

INDONESIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Indonesia remain on the Priority Watch List.¹

Executive Summary: IIPA congratulates Indonesian President Susilo Bambang Yudhoyono, his Vice President, and his new Cabinet on re-election in July 2009 for a second term (running until 2014). As a result of this election, IIPA hopes that the momentum of May 2009 Trade and Investment Framework Agreement (TIFA) discussions between USTR Ambassador Kirk and Indonesian Trade Minister Mari Pangestu, which included intellectual property rights issues, can be carried forward into 2010. With the establishment of a new Cabinet in October 2009, IIPA also hopes the Indonesian government can follow through on the promise to protect copyright and open the copyright market in Indonesia. WIPO reports that a study is underway to evaluate the contribution of creativity to Indonesia's economy. Other studies in the region have shown high output by creative industries both in terms of contribution to gross domestic product and good jobs. Those studies support the proposition that adequate and effective protection of intellectual property in a country, as well as adequate market access to foreign companies, are vital to ensure continued positive contributions to real and human capital in the country.

Unfortunately, in Indonesia, piracy problems, including end-user piracy of business software,² mall piracy including mobile device piracy and CD-R and DVD-R burning, book piracy, illegal camcording, pay TV piracy, some factory optical disc piracy, and emerging Internet-based piracy cause serious economic harm to right holders. In many instances, organized criminal groups engaged in other criminal behavior are suspected of or have been detected engaging in piracy. Piracy levels in Indonesia remained among the highest in the world in 2009. In terms of enforcement, key government enforcement agencies assisted industry in certain respects,³ for example, with several raids as part of a National IP Campaign instituted against those engaged in end-user piracy of business software.⁴ In September 2009, the Task Force extended this National IP Campaign to other sectors, making visits to mall owners and warning them that distribution or fostering distribution of infringing goods could lead to actions against them in 2010. However, IIPA members do not report that this increased focus of attention on piracy problems has led to significant deterrent enforcement actions against all kinds of piracy, increased prosecutions, improvements to the court system, or fighting corruption.⁵

Worse yet, instead of focusing attention on piracy and solutions to the problem, the government retained onerous market access barriers, including the requirement to locally manufacture film prints and home videos in Indonesia (which had been suspended throughout 2009) and added new restrictions. For example, in March 2009, the Ministry of Administrative Reform (MenPAN) issued Circular Letter No. 1 of 2009 to all central and provincial

¹ For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² Preliminary trade losses due to piracy in Indonesia of business software in 2009 were \$354.7 million, with a piracy rate of 86%. This is an increase from \$299 million and 85% piracy in 2008, and continues a trend upward in terms of losses and piracy levels for the third consecutive year. Losses to the record and music industry were US\$24.7 million in 2009, up from US\$20 million in 2008. Piracy levels for recorded music remained at 95% for both years, and the increase is explained by an increase in legitimate sales in 2009. BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Indonesia. They follow the methodology compiled in the *Sixth Annual BSA and IDC Global Software Piracy Study* (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. The methodology used by BSA and other IIPA member associations to calculate estimated piracy levels, losses, and/or sales is described in IIPA's 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf.

³ Chief government organizations with which we have cooperative relationships include MABES - Markas Besar; the Federal Police and their economic crime unit at Bareskrim, at MABES Jakarta Headquarters; the Trade and Industry Crime Unit, KRIMSSUS; and the Department of Industry, Downstream Chemical Division.

⁴ In February 2009, the National IP Task Force announced a National IP Campaign targeting corporate-end user piracy. This was followed by the sending of Direct Mailers (on the letterhead of the Task Force) to 20,000 companies followed by corporate visits in some major cities.

⁵ Indeed, on December 9, 2009, dubbed "International Anti-Corruption Day," it was reported in many major news outlets that thousands protested alleged corruption in the country (President Susilo Bambang Yudhoyono also reportedly made a speech saying he would lead the "jihad" against corruption). Kathy Quiano, *Thousands March Against Corruption in Indonesia*, December 9, 2009, at <http://edition.cnn.com/2009/WORLD/asiapcf/12/09/indonesia.protests/>.



government offices including State-owned enterprises, endorsing the use and adoption of open source software within government organizations. While the government issued this circular in part with the stated goal to “reduc[e] software copyright violation[s],” in fact, by denying technology choice, the measure will create additional trade barriers and deny fair and equitable market access to software companies. In September 2009, a new Film Law was enacted which would impose a local film quota and strict censorship requirements on local and foreign films. The Film Law is so badly conceived that no one in the film industry to our knowledge, including local and foreign industry, has come out in its support.

Priority Actions Requested in 2010: IIPA requests that the government of Indonesia take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Market Access and Related Issues

- Rescind March 2009 MenPAN circular letter endorsing the use and adoption of open source software which threatens to create additional trade barriers and deny fair and equitable market access to software companies.
- Repeal Film Law that imposes a local film quota and strict censorship requirements on local and foreign films.
- Immediately lift market access restrictions on the 1) requirement to locally replicate all theatrical prints and home video titles released in Indonesia; 2) direct distribution of audiovisual products; and 3) ban on the broadcast of most foreign programming in Indonesia.

