</sup> Article 193DDA(2), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006).

<sup>53</sup> David Tan, Copyright reform and what it means for your wedding photos, *Straits Times*, 17 September 2021, <https://www.straitstimes.com/opinion/copyright-reform-and-what-it-means-for-your-wedding-photos/>.

<sup>54</sup> Peter Carstairs, *supra* note 30 at 284-85. See also Australia, Copyright Amendment (Online Infringement) Act (2018), Section 115A; Justin Hughes, *supra* note 28 at 11 & 42 (noting the similarities in the Australian and Singaporean site blocking statutes).

<sup>55</sup> Parliament of Singapore, Explanatory Statement for the Copyright (Amendment) Bill 2014, *supra* note 48.

legitimate purposes are excluded<sup>56</sup> and ensure that the site blocking regime is specific and targeted at sites that “flagrantly” disregard copyright.<sup>57</sup> In essence, sites with a legitimate purpose with only incidental infringing content or piracy are not the targets of the law.<sup>58</sup> The factors also ensure that courts consider the proportionality of site blocking and ask, particularly in the case of the last factor around traffic/access, if blocking is appropriate given the circumstances and in the public interest.<sup>59</sup>

While seemingly well crafted, the statute still does not directly address how the site blocking orders would remain flexible amidst the common online practice of redirects, dynamic IP addresses, and changing domain names. To understand how Singapore came to have an effective site blocking regime that not only clearly defines infringing online locations but also allows for responsive enforcement, we look to the case of *Disney Enterprises, Inc v M1 Ltd*.

## **B. Disney Enterprises, Inc v M1 Ltd: Statutory Site Blocking in Practice and Dynamic Injunctions**

In *Disney Enterprises, Inc v M1 Ltd*, Disney, Paramount, and other rights holders sued major Singaporean ISPs seeking site blocking orders under Article 193DDA.<sup>60</sup> The plaintiff sought blocking orders concerning 53 sites or online locations which were eventually found to be “flagrantly infringing online locations” (FIOLs).<sup>61</sup> Among these 53 sites included notorious piracy site Kickass Torrents, which has also been subject to robust US enforcement.<sup>62</sup> Notably, by applying the factors stated above, Justice Lee found the mere making available of infringing content for streaming was sufficient to classify a site as a FIOL.<sup>63</sup> Furthermore, because the plaintiffs in the case sought a blocking order that would require ISPs to also block later discovered domain names and IP addresses that provide access to the same FIOLs, the court effectively established the need for dynamic injunctions as a part of a robust site blocking regime.<sup>64</sup>

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<sup>56</sup> Peter Carstairs, *supra* note 30 at 280, 291.

<sup>57</sup> Peter Carstairs, *supra* note 30 at 291-92 (stating that the primary purpose language in the Australian statute creates a high threshold inevitably leading to a site blocking regime that is specific and targeted at flagrant infringing sites). See also Parliament of Australia, Explanatory Statement for the Copyright Amendment (Online Infringement) Bill 2018, ¶ 10; Australian Department of Communication and the Arts, Regulation Impact Statement (2018), ¶83.

<sup>58</sup> Peter Carstairs, *supra* note 30 at 291.

<sup>59</sup> Peter Carstairs, *supra* note 30 at 293.

<sup>60</sup> *Disney Enterprise v. M1 Ltd.*, (2018) SGHC 206 at ¶ 1-4.

<sup>61</sup> *Disney Enterprise v. M1 Ltd.*, (2018) SGHC 206 at ¶ 24.

<sup>62</sup> US DOJ Office of Public Affairs, U.S. Authorities Charge Owner of Most-Visited Illegal File-Sharing Website with Copyright Infringement, 20 July 2016, <https://www.justice.gov/opa/pr/us-authorities-charge-owner-most-visited-illegal-file-sharing-website-copyright-infringement/>. See also Nick Statt, KickassTorrents domains seized after alleged owner is arrested in Poland, 20 July 2016, *The Verge*, <https://www.theverge.com/2016/7/20/12243592/kickass-torrents-artem-vaulin-founder-arrested-domains-seized/>.

<sup>63</sup> *Disney Enterprise v. M1 Ltd.*, (2018) SGHC 206 at ¶ 23- (“I was satisfied based on a consideration of all of the factors listed under s 193DDA (2) that the 53 websites were FIOLs. Hence, the requirement under s 193DDA(1)(b) was met. All of the 53 websites were one of the following: ... (b) A streaming target website: a website which allows end-users to directly stream copyrighted content. These sites directly make available the films to the public and thereby both infringe and facilitate infringement of copyright”)

<sup>64</sup> Victor Loh, *supra* note 31.

In his decision, Justice Lee stated that a “dynamic injunction anticipates and seeks to counteract circumventive measures that may be taken by owners or operators of the FIOs.”<sup>65</sup> These measures include changes to domain names, IP addresses, or URL redirects.<sup>66</sup> To illustrate this Justice Lee pointed to how multiple domain names, URLs, and IP addresses could be associated with one FIO and showed how over the course of the litigation some FIOs had even changed their domain names.<sup>67</sup> Hence, Justice Lee stated that “the dynamic injunction is necessary to ensure that the [original] injunction operated effectively to reduce further harm to the plaintiffs”.<sup>68</sup> He went on to further state that “Without a continuing obligation to block additional domain names, URLs and/or IP addresses upon being informed of such sites, it is unlikely that there would be effective disabling of access to the 53 FIOs”.<sup>69</sup> In short, the court found that dynamic injunctions should be a natural extension of any existing statutory site blocking regime<sup>70</sup> and are necessary to ensure the effectiveness of site blocking.<sup>71</sup>

This ruling also established the practice and precedent for dynamic site blocking.<sup>72</sup> Following the ruling, plaintiffs filing for blocking orders may file additional affidavits stating why a new website or domain name falls within the scope of an existing blocking order; the additional affidavits are then forwarded to ISPs, who can either extend the blocking order or dispute the merits of extending the blocking order.<sup>73</sup> This system creates a structure that allows for a responsive system of injunctions that can keep pace with the circumventive methods of the internet. Hence, this ruling coupled with the clarity offered by Article 193DDA of Singapore’s Copyright Act, provides for an effective site blocking regime that is both clear and responsive. As shown later, Singapore’s rather simple yet effective site blocking regime leaves much to be admired and inspired other jurisdictions in implementing effective site blocking regimes.