Enforcement Issues

- Follow through on the National IP Task Force’s “Campaign” to take deterrent action against piracy, including:
 - Corporate end-user piracy, to protect the local and international business software industry from the use of unlicensed business software for any commercial purpose.
 - Retail and mall piracy, including imposition of landlord liability for mall owners.
 - Mobile device piracy.
 - Illegal camcording of movies in cinemas.
 - Signal theft, i.e., those who engage in decrypting encrypted television or cable/satellite signals, or those that transmit or retransmit signals (whether decrypted with or without authorization).
 - Book piracy, to address and bring enforcement actions against illegal photocopying on and near university campuses, print piracy, and unauthorized translations.
- Bring and conclude more high-profile deterrent criminal piracy cases, including distributors, warehouses, factories, and high-profile cases involving end-user piracy of business software.
- Commit to expand Commercial Courts in Medan, Jakarta, Semarang, Surabaya and Makassar to adjudicate copyright cases, establish special IP courts for criminal cases, and take steps to improve judicial processes by developing a cadre of well-qualified, IP-literate judges and prosecutors.
- Address corruption and transparency issues, for example, by creating a database viewable by right holders on all commenced raid actions and status reports on such cases.
- Expedite the establishment by the Directorate General of IPR (DGIPR) of a “Directorate of Investigation” so that Civil Servant Investigators are authorized to enforce all IP laws.

Legislative Issues

- Enact a modern copyright law fully implementing the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) and providing for effective enforcement, including, among other necessary changes:
 - maintaining *ex officio* powers to raid upon suspicion of infringement;
 - codifying in the copyright law explicit liability against mall landlords;
 - providing minimum criminal penalties for all kinds of copyright infringement, including sellers of pirate goods and pirate end-users of business software;
 - ensuring appropriate cybercrime provisions are in place against Internet-based infringements, and creating incentives for service providers to help enforce against Internet and mobile copyright piracy;

- criminalizing the act of camcording in cinemas;
- properly protecting sound recordings under the law;
- extending term of protection.
- Ensure copyright infringement is included in larger fight against organized criminal behavior (i.e., that infringement is a predicate ground for broader criminal investigation, seizure/freezing of assets, etc.).
- Make optical disc regulations more effective by 1) making inspections routine, unannounced and off-hours; 2) enforcing against SID Code violations, including gouging off or non-use of source identification codes; 3) providing transparency in raids and results; and 4) ensuring that the Department of Industry collects exemplars.

MARKET ACCESS AND RELATED ISSUES

In 2009, the government of Indonesia took backward steps by further closing a market already considered to be one of the least open in the world for copyright businesses. As of 2008, the government had already essentially closed the market to entertainment companies, severely limiting investment in media businesses, and imposing strict restrictions on the kind of foreign content that could be broadcast in the country. The situation considerably worsened in 2008 due to the imposition of a local manufacturing requirement for the replication of film prints and home video/DVDs released in Indonesia. In 2009, the government issued a Circular announcing a government procurement policy for public sector software usage that would if implemented deny software companies of a level-playing field with the public sector and set a very poor example in terms of technology choice and procurement practices for the private sector, and enacted an ill-conceived Film Law which imposes an onerous quota for local film production and strict censorship restrictions that foreign and even local film companies oppose.

Government Procurement Preference Denies U.S. Software Companies a Level Playing Field: The government of Indonesia, under its Ministry of Administrative Reform (MenPAN), officially sent to all central and provincial government offices, including state-owned enterprises in Indonesia, Circular Letter No. 1 of 2009 issued on March 30, 2009, endorsing the use and adoption of open source software within government organizations. More specifically, the MenPAN letter, concerning the "Utilization of Legal Software and Open Source Software (OSS)," encourages government agencies to use "FOSS" (Free Open Source Software) with a view toward implementation by the end of 2011, which the Circular states will result in the use of legitimate open source and FOSS software and a reduction in overall costs of software. The letter was followed by subsequent clarification documents, including an April 2009 State Ministry of Research & Technology (RISTEK) document regarding the "Migration to Open Source in Government Agencies."

While IIPA has no issue with one of the stated goals of the circular, namely, "reducing software copyright violation," the Indonesian government's policy as indicated in the circular letter instead simply weakens the software industry and undermines its long-term competitiveness by creating an artificial preference for companies offering open source software and related services, even as it denies many legitimate companies access to the government market. Rather than fostering a system that will allow users to benefit from the best solution available in the market, irrespective of the development model, it encourages a mindset that does not give due consideration to the value to intellectual creations. As such, it fails to build respect for intellectual property rights and also limits the ability of government or public-sector customers (e.g., State-owned enterprise) to choose the best solutions to meet the needs of their organizations and the Indonesian people. It also amounts to a significant market access barrier for the software industry. The "Principles for Technology Choice Pathfinder," adopted by APEC in 2006 (furthering the 2002 "Statement to Implement APEC Policies on Trade and the Digital Economy," to which Indonesia was a participant), recognize that procurement preferences can close markets and stifle innovation and economic development. By implementing this government procurement preference policy, the Indonesian government is not adopting an effective approach to drive down piracy rates, but rather, is creating an additional trade barrier and denying fair and equitable market access to software companies worldwide, which is inconsistent with the APEC Principles.

Rather than start down this path away from innovation and to further promote respect for copyright, the government should abandon the Circular's approach and follow a realistic policy framework that includes adequate education and effective enforcement of IP rights and non-discrimination in business choice, software development, and licensing models. The government of Indonesia promised to legalize the public sector's use of software, e.g., in the January 13, 2006 Indonesian Ministry of Communication and Information (MOCI) and Microsoft Memorandum of Understanding (MOU) in which the government undertakes to legalize government use of its products on government computers. We strongly urge USTR to consider the implications that Indonesia's open source preference policy has on IP protection and access to Indonesia's market for U.S. goods and services.

III-Conceived Film Law Could Impose Quota and Strict Censorship Requirements: In September 2009, the Indonesian Parliament hastily enacted a new Film Law. As enacted, this law would continue to seriously limit foreign participation in various film businesses in ways that are inconsistent with the U.S.-Indonesia Letter Agreement on Market Access for Films and Videos. The new Law is so ill-conceived that even Indonesian filmmakers immediately came out vehemently against it upon passage.⁶ The law includes a 60% local content quota for local exhibitors that would, if enforced, severely limit local industry's exposure to the expertise and skills of foreign producers, harm local theaters, and foster piracy. Industry has apparently been assured that this quota will not be enforced, but this questions the rationale behind its passage and is generally an unsatisfactory assurance. Similarly, the Law aims to limit the number of imported films to the benefit of domestic films. Implementing regulations are currently being considered, and should in the least recognize international best practices including the ability of right owners to determine whether, how, and where their works are made available. IIPA also objects to Article 44 of the Law which bans the dubbing of imported films, which would clearly violate Paragraph 8 of the Letter Agreement between Indonesia and the United States. The dubbing of imported films into a local language is a commercial decision that should not be unduly restricted.

Local Printing Requirement: The new Film Law adds insult to injury, since on November 25, 2008, Indonesia's Minister of Culture and Tourism issued a regulation requiring all theatrical prints and home video titles (e.g., on DVD) released in Indonesia to be replicated locally with effect from January 1, 2009; the in-force date of the regulation was delayed for one year. This regulation, if implemented, would limit or possibly eliminate the importation of films printed outside of Indonesia and have serious negative consequences on the long-term viability of Indonesia's film industry, and most immediately would negatively affect IIPA member companies' 2010 release schedule for the country. There are many concerns, chiefly among them being that existing local facilities are unable to handle both the volume and quality output requirements of the motion picture industry, and that the industry cannot be assured that all security issues have been properly identified and dealt with. Motion picture industry representatives have expressed their opposition to the Minister of Trade, the Director of the Ministry of Culture and Tourism, and the Director of Film of the Ministry of Culture and Tourism. This harmful regulation, which appears to have been incorporated into the Film Law, should be formally and permanently abrogated as soon as possible, and in the least, it should be immediately confirmed that the regulation is suspended for 2010.

New Withholding Tax: Recent amendments to Indonesia's tax law broadened the definition of "royalties" in a manner that result in the imposition of a new withholding tax on theatrical exhibition fees. While the full effect of the amendments have not yet been quantified, any potential indirect impact on overseas suppliers could detrimentally impair the further growth of the theatrical sector.

⁶ Liz Shackleton, *Indonesian Filmmakers Condemn New Film Law*, September 10, 2009, at ScreenDaily.com (in addition to the requirements noted above, the law reportedly requires local filmmakers to submit an outline of their projects, including the title, story and production plan, to the Ministry of Culture and Tourism three months before production begins, and also requires licensure requirements for producers and the imposition of censorship, including unspecified limits will be placed on the depiction of drug use, sexual content, and other topics which the government considers controversial). According to the article, local filmmakers say the new law places restrictions on creativity and that the 60% quota, designed to protect the local film industry, could actually harm it. The article quotes director Riri Riza noting that a quota will encourage "the production of low-quality movies to fulfill the 60% quota." The law, according to reports, seems to be a reaction to recent box office growth due to the roll-out of new cinemas (Indonesia now reportedly has only 554 screens with room to grow, and 11 Pay TV stations that are also doing well). According to the new legislation, violating the rules could result in a prison sentence of up to five years and a maximum fine equivalent to about US\$500,000.

Trading and Distribution Rights, and Media Investment Ban: Indonesia maintains a blanket prohibition on foreign company participation in, or even investment in, importation, direct distribution, exhibition, or retailing in most copyright products in Indonesia. Presidential Decree 118 of 2000 remains in force and stipulates that all importation and distribution of films and video products is restricted to wholly-owned Indonesian companies. An annexure to the Decree lists those media sectors closed to foreign investment, including:

- Radio and television broadcasting service providers, radio and television broadcasting subscription service providers, and print media information service providers.
- Film making businesses, film technical service providers, film export and import businesses, film distributors, and movie house operators and/or film showing services.

However, the Broadcast Law allows foreign ownership up to a 20% cap. IIPA understands that the Broadcast Law overrides the Presidential Decree. IIPA notes the longstanding promise made by the government of Indonesia that it would open investment in media companies to foreigners as soon as the Indonesian market was opened to the direct distribution of any other foreign goods (which occurred many years ago).

Broadcast Law Ban on Broadcasting of Foreign Programming: The "Broadcast Law"⁷ bans the broadcast of most foreign programming in Indonesia.⁸ The Independent Regulatory Commission (KPI) created by the new Broadcast Law has been installed and has issued implementing regulations, but a competing set of regulations was issued by the Ministry of Communication and Information Technology (KomInfo), and the latter was challenged as unconstitutional by KPI.⁹ Regardless of which regulations govern, the law is onerous and the various market access restrictions and bans on broadcasting should be lifted.

PIRACY AND ENFORCEMENT CHALLENGES IN INDONESIA

Indonesia Ranks in World's Top 12 Highest Business Software End-User Piracy Rates, But Enforcement Cooperation Remains Generally Good: The willful use of unlicensed or pirate software in the workplace continues to cause the greatest losses to business software companies in Indonesia. The software piracy rate in Indonesia rose slightly, from 85% to 86%, between 2008 and 2009 and still exceeds the Asia regional average (which was 61% in 2008). For 2008, Indonesia ranked 12th highest in the world in terms of global piracy rate, and 19th highest in the world in terms of global losses. Failure to deal with software piracy harms not only U.S. (and other foreign) software companies but harms Indonesia's local economy. A January 2008 study done by the International Data Corporation (IDC) with the Business Software Alliance (BSA) concluded that decreasing Indonesia's software piracy rate by ten percent over a four year period to 2011 would add US\$1.8 billion to Indonesia's economy, create 2,200 new high-wage high-tech jobs and generate an additional \$90 million in tax revenue.