### III. COMING TO THE SAME CONCLUSION: COMMON LAW SITE BLOCKING IN INDIA

While Indian copyright legislation does provide for civil and criminal penalties like many other advanced nations<sup>74</sup>, site blocking in India is largely an operation of common

<sup>65</sup> Disney Enterprise v. MI Ltd., (2018) SGHC 206 at ¶ 35.

<sup>66</sup> Id. at 65, (“This would include measures taken to change the domain name, URL and/or IP address providing access to the FIO”).

<sup>67</sup> Disney Enterprise v. MI Ltd., (2018) SGHC 206 at ¶ 35-6 (“Owners or operators of FIOs are able to take measures which circumvent existing blocking orders since it is possible for a single FIO to be accessed via multiple domain names, URLs and/or IP addresses. As an illustrations of the schedule to the plaintiffs’ application sought to block the FQDNs which provide access to the FIO known as “series9”. Multiple domain names, URLs and IP addresses were associated with the “series9” FIO... For example, the primary domain name for the FIO “xmovies8” has since been changed from “xmovies8.es” to “xmovies8.nu”. As the domain name “xmovies8.nu” did not exist at the time of the application and was not listed under the plaintiffs’ schedule”)

<sup>68</sup> Disney Enterprise v. MI Ltd., (2018) SGHC 206 at ¶ 42.

<sup>69</sup> Disney Enterprise v. MI Ltd., (2018) SGHC 206 at ¶ 42.

<sup>70</sup> Disney Enterprise v. MI Ltd., (2018) SGHC 206 at ¶ 38.

<sup>71</sup> Disney Enterprise v. MI Ltd., (2018) SGHC 206 at ¶ 42.

<sup>72</sup> Justin Hughes, *supra* note 28 at 11; See also Victor Loh, *supra* note 31.

<sup>73</sup> Disney Enterprise v. MI Ltd., (2018) SGHC 206 at ¶ 45. See also Justin Hughes, *supra* note 28 at 11-12.

<sup>74</sup> India Copyright Act, 1957, No. 14, § 55, Acts of Parliament, 1957 (India), India Copyright Act, 1957, No. 14, §§ 63, 63A, Acts of Parliament, 1957 (India). See also Arpan Banerjee, Copyright Piracy and the Indian Film Industry: A “Realist” Assessment, 34 *Cardozo Arts & Ent. L.J.* 609, 661 (2016).

law.<sup>75</sup> India possesses a billion-dollar film industry<sup>76</sup> that is dependent on the protection of intellectual property to grow and remain profitable.<sup>77</sup> The existence of a site blocking regime has been recognized as an area of success for copyright law in India, where there seems to be a prevalent culture of online piracy.<sup>78</sup> Indian courts have been issuing site blocking orders for years and become a part of addressing online piracy.<sup>79</sup> However, unlike Singapore, India did not arrive at its site blocking regime instantly. It was only through numerous judgments did India largely feel its way towards clear legal standards which identify infringing online locations and subsequently responsive enforcement mechanisms. Throughout this process, various Indian courts have had to address concerns around site blocking.<sup>80</sup> Therefore, India's experience in common law site blocking can prove instructive in addressing concerns around site blocking and understanding what makes an effective site blocking regime.

### A. Overview of Site Blocking in India

Website blocking orders from Indian courts have become a common and reliable means of copyright enforcement.<sup>81</sup> In fact in certain industries, like the film industry, there has been a noticeable trend towards pre-emptive site blocking injunctions against infringing sites since 2011.<sup>82</sup> Because India's common law site blocking regime was largely developed through various judgements,<sup>83</sup> the evolution of India's site blocking regime has been mostly a patchwork process. Initially, the broad wording of some site blocking orders led to ISPs blocking entire websites<sup>84</sup> and some "over-blocking".<sup>85</sup> This was eventually corrected by another case where the court limited site blocking orders to

<sup>75</sup> Justin Hughes, *supra* note 28 at 10.

<sup>76</sup> FE Bureau, India Box Office collections: Regional cinema led by Telugu, Tamil movies overtakes Bollywood, *Financial Express*, July 11, 2020, <https://www.financialexpress.com/entertainment/bollywoods-big-but-regional-cinema-is-also-raking-in-the-moolah/2020134/>; PTI, Indian film industry's gross box office earnings may reach \$3.7 billion by 2020: Report, *DNA INDIA*, September 26, 2016, <https://www.dnaindia.com/entertainment/report-indian-film-industry-s-gross-box-office-earnings-may-reach-37-billion-by-2020-report-2258789/>.

<sup>77</sup> Nigel Cory, *supra* note 36.

<sup>78</sup> Arpan Banerjee, *supra* note 74 at 609, 672.

<sup>79</sup> See, e.g., *Reliance v. Jyoti Cable*, (2011) Civil Suit No. 1724 of 2011 (Del. H.C.) (Jul. 20, 2011) (India); *Fox v. Macpuler*, (2015) Civil Suit No. 2066 of 2011 (Delhi H.C.) (May 14, 2015) (India), *Vodafone v. R.K. Productions* (2013) 54 P.T.C. (Mad. H.C.) 149, (India), *Yash Raj Films v. Bharat Sanchar Nigam*, Civil Suit No. 692 of 2016 (Bom. H.C. July 4, 2016); *UTV Software Communication Ltd. V 1337X*, (2019) Civil Suit No. 768 of 2018 (Del. H.C.) (Apr. 10, 2019) (India). See Also Javed Anwer, *supra* note 20; Anupam Saxena, *supra* note 20.