Overall, enforcement against end-user software infringements in businesses did not improve much in 2009. Some police commands who signed memoranda of understanding (MOUs) have been very cooperative when identifying and following through on cases of end-user infringement. The police are normally taking *ex officio* actions, although in many cases the police take these actions without notifying right holders and administer fines without

⁷ Law of the Republic of Indonesia, No. 32 Year 2002, Regarding Broadcasting (in force February 2003).

⁸ Specifically, the Law requires that private broadcasting institutions be established initially without any foreign investment. Subsequent foreign investments can then be made, but only up to a 20% ownership cap shared by a minimum of two shareholders. Additional restrictions in the draft legislation include: (1) a restriction on foreign managers, (2) cross ownership limitations, (3) a local content quota of 60% on broadcast television and 10% on pay-television, (4) a 30% dubbing quota on foreign programs, (5) advertising limits of 20% of total broadcasting time for private broadcast stations and 15% for public stations, and (6) a total ban against the establishment of foreign broadcast institutions in Indonesia.

⁹ Of particular concern to foreign broadcasters is that the Kominfo regulations (issued on November 16, 2005) were reported to have a number of negative features, including a "made in Indonesia" requirement for pay-TV advertising, which would prohibit regional advertising pass-through. Article 24(5) of Government Regulation of the Republic of Indonesia No. 52 of 2005 Regarding Broadcasting Provided by Subscriber Broadcasting Institutions requires advertising to use a "domestic resource," although it is not clear if this requires the advertising to be made in Indonesia (e.g., this may simply mean Indonesian talent or resources have to be used). Article 24(6) required foreign advertising to be replaced by domestic advertising, and cross-media and foreign ownership restrictions.

consulting the industry. This lack of transparency raises obvious concerns and also diminishes the deterrent value of such actions. In 2009, there were 42 overall actions against end-user piracy of business software, with police initiating 13 corporate end-user raids based on BSA complaints, and 29 police-initiated raids.

Further exacerbating the end-user software piracy problem in Indonesia has been a generally ineffective judicial system to combat piracy. It often takes an unusually lengthy period for a case to be finalized and there is no indication that IPR cases (especially criminal prosecutions) are being prioritized. In 2009, we understand that criminal trials against corporate end-user piracy in the country were concluded (one decided by the Semarang District Court in Central Java, and two others decided by the South Jakarta District Court). This follows seven criminal convictions in 2008. In the South Jakarta cases, the police successfully investigated and prosecuted two IT managers for using unlicensed software for business purposes. In November 2009, these two defendants were found guilty for end-user piracy by the South Jakarta District Court. They were both sentenced to six months imprisonment, suspended for 10 months probation, and fined IDR10 million (about US\$1,050), which may be substituted with 2 months imprisonment. This sentence was shocking to the local software industry due to the extremely low, non-deterrent fines imposed.

Camcording Piracy: Camcording piracy remains a problem in Indonesia, aggravated by the absence of anti-camcording legislation. Illegal camcording of major U.S. movies occurs right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre. This usually occurs very early in a movie's theatrical release window or may even occur prior to the film's release (e.g., at a promotional screening). Camcorder pirates typically sell the master recordings to illicit "source labs" where they are illegally duplicated, packaged and prepared for sale on the black market, then distributed to bootleg "dealers" throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites, as well as on street corners and night markets around the world well before their intended legitimate debuts.

Retail Piracy/Mall Piracy: In 2009, retail piracy in kiosks and malls remained open and blatant, including factory and burned-to-order CDs, VCDs, DVDs and CD-ROMs of music, movies (including pirate movies in or claiming to be in BluRay format), software, and published materials. Also problematic are mobile device piracy (loading illegal copyrighted files onto various mobile devices or carriers) and hard disk loading, in which computers are loaded with the latest software – all of it unauthorized – at the point of sale of the hardware. Major cities including Jakarta, Semarang, Medan, Makassar, Bandung, and Surabaya have hotspots replete with pirate materials (notorious spots include Ratu Plaza, Pinangia Plaza, Glodok, and Ambassador Mall).

In terms of overall enforcement, some industry sectors continue to receive some cooperation, especially from the police, in raiding activities. The DGIPR submission to USTR in February 2009 appears to list several raids and seizures, e.g., including seizures of 2.6 million pieces in 2008. In 2009, BSA assisted police in investigating seven retail piracy cases (all in Medan, North Sumatra), two additional cases relating to the rental of pirate software (all in Central Java), and two cases involving small illegal software replicators (all in Tangerang City, Banten Province). However, others report a lack of coordinated enforcement effort in 2009 sufficient to provide a deterrent. Those industries generally report sporadic actions by the police against retail establishments engaged in piracy which result in immediate but short-lived closures of stalls. It is even reported that authorities apparently request payment from right holders of operational costs before conducting investigations or continuing prosecutions which is unacceptable.

A couple of bright spots included initial action by the long-awaited National IP Taskforce and an apparent sign that they may be prepared to introduce landlord liability for infringements of copyright by tenants. In September 2009, the National IP Taskforce launched a National IP Campaign targeting the public sector in Jakarta, as well as major cities such as Surabaya, Medan, Bandung, and Batam, in which they warned mall management and urged them to ensure that their malls were clear of pirate optical disc products. The Taskforce leadership has indicated to the mall owners that legal action against malls may be taken in 2010 if no significant improvement is found in keeping the mall clean from pirated product. Industry also understands from DGIPR that a long-awaited Directorate of

Investigation to coordinate enforcement efforts may be established in 2010. In addition, there appear to be potential copyright law changes that will enable DGIPR PPNS officers to conduct enforcement raids without requiring Police support or assistance. Whichever developments occur, industry would be most keen to see greater accountability and coordination efforts by the Taskforce to drive consistent and effective enforcement.