<sup>80</sup> See e.g. *UTV Software Communication Ltd. V 1337X*, (2019) Civil Suit No. 768 of 2018, ¶¶ 21 (concerns around the proportionality of site blocking), 50 (concerns that online infringement should be treated differently than physical infringement), 55 (concerns around maintaining a free and open internet) (Del. H.C.) (Apr. 10, 2019) (India).

<sup>81</sup> Arpan Banerjee, *supra* note 74 at 609, 669.

<sup>82</sup> Arpan Banerjee, *supra* note 74 at 609, 666.

<sup>83</sup> Justin Hughes, *supra* note 28 at 10.

<sup>84</sup> Arpan Banerjee, *supra* note 74 at 609, 667; See also Kunal Dua, Confusion Reigns as Indian ISPs Block Vimeo, Torrent Websites, *NDTV* (May 17, 2012), <http://gadgets.ndtv.com/internet/news/confusion-reigns-as-indian-isps-block-vimeo-torrent-websites-223340>; Nikhil Pawa, Update: Files Sharing Sites Blocked In India Because Reliance BIG Pictures Got A Court Order, *MEDIANAMA* (July 21, 2011), <http://www.medianama.com/2011/07/223-files-sharing-sites-blocked-in-india-because-reliance-big-picturesgot-a-court-order>; See also e.g., *Reliance v. Jyoti Cable*, (2011) Civil Suit No. 1724 of 2011 (Del. H.C.) (Jul. 20, 2011) (India)

<sup>85</sup> Peter Carstairs, *supra* note 30 at 286.

only the URLs that were specifically hosting infringing content.<sup>86</sup> However, by narrowly tailoring site blocking orders to specific URLs, it became difficult to enforce them when infringers simply changed their URL or domain names.<sup>87</sup> The sometimes overbroad, inadequate, or contradictory site blocking orders, and corollary international developments in site blocking eventually led to the case of UTV Software Communication Ltd. V 1337X.<sup>88</sup>

## **B. UTV Software Communication Ltd. ... v 1337X: Common Law Site Blocking and Dynamic Injunctions**

In the 2019 case of UTV Software Communication Ltd. v. 1337X, companies that were in the business of creating content, producing, and distributing films in India sued a host of defendants, including infringing websites, ISPs, and relevant Indian government agencies.<sup>89</sup> The plaintiffs sought an order directing ISPs to block access to a number of infringing websites like “1337.to” and “yts.am”.<sup>90</sup> These websites were eventually found to be “rogue sites” or FIOs.<sup>91</sup> Addressing the “threat” a site blocking regime poses to internet freedom, Justice Manmohan stated that a site blocking regime was not inconsistent with a free and open internet.<sup>92</sup> He also further iterated the need for the law to address online infringement no differently from offline infringement.<sup>93</sup>

The opinion then proceeded to distinguish between accidental and intentional piracy.<sup>94</sup> Doing so requires effectively defining the scope of what a “rogue website” or “flagrantly infringing online location” (FIOs) is.<sup>95</sup> This involves considering the proportionality of granting a site blocking order and creating a means of evaluating online

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<sup>86</sup> Vodafone v. R.K. Productions (2013) 54 P.T.C. (Mad. H.C.) 149, ¶ 4 (India) (quoting an earlier order where the court had stated that “the interim injunction is granted only in respect of a particular URL where the infringing movie is kept and not in respect of the entire website.”).

<sup>87</sup> Arpan Banerjee, *supra* note 74 at 609, 668-9; See also Deity v. Star, Review Petition in First Appeal Order No. 57 of 2015, ¶ 14 (Del. H.C. July 29, 2016), available at <http://lobis.nic.in/ddir/dhc/PNJ/judgement/29-07-2016/PNJ29072016REVIEWPET1312016.pdf/>.

<sup>88</sup> The case cites and points to various international developments in site blocking that it uses to decide the issue. See UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶¶ 11, 88-93, 97-98 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>89</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶¶ 2-4 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>90</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶¶ 2-4 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>91</sup> Nigel Cory, *supra* note 36.

<sup>92</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 55 (Del. H.C.) (Apr. 10, 2019) (India) (“just as supporting bans on the import of ivory or cross-border human trafficking does not make one a protectionist, supporting website blocking for sites dedicated to piracy does not make one an opponent of a free and open Internet. Consequently, this Court is of the opinion that advocating limits on accessing illegal content online does not violate open Internet principles.”).

<sup>93</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 53 (Del. H.C.) (Apr. 10, 2019) (India) (“should an infringer of the copyright on the Internet be treated differently from an infringer in the physical world? If the view of the aforesaid Internet exceptionalists school of thought is accepted, then all infringers would shift to the e-world and claim immunity! A world without law is a lawless world. In fact, this Court is of the view that there is no logical reason why a crime in the physical world is not a crime in the digital world especially when the Copyright Act does not make any such distinction”).

<sup>94</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 57 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>95</sup> Peter Carstairs, *supra* note 30 at 291-93.

behavior.<sup>96</sup> After an exhaustive review of site blocking regimes internationally, including Singapore,<sup>97</sup> the court eventually arrived at a non-exhaustive list of factors to determine if a site is “rogue” or a FIOI.<sup>98</sup> The list of factors are presented below alongside Singapore’s aforementioned statutory factors:

UTX v. 1337X Factors <sup>99</sup>	Singapore Statutory Factors <sup>100</sup>
(a) Primary Purpose of the website	1. Primary Purpose of the website is to commit or facilitate copyright infringement
(b) Flagrancy of infringement or facilitation of infringement	
(c) There is no traceable or personal detail of the person who registered the website	
(d) Silence or Inaction by the website after receipt of take down notices for copyright infringement	
(e) The website makes available or contains directories, indexes or categorizes means to infringe or facilitates infringement	2. The website makes available or contains directories, indexes or categorizes means to infringe or facilitates infringement
(f) The owner or operator of the site displays a disregard for copyright generally	3. The owner or operator of the site displays a disregard for copyright generally
(g) Access to the website has been disabled by orders from other jurisdictions for copyright infringement	4. Access to the website has been disabled by orders from other jurisdictions for copyright infringement
(h) The website contains guides or instructions to circumvent measures or	5. The website contains guides or instructions to circumvent measures or

<sup>96</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶¶ 57, 75-82 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>97</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 11 (Del. H.C.) (Apr. 10, 2019) (India). See also Article 193DDA, Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006). See also Parliament of Singapore, Explanatory Statement for the Copyright (Amendment) Bill 2014, supra note 48; Australia, Copyright Amendment (Online Infringement) Act (2018), Section 115A; Justin Hughes, supra note 28 at 9-11.