Book Piracy: Piracy of published materials in Indonesia, especially academic books and journals, continues to be a major concern. While commercial-scale photocopying (mainly on and near university campuses) remains the primary challenge, print piracy and unauthorized translations are also problematic. Most copy centers provide catalogs to facilitate the business of copying academic texts for students, with shops operating on a “print to order” basis upon customer demand, thus avoiding the stockpiling of illegal copies. IIPA calls upon the government of Indonesia to take swift effective actions against book piracy, whether in the form of illegal photocopying, print piracy, or unauthorized translations. As one step, the Indonesian government should work with right holder groups, such as the local publishers group IKAPI, to tackle this problem effectively and take steps to legitimize the use of published materials at schools and universities. There does appear to be some progress as local representatives report that at least some university lecturers are encouraging their students to purchase legitimate books. This positive development should be supported and university administrations should take a more active role in ensuring that their institutions adopt formal policies mandating use of legitimate materials on campus and undertake campus based anti-piracy campaigns.

Internet Piracy: Internet usage in Indonesia has exploded over the past several years, and there are as many as 30 million Internet users throughout Indonesia as of the end of 2009 (according to Asosiasi Penyelenggara Jasa Internet Indonesia, APJII, Indonesia’s Internet service provider association) or roughly 12% of the population. By contrast, only two million Indonesians had Internet access as of 2000. Indonesia ranked first in the world in growth of broadband connections in the third quarter 2009 (with additions of 163,000 broadband connections), and almost 300,000 total broadband connections.

Industry reports that a new Cyber Law was enacted (“Law of The Republic of Indonesia Concerning Electronic Information And Transactions”) which could be helpful in combating unauthorized use of copyright materials in the online space. Article 25 of the Cyber Law provides protection for copyrighted works in electronic formats. Unfortunately, the acts of communicating or making available copyright materials are not included in the “Prohibited Acts” (Articles 27 through 37). These acts should be added as expressly prohibited. While generally, ISPs are cooperating with right holders, the Ministry of Communication and Information needs to devise a strategy to deal with growing Internet piracy in 2010, including mechanisms to ensure removal of infringing content and dealing with illegal P2P file sharing. Especially important is to devise strategies to deal with fraud occurring over the Internet, such as the use of fake names, addresses, or identities.

Organized Criminal Syndicate CD-R “Burning” Operations: Pirate “burning” of content onto recordable optical discs is the chief form of optical disc pirate production in Indonesia. All indicators suggest that criminal syndicates support illegal production and distribution. Burned discs are less expensive to produce in non-industrial numbers and thus are an attractive vehicle for less technically proficient or wealthy investors to produce and sell for a lower price than factory-produced discs. With decreased overhead costs, many rental houses in Jakarta and other cities have been identified as “home industries” for optical disc burning.

Mobile Device Piracy: The unauthorized loading or pre-loading of illegal copyright content (songs, movies, TV shows, books and journals, ring tones, etc.) onto mobile devices such as mobile telephones, iPods, other MP3 players, and recordable media such as flash drives and memory sticks, has rapidly increased in Indonesia. Mobile device piracy is a highly organized and sophisticated criminal activity, with main business services even offering franchises to smaller vendors.

Signal Theft/Pay TV Piracy: Signal theft – the unauthorized transmission of broadcast or pay TV signals – has gradually worsened in Indonesia. An estimated 600,000 to 1,000,000 households receive illegal connections.

Additionally, television signals are being pirated from neighboring countries (overspill) or from domestic satellite (DTH) signals to feed illegitimate provincial cable operators. In addition, vendors openly sell illegal decryption devices such as set-top boxes and smart cards in Indonesia's markets.

In 2009, the Indonesian government launched a campaign to deal with signal theft. In August 2009, the Director of Broadcasting in the Ministry of Communications and Information Technology (Depkominfo), observed at the National Seminar on Pay-TV Broadcasting, that the campaign is intended to legalize the Pay TV market by stopping provincial cable companies from operating in the "informal" sector without proper licenses. Indonesia's Director General of Intellectual Property similarly noted that re-distributing channels without authorization from the rights holder was illegal, punishable by fines and potentially prison terms (both the Broadcast Law and the Copyright Law of 2002 provide a degree of protection for broadcast signals but enforcement to date has been virtually non-existent). The government noted that there are estimated to be over 2,700 pay-TV companies in Indonesia, the vast majority of which are small cable companies in provincial areas that lack the licenses required by law. The government noted that it was entering an "outreach" phase, with seminars and discussions planned in seven major provincial centers by the end of 2009 and then would enforce after a "grace" period of several months. IIPA is pleased that the government has committed to legalize the Pay TV market and encourages the government to move expeditiously to enforce the laws, first by sending messages that these provincial cable operators must be legalized and require a contract with an authorized programming distributor in order to distribute pay-TV programming, and then by enforcing against those operators who fail to legalize. Additionally, IIPA hopes that Indonesian police work with Indonesian pay-TV platform companies to repress blatant sale of set-top boxes and smart cards, whose importation and sale are illegal under Indonesian law.

Indonesian Authorities Need to Address Remaining Enforcement Concerns: The following are a few of the remaining enforcement needs to be addressed in 2010 by the Indonesian government.

- **Capacity Building for Judiciary Needed; Extend Special IP Courts to Handle Copyright Cases:** It is imperative that steps be taken in 2010 to improve judicial processes, including capacity building to develop a cadre of well-qualified, IP-literate prosecutors and judges so that copyright cases can be decided justly, move quickly through the criminal system, and result in needed deterrence. A website to report the status of cases in the system would allow right holders to assist and provide necessary transparency for right holders and deterrence against pirates in these cases. Trainings specifically focused on problems in copyright cases could be helpful. Issues might include end-user software piracy, mobile device piracy, Internet-based infringements, camcording piracy, book piracy, "mod chip" or other circumvention device manufacture or distribution, and Pay TV theft. IIPA understands that special IP courts have been established to solve cases from civil matters such as cancellation of industrial property and civil claims for injunctions and damage recoveries for IP infringements. These are under the jurisdiction of five commercial courts in Medan, Jakarta, Semarang, Surabaya and Makassar which cover all the provinces in Indonesia. It would be useful to extend these courts to handle copyright matters and to establish special IP courts to adjudicate criminal cases of copyright infringement as well. As has been noted, the results in criminal cases to date in Indonesia have generally been non-deterrent.
- **Transparency Issues Remain Unresolved:** Lack of transparency in the enforcement system hinders effective enforcement and deterrence in Indonesia. In many cases, right holders are not informed about raids when they happen and subsequent court decisions involving their products. In some jurisdictions, end-user software raids do not get reported to right holders, and there are no formal records of criminal convictions. This lack of transparency results in right holders not being able to assist in raiding preparations before they occur or help prepare case files after raids occur. As another example, reporting of cases has tended to focus on aggregate numbers of cases and not results obtained. In its 2009 submission to USTR, the Indonesian government claimed there were 61 new criminal copyright cases in 2008, with 67 criminal convictions. The charts provided listed 162 cases from 2007 and 61 from 2008, representing a major decrease year-on-year. Yet, there is no information on results of these cases, only that convictions were sought. It would be important to know whether these cases

resulted in sentences actually imposed or were suspended. These transparency issues should be resolved so that the government of Indonesia can clarify its enforcement record and increase deterrence.

- **Case Broker Payoffs:** It has been reported on occasion that authorities who initiate certain kinds of raids, for example, end-user software raids, do so on their own without notifying right owners, and then usually settle such cases privately and drop them without notifying right holders. We understand this often happens because “case brokers” working on behalf of defendants seek to influence the police and settle cases without bringing industry into such cases. Nevertheless, there are also police units that play by the rules and apply the law objectively. They reject any ‘approach’ by case brokers. Solving the transparency issue noted above would avoid the problem described.

Optical Disc Plants: Industry estimates that Indonesia’s capacity of operating optical disc lines stands at about 20 times the legitimate domestic demand. Unfortunately, notwithstanding that there have been a few key raids and prosecutions,¹⁰ the promise of Indonesia’s Optical Disc Regulations which were implemented some years ago has not led to a significant reduction in piracy. As an example of the problems, notwithstanding the integration of a new optical disc forensics lab installed at the National Police Central Forensic Laboratory (PusLabFor), PusLabFor has informed industry that, because of the lack of funding and manpower, they now expect copyright owners to provide support such as test purchase items.

TRAINING AND PUBLIC AWARENESS

Various Industry Trainings Provide Capacity Building Assistance in 2009: In 2009, as in previous years,¹¹ the copyright industries conducted and participated in various training and public awareness activities in Indonesia. Training has been carried out with police, although more needs to be done. For example, in October 2009, BSA spoke to about a dozen police officers from West Java Regional Police and about 100 students from the Faculty of Law, University of Padjajaran in Bandung, West Java, about legal aspects of corporate end-user piracy. In addition, BSA and the U.S. Commercial Services hosted a mini “software asset management” (SAM) seminar targeting 63 companies in Jakarta in May 2009. IIPA understands that some enforcement seminars have taken place in Lampung, Medan and Bali as part of the National IP Campaign in February 2009. The Motion Picture Association provided training throughout the year for approximately 180 theater employees on anti-camcording investigation and enforcement techniques.

U.S. Department of Justice Program Lends Positive Support to Industry: IIPA members continue to support the training program from the United States, the “International Criminal Investigative Training Assistance Program” (ICITAP) which commenced in October 2006. This program, comprising an anti-piracy enforcement initiative and an optical disc piracy initiative, has led in the past to some concrete positive results in terms of facilitating better enforcement against copyright infringements. It also helped build capacity, mentored, and provided technical assistance to optical disc factory inspection teams that include officials from the Department of Industry (DOI), Police, Customs, the Department of Trade and the Directorate General of Intellectual Property Rights in implementing the provisions of the optical disc regulations.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law Implementing Regulations Still Have Not Been Issued: Copyright protection in Indonesia is governed by the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (Copyright Law) (effective July 29, 2003) (Undang-Undang RI No. 19 Thn 2002 Tentang Hak Cipta). Regulations dealing with “rights

¹⁰ In one case, an August 2007 raid on a registered optical disc manufacturer, PT Multimedia Replikasi Plastikatama, resulted in the criminal conviction of the plant operator, who was sentenced to 30 months imprisonment in 2008.

¹¹ Training activities in 2008 are highlighted in the 2009 Special 301 report on Indonesia, and included motion picture industry programs to combat illegal camcording in cinemas and business software industry trainings for police and prosecutors on combating end-user software piracy.

management information" (RMI) were finalized in 2005, but implementing regulations regarding technological protection measures (TPMs) (as covered in Article 27 of the Copyright Law) are still missing and are needed to fully implement the WCT and the WPPT.¹² Indonesia joined the WCT on June 5, 1997 (in force March 6, 2002) and the WPPT on February 15, 2005.