<sup>98</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 59 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>99</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 59 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>100</sup> Article 193DDA(2), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006).

orders of any court that blocks the site due to copyright infringement	orders of any court that blocks the site due to copyright infringement
(i) Volume of traffic or frequency of access to the website	6. Volume of traffic or frequency of access to the website
(j) Any other relevant matter	

The similarity of these factors reflects a consensus around clear and effective standards which define a “rogue website” or FIOI. Furthermore, the factors have also been regarded in other jurisdictions as a means to ensure that sites largely operated for legitimate purposes are excluded and ensure that a site blocking regime is specifically targeted at sites that “flagrantly” disregard copyright.<sup>101</sup> They reflect a basic understanding that one of the first issues when designing a site blocking regime is to ensure that it only applies to FIOIs or “rogue websites” and to avoid the practice of “over-blocking”. One of the best ways to do that is to have a proportionate criterion in making that determination.

Justice Manmohan Singh then also addresses the question of how to make site blocking effective against the practice of “hydra headed rogue websites” resurfacing under mirror websites, changed domain names, or dynamic IP addresses.<sup>102</sup> Explicitly drawing lessons from the Singapore High Court’s judgment in *Disney Enterprises, Inc v M1 Ltd*, the court similarly established a practice of dynamic injunctions to ensure that site blocking orders were effective.<sup>103</sup> Unsurprisingly, the court implemented a similar procedure for the administration of dynamic injunctions allowing for plaintiffs to submit affidavits asserting with evidence that a website is merely a mirror, redirect, or changed IP address of an already blocked site.<sup>104</sup> The reason for dynamic injunctions is a natural extension of the court’s qualitative determination of “rogue websites”. When considering a blocking order against a site, a court evaluates the site’s primary purpose qualitatively to determine if the actions of the site are infringing.<sup>105</sup> This is different from considering it quantitatively, which will limit the court to considering specific URLs or domain names in isolation and blocking orders will lack the breadth necessary to combat the evasive

<sup>101</sup> Peter Carstairs, *supra* note 30 at 291-92 (stating that the primary purpose language in the Australian statute creates a high threshold inevitably leading to a site blocking regime that is specific and targeted at flagrant infringing sites). See also Article 193DDA(2), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006); Parliament of Australia, Explanatory Statement for the Copyright Amendment (Online Infringement) Bill 2018, ¶ 10; Australian Department of Communication and the Arts, Regulation Impact Statement (2018), ¶83. Compare *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005) (“We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties”).

<sup>102</sup> *UTV Software Communication Ltd. V 1337X*, (2019) Civil Suit No. 768 of 2018, ¶ 94-95 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>103</sup> *UTV Software Communication Ltd. V 1337X*, (2019) Civil Suit No. 768 of 2018, ¶ 100 (Del. H.C.) (Apr. 10, 2019) (India). See also *Disney Enterprise v. M1 Ltd.*, (2018) SGHC 206 at ¶ 35, 38, 42 (Singapore H.C.) (Singapore)

<sup>104</sup> *UTV Software Communication Ltd. V 1337X*, (2019) Civil Suit No. 768 of 2018, ¶ 101 (Del. H.C.) (Apr. 10, 2019) (India); See also *Disney Enterprise v. M1 Ltd.*, (2018) SGHC 206 at ¶ 45 (Singapore H.C.) (Singapore)

<sup>105</sup> *UTV Software Communication Ltd. V 1337X*, (2019) Civil Suit No. 768 of 2018, ¶ 61 (Del. H.C.) (Apr. 10, 2019) (India).

practices of “rogue websites”.<sup>106</sup> Indeed, the court also suggests that a site changing URLs and domain names to evade a court order in effect shows that the site is “rogue” because it displays a blatant disregard for copyright and the site blocking order.<sup>107</sup> Therefore, the court in India has found dynamic injunctions as a natural approach towards maintaining the effectiveness of a site blocking regime.

#### IV. A CIVIL LAW APPROACH: SITE BLOCKING IN FRANCE

It is important to note that unlike Singapore, India, or the United States, Vietnam is a code-based civil law system rather than a common law system. This is largely a feature of Vietnam’s colonial history and geography. As a former French colony and communist country, it should not be surprising that Vietnam’s legal system is strongly influenced by the historical French code system, Chinese law, and later communist Soviet law.<sup>108</sup> In fact, in its most recent constitutional redrafting, both French and Chinese law were used in various areas as points of reference.<sup>109</sup> In broad strokes, civil or code law jurisdictions regard the legal code as the primary source of law.<sup>110</sup> The cases that arise out of the code are reviewed in isolation on a case-by-case basis without any precedential value.<sup>111</sup> The role of civil code legislation is to be as broad as possible to anticipate the wide variety of potential scenarios.<sup>112</sup> While the differences between Vietnam’s code-based system and the common law jurisdictions covered above seem like an obstacle to implementing site blocking in Vietnam, other code-based nations’ experiences in site blocking show it is possible.<sup>113</sup> Because of its historical influence on Vietnamese law, it is helpful to also look at how France’s code-based civil law system has implemented an effective site blocking regime, based on similar principles of clear legal standards targeting online piracy and responsive enforcement measures.