Copyright Law Amendments Needed to Modernize Protection: Reform of the Copyright Law has been in the works for a several years, and IIPA understands that a draft set of amendments emerged in 2008 and is currently in the legislative queue. IIPA encourages the Indonesian government to ensure that any proposed changes are open for public consultation and comment. The following issues should be dealt with in any amendment, to ensure that the law meets the needs of the modern copyright system and keeps abreast of the latest in international and WCT and WPPT obligations:

- **Provide Minimum Criminal Penalties for All Kinds of Copyright Infringement:** There is a continuing need to provide a minimum criminal penalty clause as to all copyright infringements. The current Copyright Law provides minimum criminal penalties only for the production or manufacture of pirate goods (see Article 72(1) of the Copyright Law). For future amendments, it would be vital to provide minimum criminal penalties for sellers of pirate goods as well as those who engage in corporate end-user piracy, especially in view of the low fines we have seen imposed by the courts. The law should also maintain current maximum sentencing provisions. We understand there is a draft criminal code being considered, but IIPA has not been given an opportunity to review such a draft (and it may be that the minimum penalties will be dealt with directly in the copyright law).
- **Maintain *Ex Officio* Powers to Raid Upon Suspicion of Infringement:** It is important that, for the next amendment of the Copyright Law, copyright infringement must remain a state offense. Any change from this could result in a significant decrease in the numbers of raids and decrease the efficacy of enforcement in Indonesia.
- **Provide for Landlord Liability:** Landlords that do not directly infringe but control infringement of tenants and financially benefit from such infringement should be held liable in Indonesia. This would ensure that all mall owners would be responsible for ridding their premises of piracy. Articles 55 and 56 of the Penal Code provide for criminal liability for one who forces others to commit or jointly commits a criminal act (Article 55(1)) or one who providing "opportunity" or "intentionally 'persuades' others" to commit a criminal act. We understand the government is considering codifying such liability for criminal copyright infringements as to mall landlords who have infringing activity occurring on their premises. IIPA supports this move.
- **Cover Copyright Infringement Under Cybercrime Law, and Provide Incentives for Service Providers to Cooperate, Including Notice and Takedown:** With Internet piracy, including P2P downloading, increasing in Indonesia, it is imperative that the laws adequately address computer-based infringements. The government of Indonesia has reportedly just enacted a new Cyber Law. IIPA has not had an opportunity to review this law, but looks forward to doing so to compare it against the Council of Europe Cybercrime Convention.¹³ Reportedly, the law requires some technical implementing regulations including those related to ISP liability, although it is already apparently being employed to prosecute cases involving online

¹² An April 2003 Report issued by the Indonesian government indicates that

The Law No. 19 does not provide detailed provisions on the safeguard of technological measures. Rather, such provisions have been accommodated by Law Number 14 of 2001 regarding Patents.

IIPA is unaware of any articles that deal with TPMs in the Patent Law.

¹³ Article 10 of the Council of Europe Cybercrime Convention (Sept. 10, 2001) provides that a party to the Convention will "establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed willfully, on a commercial scale and by means of a computer system."

pornography or distribution of false information through Internet media, although unfortunately not involving copyright piracy. The law should be used to combat IP-related cybercrime including copyright infringements. It is also very important to ensure that proper incentives are put into place to ensure service providers cooperate with right holders to curtail such infringing activities. Service providers need to be reminded of potential liability for infringements occurring over their networks, and mechanisms need to be available to ensure removal of infringing content, including notice and takedown as well as effective and fair policies in place by ISPs as to potential termination of repeat infringers, and to ensure assistance to right holders in identifying and removing infringing content and P2P piracy.

- **Include Anti-Camcording Piracy Provisions and Consider Standalone Provisions:** Preferably standalone legislation, but at least a provision in the proposed copyright amendments, should be enacted to define the act of camcording or recording in cinemas as a strict liability criminal offence. This would enable Indonesian authorities to arrest and prosecute individuals who record a movie in the theaters, without needing to establish subsistence of copyright, copyright ownership, or copyright infringement.
- **Provide Rights for Producers of Sound Recordings, Including Those in Line with WPPT:** Producers of sound recordings must be granted exclusive rights to control the dissemination of their products over the Internet. These include an exclusive communication to the public right including all forms of wire and wireless transmissions (including broadcast) as well as exclusive distribution and public performance rights (see below regarding “publication” right). Producers also need the ability to authorize or prohibit importation into Indonesia of copies of phonograms, and the right to control the distribution of copies of phonograms.
- **Establish Statutory Damages:** The TRIPS Agreement permits WTO members to adopt a system of pre-established damages. In cases where it is difficult or impossible to determine actual damages, which would by definition include cases against pirate distributors (without receipts, which infringing operations often would not keep, it may be impossible to know how many copies of a work have been distributed), or cases in which the infringer achieved an unjust enrichment (as in the case of end-user piracy of business software), it would be important for right holders to be able to elect, in advance of final judgment, to receive pre-established damages equivalent to compensation for the injury suffered by the right holder.
- **Modernize Term of Protection:** Term of protection should be provided consistent with international trends and U.S. standards (e.g., life of the author plus 70 years, or in the case of works whose term is calculated based on the date of publication or for which authorship is corporate, 95 years).
- **Provide TRIPS-Compatible Protection for Pre-Existing Works/Related Rights:** While Article 74 confirms that prior regulations shall remain in effect except where contradictory with the new law, and Article 75 confirms the continued validity of previously issued copyright registrations, provisions should be added in an amendment or regulation to provide Berne/TRIPS-compatible protection for existing works, as well as for producers of sound recordings and performers. (We note that Indonesia is already under a bilateral obligation to provide a TRIPS-compatible term to all pre-existing works of U.S. origin.)
- **Ensure That the Right of “Publication” Encompasses WCT and WPPT “Making Available” Concept:** The author’s right of “publication” in the Copyright Law explicitly includes an exclusive right of “dissemination of a Work, by utilizing whatever means including the Internet, or by any manner so that such Work is capable of being read, heard or seen by any other person.” It appears that the drafters intended this broad right, as applied to works, to satisfy the requirements of the WCT with respect to “communication to the public.” The phrase “read, heard, or seen by any other person” appears to be an attempt to express the “making available” concept and the government of Indonesia should confirm that this phrase covers the making available of a work so that it can be accessed “from a place and at a time individually chosen or selected” by the user. This provision should also be made applicable, *mutatis mutandis*, to related rights.

- **Limit Private Copy Exception to Single Lawfully Obtained Copy:** Article 57 of the Law provides an exemption for non-commercial possession (i.e., would exempt from civil liability anyone who possesses “any work,” as long as the person “obtain[s]” the work “solely for his own need and not using it for any commercial purposes and/or any interests related to commercial activities”), but may amount to an overly broad limitation on liability for copyright infringement, since there does not appear to be any limitation on the number of copies of the work, the format (i.e., analog versus digital), the method of obtaining (i.e., by importation, purchase, off the Internet). This exception must be limited to a single lawfully obtained copy.
- **Fix Adaptation Right Which is Curtailed in Indonesia Law (a Violation of the Berne Convention):** Authors have an adaptation right in Indonesia, but it is curtailed in Indonesia by Article 24(2) and (3) give the author (and the author’s heirs) the right to refuse to authorize *any* “changes” including any change to the “title” or “subtitle” of a work regardless of whether the copyright in that work has been assigned. This right violates the Berne Convention as it would impinge upon the ability to exercise (and to assign) the exclusive right of adaptation in Berne Article 12.

Need for IP Hook to Organized Crime Statute: It has been established that criminal syndicates behind pirate enterprises which manufacture and distribute optical discs are also involved in many other forms of crime such as trafficking in persons, illegal logging and illegal gambling. As such, the government of Indonesia needs to ensure that copyright infringement is included in as a predicate crime for remedies under its organized crime law, e.g., grounds for broader criminal investigations, seizure/freezing of assets, etc.

Implementing Regulations to New Customs Law: Law No. 17 of 2006 (amending Law No. 10 of 1995) apparently improved border and customs measures in Indonesia. The government is apparently now reviewing implementing regulation on this law, which will cover intellectual property enforcement issues. IIPA would hope to be able to review and comment on such regulations prior to their issuance to ensure that they provide adequate border measures.

Electronic Information and Transactions Bill: The government has reportedly enacted the Law on Electronic Information and Transactions, No. 11 (2008) which may prove helpful to right holders. Specifically, Article 5 of the Law reportedly allows electronic material (e.g., screenshots, music files downloaded from the Internet, etc.) to be admissible as evidence in court. Implementing regulations remain pending.

Optical Disc Regulations Should be Strengthened and Made GATT/WTO-Consistent: The “Government Regulation Number 29 of 2004 Concerning High Technology Production Facilities for Optical Discs” (in force April 5, 2005) can be strengthened by:

- making inspections routine, unannounced and off-hours;
- expressly prohibiting the unlawful use of or manipulation of source identification (SID) code, and enforcing against SID code violations, including gouging off SID Codes and/or total non-use of SID codes;
- ensuring that the Department of Industry collects exemplar discs from each plant;
- provide for centralized licensing of production of prerecorded or blank optical discs;
- remove immediately the Regulations’ requirement that imported, pre-recorded discs be marked with identification code, which violates GATT/WTO rules and could have other negative ramifications;
- adequately covering stampers and masters;

- expressly covering exports of discs, equipment and raw materials;
- expressly authorizing forcible entry in an inspection in case a suspect target refuses entry;
- requiring the government to keep records of “permits” and raids run; and
- expressly imposing corporate liability on individuals.

Two Ministerial Decrees were issued by the Minister of Trade and Industry, one relating to the importation of machinery, raw material, and optical discs,¹⁴ and another on reporting by registered producers.¹⁵ The former sets forth requirements as to the importation of optical disc production machinery, raw materials (optical grade polycarbonate) and, unfortunately, finished discs (in addition to blank discs). It remains a fear that this importation Decree will be used as a tool to keep legitimate copyright owners or authorized distributors from importing discs into Indonesia. The government of Indonesia should give assurances that such is not the case.

GENERALIZED SYSTEM OF PREFERENCES

Indonesia currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program, which offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective protection for intellectual property rights.” In 2008, almost \$2.2 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for almost 13.8% of its total imports to the U.S. During 2009, almost \$1.5 billion worth of Indonesian goods, or almost 11.3% of Indonesia’s total imports to the U.S., entered the U.S. under the duty-free GSP code. Indonesia needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to continue to receive favorable treatment under the GSP program.

¹⁴ Regulation of Minister of Trade of the Republic of Indonesia 05/M-DAG/PER/4-2005 (May 2005) (which repealed Ministerial Decree of the Minister of Trade and Industry of Republic of Indonesia, Number 645/Mpp/Kep/10/2004 (October 18, 2004), Regarding Stipulations on Importation of Machinery, Machine Equipments, Raw Material and Optical Disc.

¹⁵ Ministerial Decree of the Minister of Trade and Industry of Republic of Indonesia, Number 648/Mpp/Kep/10/2004 (October 18, 2004), Regarding Reporting and Monitoring of Optical Disc Industrial Company.