Within the EU, site blocking begins with the 2001 Information Society Directive. Article 8(3) of the directive provides for the ability for copyright owners to obtain “no fault” injunctions against ISPs to block pirated websites.<sup>114</sup> The French legislature has codified this in the French intellectual property code and its laws for the digital

<sup>106</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 63 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>107</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 67 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>108</sup> Carol V. Rose, The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study, *Law & Society Review*, Vol. 32, No. 1, 93, 96-100, (1998).

<sup>109</sup> BUI NGOC SON, Contextualizing the Global Constitution-Making Process: The Case of Vietnam, 64 *Am. J. Comp. L.* 931, 945-47 (2016).

<sup>110</sup> The World Bank, Key Features of Common Law or Civil Law Systems, <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law>

<sup>111</sup> Thomas H. Reynolds (1998). “Introduction to Foreign and Comparative Law”. In Rehberg, Jeanne; Popa, Radu D (eds.). *Accidental Tourist on the New Frontier: An Introductory Guide to Global Legal Research*, 47& 58.

<sup>112</sup> Alain Levasseur, Code Napoleon or Code Portalis?, 43 *Tul. L. Rev.* 762, 769 (1969) (The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details.)

<sup>113</sup> Most of the EU countries named including France, Germany, and Greece are civil law jurisdictions that have issued site blocking injunctions, see Justin Hughes, *supra* note 28 at 7.

<sup>114</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 8, 2001 O.J. (L 167); Justin Hughes, *supra* note 28 at 7.

economy.<sup>115</sup> In applying these laws, French courts have issued site blocking orders not only in cases of copyright infringement<sup>116</sup> but also trademark issues.<sup>117</sup> Furthermore, France has recently been considering administrative measures implementing site blocking like a blacklist of piracy sites.<sup>118</sup> Various European courts have also blocked sites in cases where infringing link without the right holder's permission was hosted<sup>119</sup> and in cases where video sites were found to be “fully dedicated or virtually dedicated” to copyright infringement.<sup>120</sup> The relevant legislation and cases suggest that even in a code-based system, it is possible to have a site blocking regime that is clear and responsive.

French civil courts have also been open to ordering dynamic injunctions against ISPs to address evasive measures taken by some infringing websites.<sup>121</sup> In a case brought by various scientific publishing companies against ISPs seeking dynamic injunctions against infringing sites, the French court applying the aforementioned laws found dynamic injunctions appropriate.<sup>122</sup> This decision was based on similar concerns surrounding the evasive measures taken by some infringing sites in changing domain names and access paths.<sup>123</sup> Similar decisions can be found in many other EU member states with civil law

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<sup>115</sup> Article 6 I 8° of the Law for confidence in the digital economy, (“The judicial authority may prescribe, in summary proceedings or on application, to any person mentioned in 2 (host) or, failing that, to any person mentioned in 1 (ISP), any measures to prevent damage or to put an end to damage caused by the content of a communication service to the public online”); Article L. 336-2 of the French Intellectual Property Code, (“In the event of an infringement of copyright or a related right caused by the content of a communication to the public online service, the president of the judicial court ruling according to the accelerated procedure on the merits may order, at the request of the owner of rights in protected works and objects, their successors in title, collective management bodies governed by Title II of Book III or professional defense bodies referred to in Article L.”. 331-1, any measures to prevent or stop such infringement of copyright or a related right, against any person likely to contribute to remedying it. The request may also be made by the Centre national du cinéma et de l’image animée”). See also Alya Bloum, French Supreme Court: Internet intermediaries must pay for blocking measures against illegal streaming websites, August 3, 2017, Hogan Lovells Global Media and Communications Watch, <https://www.hlmediacomms.com/2017/08/03/french-supreme-court-internet-intermediaries-must-pay-for-blocking-measures-against-illegal-streaming-websites/>.

<sup>116</sup> Clara Hainsdorf & Bertrand Liard, French Courts Ordered to Block and Delist 16 Streaming Websites, *JD SUPRA*, Jan. 13, 2014, <https://www.jdsupra.com/legalnews/french-courts-ordered-to-block-and-delis-08092/>.

<sup>117</sup> Anne-Marie Pecoraro, Rodolphe Boissau, Trademark law: counterfeiting. A look back at two trademark court decisions allowing site-blocking of massively infringing sites in France., Dec. 11, 2020, <https://www.uggc.com/en/trademark-law-counterfeiting-a-look-back-at-two-trademark-court-decisions-allowing-site-blocking-of-massively-infringing-sites-in-france/>.

<sup>118</sup> Nigel Cory, *supra* note 6; Ernesto Van der Sar, French Minister of Culture Calls For Pirate Streaming Blacklist, April 23, 2018, <https://torrentfreak.com/french-minister-of-culture-calls-for-pirate-streaming-blacklist-180423/>.

<sup>119</sup> *UPC Telekabel Wien v. Constantin Film Verleih*, Court of Justice of the European Union, Case C-314/12, ¶ 25, March 27, 2014 (“it must be stated that an act of making protected subject-matter available to the public on a website without the rightholders’ consent infringes copyright and related rights”); See also *UTV Software Communication Ltd. V 1337X*, (2019) Civil Suit No. 768 of 2018, ¶ 9 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>120</sup> Clara Hainsdorf & Bertrand Liard, *supra* note 116.

<sup>121</sup> European Union Intellectual Property Office, *supra* note 26 at 35 (“Dynamic blocking injunctions are available – and have been granted – in most SMS, including Denmark, France, Ireland, Italy, the Netherlands, Spain, Sweden, and the UK”). It could be argued that France imposes a heavier burden on ISPs to police evasive measures undertaken by infringing sites through dynamic injunctions. See Supreme Court of France (Cour De Cassation), 6 July 2017, 16-17.217 (France); Tribunal de grande instance de Paris, 23 May 2019, RG 19/001744 (France).

<sup>122</sup> Tribunal de grande instance de Paris, 7 March 2019, 18/14194 (France). See also, *supra* note 26 at 77-78.

<sup>123</sup> *Id.* at 122.

systems.<sup>124</sup> Therefore, when taken together, the French experience and that of many other EU civil law regimes show that a clear and effective site blocking regime is possible in a civil law jurisdiction. Vietnam should be no exception.

## V. CLEARING THE FOG: THE NEED FOR EFFECTIVE SITE BLOCKING IN VIETNAM

Vietnam has a rapidly growing online marketplace and a vibrant online infringement culture.<sup>125</sup> Sixty percent of all internet consumers in Vietnam openly admit to streaming on piracy sites.<sup>126</sup> While there are laws that attempt to address the problem of online piracy,<sup>127</sup> the reality is that Vietnam's current framework allows for a fair amount of online piracy.<sup>128</sup> However, it is long overdue for Vietnam to address these issues.<sup>129</sup> With Vietnam's accession to both the CPTPP<sup>130</sup> in 2018 and the WCT at the end of 2021,<sup>131</sup> this has not been more pressing. The previously discussed cases and jurisdictions show that Vietnam has plenty of good examples to follow in establishing an effective site blocking regime with clear legal standards targeting online piracy and responsive enforcement measures to keep up with infringers. They also provide significant guidance on how to consider the potential issues that arise when establishing an effective site blocking regime. However, a lack of clarity and efficacy in Vietnam's intellectual property laws as well as structural issues in Vietnam's economic system pose challenges to the direct application of the previously discussed models.

### A. Copyright Protection in Vietnam: A Lack of Clarity and Efficacy

If a clear and responsive site blocking regime is possible, there is a natural question around why Vietnam's current system is inadequate. While the existence of the Vietnamese Law on Intellectual Property and its associated regulations seem to suggest some form of copyright protection that can be used to combat online piracy, Vietnam

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<sup>124</sup> European Union Intellectual Property Office, Study on Dynamic Blocking Injunctions in the European Union, *supra* note 26 at 110-132; See also e.g. Maritime and Commercial Court (Sø- & Handelsretten), Case Number A-51-17, 21 February 2018, Fritz Hansen A/S and Others (represented by Rettighedsalliancen SMF.) v Telia Danmark A/S and Dominidesign Furniture LTD (Denmark); Sony Music Entertainment (Ireland) & Ors v UPC; Communications Ireland Limited [2016] IECA 231 (Ireland); Amsterdam Court of Appeal, Brein v. Ziggo and XS4ALL, 2 June 2020, ECLI:NL:GHAMS:2020:1421 (Netherlands); Court of Milan, Ordinanza N.42163/2019 R.G. of 5 October 2020, Sky Italia, Lega Serie A V Cloudflare and Others (Italy).

<sup>125</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 108.

<sup>126</sup> New survey shows Vietnam among highest in online piracy in Southeast Asia., *supra* note 7.

<sup>127</sup> See Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property; Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, *supra* note 127.

<sup>128</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 106.

<sup>129</sup> See *supra* where Vietnam is failing their TRIPS obligations. See also IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 110.

<sup>130</sup> Government of New Zealand, *supra* note 16.

<sup>131</sup> In short, when Vietnam signed the CPTPP, it took out a reservation on accession to the WCT for three years. This means that Vietnam was allowed to sign the treaty as long as it acceded to the WCT within 3 years. Since the treaty went into effect on December 31, 2018, three years from then is December 31, 2021. See CPTPP, *supra* note 17 at 18-5, 18-64.

suffers from an absence of law and accountability necessary for its already poor enforcement mechanisms.<sup>132</sup>

### 1. Vietnam's Law on Intellectual Property

Because Vietnam is a civil code jurisdiction, understanding the copyright protections in Vietnam begins with its intellectual property code.<sup>133</sup> While the law provides for the possibility of administrative sanction and certain remedies for copyright infringement, it does not currently state any form of secondary liability.<sup>134</sup> This is highly problematic when considered in the context of online piracy because most infringers are not ISPs hosting infringing content but are end-users who use an ISP's services to access infringing sites. The lack of secondary liability leaves rights holders with little recourse against online piracy. The problem is further exacerbated when one recalls that secondary liability is largely an operation of common law.<sup>135</sup> Without statutes like the aforementioned French provisions which allow courts to hold third-parties accountable,<sup>136</sup> it is unclear how much authority Vietnamese courts have over ISPs. With such a lack of clarity over the law, it would be difficult to hold ISPs accountable much less ask them to block sites. Thus, the lack of ISP accountability has allowed for purveyors of online piracy and their end-users to effectively escape any form of consequences.

### 2. Circular 07

Interestingly, in 2012, the Ministry of Information and Communications in Vietnam released Joint Circular 07/2012/TTLT- BTTTT – BVHTTDL, stipulating the duties of enterprises providing intermediary service, like ISPs, in the protection of copyright and related rights on the Internet and in the telecommunication networks environment.<sup>137</sup> It imposed a duty on ISPs and intermediaries to take down infringing content and terminate services under certain circumstances,<sup>138</sup> and only under state direction.<sup>139</sup> Article 5 of Circular 07 does this by stipulating that ISPs have a duty to remove and delete “content of digital information which violates copyright and related rights, cutting, stopping and suspension of the Internet line, telecommunication line as receiving request in written of the inspector of the Ministry of Information and Communications or inspector of the Ministry of Culture, Sports and Tourism or other competent State agencies as prescribed

<sup>132</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 106-7.

<sup>133</sup> Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property, supra note 127.

<sup>134</sup> I cannot prove a negative but the law will be cited so people can see for themselves. Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property, supra note 127; See also IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 112.

<sup>135</sup> 3 Nimmer on Copyright § 12.04 (2021).

<sup>136</sup> Notice these statutes both allow for the holding of third parties to the infringement accountable, Article 6 I 8° of the Law for confidence in the digital economy, see supra note 115; Article L. 336-2 of the French Intellectual Property Code, supra note 115.

<sup>137</sup> Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, supra note 127 at Article 5.

<sup>138</sup> Id. at 137.

<sup>139</sup> Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, supra note 127 at Article 5; IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 112.

by law".<sup>140</sup> Despite the existence of such regulation, this authority has been used in practice only in very narrow circumstances where online services and websites are directly infringing.<sup>141</sup> This is likely because Circular 07 does not spell out clear penalties against ISPs for violating such a duty and a general lack of enforcement by the Vietnamese government.<sup>142</sup>

Further, the type of blocking provided in Circular 07 may only apply to websites that use the "internet services of a Vietnam company," i.e., if an infringing website uses a host that is provided by a Vietnamese company, registered a domain name with a Vietnamese Company (Vietnamese registrar), or uses an IP address that is managed by a Vietnamese company.<sup>143</sup> If this is correct, the effectiveness of the website blocking provision will be greatly different and even reduced<sup>144</sup>, as it does not account for the borderless nature of online piracy. Moreover, it does not seem like Circular 07 allows for dynamic injunctions or blocking against ISPs. When placed together with Vietnam's Law on Intellectual Property, it is hard to see any concrete avenues for rights holders to hold ISPs accountable for the rampant online piracy that is occurring in Vietnam. The main issue with Circular 07 is not that it does not create some form of site blocking in Vietnam, but rather it creates a form of site blocking so toothless that it is ineffective.

### 3. Structural Problems

Moreover, there are issues with Vietnam's legal and market system which contribute to a culture of online piracy. Vietnam has and continues to have restrictions preventing foreign companies from setting up subsidiaries to distribute "cultural products" and has entry barriers around the importation and distribution of copyrighted works.<sup>145</sup> These restrictions on market access fosters a demand for pirated content, which inevitably pushes Vietnamese consumers towards their illegal alternatives.<sup>146</sup>

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<sup>140</sup> Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, *supra* note 127 at Article 5.

<sup>141</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 112.

<sup>142</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 107; See also Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, *supra* note 127.

<sup>143</sup> Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, *supra* note 127 at Article 1; IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 112.

<sup>144</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 112.

<sup>145</sup> Nguyen Huy Hoang, Ho Thi Le Tra, Market access conditions applied to foreign investors under Decree No. 31/2021/nd-cp, Lexology, 20 September 2021, <https://www.lexology.com/library/detail.aspx?g=35eb4d79-ad70-4865-8fc6-6a03760f6a6e/>; See also IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 112.

<sup>146</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 112.

Another issue is that no John Doe suits are allowed for the enforcement of copyright.<sup>147</sup> This means that, unlike in India, in order to sue for infringement rights holders are required to acquire evidence of each infringer. The lack of John Doe suits and the impossibility of investigation, when placed together with the fact that the Vietnamese have been known to impose onerous and detailed requirements around the identification of infringers<sup>148</sup> are all indicative of an enforcement system that is not necessarily functioning. It should come as no surprise that to date there has never been any criminal proceeding brought for online infringement.<sup>149</sup> More significantly, they pose problems for rights holders who may eventually wish to seek redress via a site blocking order but cannot because they lack the ability to ascertain if there is infringement or who is infringing.

Further, Vietnam has laws around foreigners conducting investigations which prevents rights holders from effectively discerning if their works are being infringed or gathering evidence to meet Vietnam's already amorphous yet onerous standards around online piracy and copyright enforcement.<sup>150</sup>

## **B. Site Blocking in Vietnam: Possible Approaches**

While a complex array of overlapping factors seems to be the reason behind Vietnam's currently lackluster copyright regime, the main obstacle seems is a lack of effective ISP regulation. When ISPs are not compelled to move against infringement it creates an environment where the online world is insulated from laws. This creates a flight of infringers online to escape the reach of the law.<sup>151</sup> This is happening online in Vietnam.<sup>152</sup> Thus, any solution to online piracy in Vietnam must be able to bring the law into the online world. Effective site blocking arises as a means for bringing physical legal consequences into the online sphere. By enacting a clear, and responsive site blocking regime, Vietnam can begin to hold ISPs accountable for the infringing activity that they facilitate and prevent infringers from accessing those sites. However, if there are any lessons to be learned from Vietnam's experience with Circular 07 and other countries' experiences, site blocking regimes cannot be limited by the geographic location or domain names. They must be allowed to act on any site based on the qualitative nature of the site towards copyright infringement. The enactment of such a regime can happen in Vietnam in many ways, this note looks proposes two possible approaches that are feasible and considers their effect on online piracy in Vietnam.

### **1. A Statutory Approach**

One approach Vietnam could take to institute a site blocking regime would be to draw from the Singaporean or French experiences and introduce statutory measures which

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<sup>147</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 106.

<sup>148</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 108-9.

<sup>149</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 109.

<sup>150</sup> *Id.* at 148.

<sup>151</sup> *UTV Software Communication Ltd. V 1337X*, (2019) Civil Suit No. 768 of 2018, ¶ 53 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>152</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 108.

directly enact a Vietnamese site blocking regime that reflects current international norms. This could happen in two ways. Vietnam could, drawing from their French tradition, embrace the broad approach that is traditional to civil law jurisdictions<sup>153</sup> and enact a broad statute allowing for rights holders to apply for injunctions when ISP services are being used to infringe copyright. A broad statute establishing such a site blocking regime is likely to look like Article 8(3) of the EU, 2001 Information Society Directive or the other French statutes mentioned above<sup>154</sup>. This would largely leave effective enforcement to Vietnam's courts. Alternatively, Vietnam could look to its neighbor Singapore and enact a rather tailored statute, which clearly identifies the scope of the site blocking regime. Such a statute would not look very different from those in Australia.<sup>155</sup>

In light of Vietnam's existing judicial and statutory system, this approach does not seem wise. Given the onerous evidentiary requirements and inability of foreign rights holders to investigate any infringement<sup>156</sup>, it is unlikely that such an approach would be able to successfully change the status quo. In fact, this becomes all the more obvious when there has been a conversation around court reform in Vietnam, particularly in the intellectual property space.<sup>157</sup>

Furthermore, while a tailored statutory framework may provide more guidance to Vietnam's courts in their implementation of a site blocking regime, it still does not solve the fact that cases will have to be brought within Vietnam's onerous evidentiary and investigatory laws.<sup>158</sup> The above analysis shows that any statutory approach altering Vietnam's legal code towards establishing a site blocking regime would likely require secondary legal reforms to even remotely be able to operate. This makes it unlikely that such an approach will have much success in helping Vietnam achieve a more robust copyright regime.

## 2. Administrative Approach

A more promising approach towards introducing an effective site blocking regime in Vietnam is via administrative law. This approach largely relies on the fact that Circular 07 has already given Vietnamese inspectors at the Ministry of Information and Communications or the Ministry of Culture, Sports, and Tourism the authority to impose a duty on ISPs to takedown infringing content and stop access.<sup>159</sup> Given that those ministries already have the power to impose site blocking orders on ISPs, one possibility would be the creation of more regulations outlining how rights holders can petition the

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<sup>153</sup> *Id.*, at 112.

<sup>154</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 8, 2001 O.J. (L 167)

<sup>155</sup> Peter Carstairs, *supra* note 30 at 284-85. See also Australia, Copyright Amendment (Online Infringement) Act (2018), Section 115A; Professor Justin Hughes, response to questions from Senators Tillis, Coons, and Blumenthal, Senate Judiciary Committee / Intellectual Property Subcommittee, 11 & 42, 14 April 2020 (noting the similarities in the Australian and Singaporean site blocking statutes).

<sup>156</sup> *Id.* at 148.

<sup>157</sup> IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, *supra* note 9 at 113.

<sup>158</sup> *Id.*, at 148.

<sup>159</sup> Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, *supra* note 127 at Article 5(3).

various ministries for relief. This approach has the benefit of allowing the Vietnamese government the flexibility to leave most of their current legal framework entirely intact and simply shift its approach to online piracy within its governmental bureaucracy. This is because a regulatory approach via administrative law allows the Vietnamese ministries to simply stipulate whatever it wishes to consider when asking an ISP to block a site. This would bypass any conflicts with existing issues concerning onerous evidentiary requirements and help lessen the effect of restrictive foreign investigation restrictions.

However, as we have observed from the international experience with site blocking, effective site blocking regimes operate best when there are clear standards are establishing FIOs followed by flexible and responsive enforcement. This responsive enforcement is usually categorized by allowing for the subsequent blocking of the same sites under changed domain names, URLs, IP addresses, and more. As such this administrative approach is likely to look like the blacklist of illicit sites that the French were considering,<sup>160</sup> with the procedure for filings mirroring satisfaction of the factors articulated in the Indian and Singaporean experiences in defining FIOs. It should also allow for blocking orders from the ministries to function like dynamic injunctions by allowing subsequent affidavits to be submitted to allow changes in domain names, URLs, and IP address, to be added to the blacklist.

While seemingly effortless, the establishment of a site blocking regime via the ministries may require the ministries to amend Circular 07 to address what happens in the event ISPs do not comply with an administrative order. This is so site blocking orders from the ministry are obeyed and have teeth. Furthermore, an administrative driven approach to site blocking would not be difficult for the Vietnamese government to implement but may require an increase in the number and effectiveness of its administrative personnel to adequately address the various petitions that will inevitably be filed. It should also be noted that such an approach does place a disproportionate amount of power to censor the internet in the hands of the Vietnamese government.<sup>161</sup> Despite this, an administrative approach to site blocking in Vietnam seems like the most efficient and painless approach possible.

## CONCLUSION

The growth and expansion of Vietnam's online marketplace poses serious challenges to effective copyright enforcement, especially in light of its intellectual property laws. Vietnam's increasing economic development and accession to various economic treaties makes it an increasingly attractive location for investment in the global economy. This includes many domestic and foreign authors and copyright holders who may want to sell and distribute their works to a captive audience. However, the prevalence of online piracy in Vietnam poses a major obstacle to the development of Vietnam's creative economy. Vietnam's recent ratification of the CPTPP and accession to the WCT late last year, make how Vietnam eventually addresses online piracy all the more pertinent. At first glance, Vietnam's online piracy appears to be a challenging problem. Fortunately, many nations have effectively dealt with the threat of online piracy to

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<sup>160</sup> Nigel Cory, *supra* note 6; Ernesto Van der Sar, *supra* note 118.

<sup>161</sup> There has been some commentary that such unilateral power over copyright law can have effects on the nature of free speech, particularly in countries with more communistic style governments, See Stephen McIntyre, *The Yang Obey, but the Yin Ignores: Copyright Law and Speech Suppression in the People's Republic of China.*, 29 UCLA PAC. BASIN L.J. 75, 77-81(2011).

copyright through the implementation of site blocking. Vietnam's Asian neighbors are no strangers to site blocking and can serve as guides for what might be possible in Vietnam. Ideally, good site blocking regimes possess clear rules which allow for the identification of FIOs and responsive enforcement mechanisms to address guileful bad actors. In common law jurisdictions, like India<sup>162</sup> and Singapore<sup>163</sup>, this has resulted in clear factor tests followed by dynamic injunctions. In contrast, civil law jurisdictions have also found success in well-constructed broad statutes that allow their courts to effectively address the idiosyncrasies of the case in front of them. The bitter pill is that Vietnam has a myriad of options and jurisdictions from which it can take lessons to implement an efficient copyright enforcement regime that includes site blocking as one of its tools. However, none of those options that currently exist can be implemented without some changes to Vietnam's existing framework. This is further exacerbated by the reality that Vietnam's obligations to the CPTPP and the WCT have come due which requires Vietnam to act now.

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<sup>162</sup> UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 59 (Del. H.C.) (Apr. 10, 2019) (India).

<sup>163</sup> Singapore, Copyright Act (Chapter 63 of Singapore Laws), Article 193DDA (revised 31st January 2006).