

INDONESIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Indonesia remains a market rife with physical and online piracy, which, coupled with onerous market access barriers, closes opportunities to the creative industries to supply legitimate product. This situation subsists notwithstanding good relationships between right holders and Indonesian authorities, and in particular, improvements in the cooperation and enforcement efforts against businesses and other organizations that use unlicensed software. One of the greatest frustrations remains the non-transparent and non-deterrent court system, shielding right holders from information about cases directly affecting their interests, and even the Indonesian Government has recognized irregularities in the system negatively affect enforcement efforts. New potential hurdles threaten to make the situation even worse, including a customs valuation method for audiovisual products that is inconsistent with standard international practice, a potential mandated collective licensing window, and potential removal of *ex officio* enforcement authority. Unfortunately, such undue regulatory intervention and overly-protectionist policies affecting the audio-visual sector threaten the continued support and development of that industry. Without a reversal on some of these proposed policies, and without the scaling back of market access barriers, the situation in Indonesia for copyright owners could remain bleak for the foreseeable future. As Internet and mobile penetration deepen, it is critical that Indonesia develop the policies and practices necessary to enforce IP rights on these new developing mediums. We thank the U.S. Government for its continued engagement on these issues.²

Priority Actions Requested in 2011:

Enforcement Issues

- 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.
- Establish a National IP Taskforce website tracking prosecutions completed, including parties, legal basis of the prosecution, penalties assessed, and evidence found during the raid.
- Commit to expand Commercial Courts in Medan, Jakarta, Semarang, Surabaya and Makassar to adjudicate copyright cases, establish special IP courts for criminal cases, with trained judicial officers.
- Follow through on the National IP Task Force's "Campaign" to take deterrent action against all forms of piracy.
- Ensure Directorate of Special Crimes ('Ditreskrimsus') and "Type A" Police Commands run sustained IPR police investigations with deterrent results.
- Retain *ex officio* enforcement authority and provide transparency in raiding.
- 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

- Modernize the Copyright Law (2002): 1) maintaining *ex officio* enforcement authority, 2) establishing landlord liability, 3) providing minimum criminal penalties for copyright infringement, 4) ensuring effective measures are in place to combat online infringements by introducing notice and takedown procedures and taking steps to encourage the active cooperation of Internet service providers with rights holders to prevent the use of networks for the commission of infringing acts, including but not limited to establishing fair and effective processes for

¹ For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² The U.S. Government has engaged on IPR issues in the Indonesia-U.S. Comprehensive Partnership plan "to promote better protection and enforcement of intellectual property rights" and through the Trade and Investment Framework Agreement.



dealing with repeat infringers, 5) outlawing illegal camcording, 6) providing WCT and WPPT-compatible rights (including the public performance, public communication and making available rights) for works and sound recordings, 7) fully implementing the WCT and WPPT, and 8) extending the term of protection for works and related rights.

- Ensure copyright infringement is considered a predicate offense under anti-organized crime laws that permit 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; 4) covering imports of raw materials; and 5) ensuring that the Department of Industry collects exemplars.

Market Access and Related Issues

- Repeal Film Law that imposes film quota, strict censorship requirements, and other restrictions on film industry.
- Ensure that procurement policies do not impede technology choice with respect to software.
- Revise Customs Law 1995 and associated regulations so that duties are assessed on the basis of the underlying carrier medium.
- Immediately and permanently remove other market access restrictions, including:
 - the requirement to locally replicate all theatrical prints and home video titles released in Indonesia (the requirement was suspended until January 1, 2012 but the suspension should be made permanent).
 - the ban on direct distribution of audiovisual products.
 - the ban on the broadcast of most foreign programming in Indonesia.

PIRACY AND ENFORCEMENT UPDATES IN INDONESIA

IIPA's previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries. The following provides updates on ongoing and new issues over the past couple of years.

Court System Lacks Transparency, Remains Non-Deterrent: A major hurdle over the years for copyright owners in Indonesia has been the failure of the court system to properly deter piracy. Most cases brought involve small-scale distribution of pirated materials in the physical environment; very few involve major source piracy, warehouses, or cases against ringleaders up the supply chain. Moreover, of the hundreds of cases investigated by the police, industry reports that only a few are brought before the courts.³ Further, there is lack of transparency on cases and case results and in the cases industry does learn about, and criminal fines are extremely low and non-deterrent.⁴ IIPA recommends establishing a National IP Taskforce website to track case results.⁵ IIPA understands that special IP courts have been established under the jurisdiction of five commercial courts in Medan, Jakarta, Semarang, Surabaya and Makassar and that they are handling copyright cases.

Retain *Ex Officio* Authority for Police, Activate Directorate of Special Crimes, and Establish Directorate of Investigation: It remains critical in Indonesia, which experiences so much piracy up and down the

³ The Indonesian Ministry of Trade, in its 2009 report to the U.S. Trade Representative in response to Special 301, indicated in a chart form that the Indonesian National Police (INP) had conducted a total of 139 copyright-related raids in 2009, 29 of which had been passed along to the Public Prosecutor for further disposition, while one case had been dismissed for lack of a complete dossier, two enterprise end-user software piracy cases settled, and 107 cases still under investigation at the time of the filing (in February 2010). See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property System of Indonesia*, February 25, 2010 (retrieved at regulations.gov), Table 8.

⁴ The local recording industry reports on one pirate CD 'burning' case in Lubuk Sikaping, Padang in which a Public Prosecutor did not accept a statement/affidavit that the suspect had never been licensed to sell the content, but asked the police to investigate further. Eventually, upon complaint to the National Public Prosecutor, the case was brought charging the accused and seeking three years imprisonment. It was only due to the persistence of the industry that this case was brought, and only after significant delay.

⁵ All case records are manually written into a log book in each District Court, making it difficult to identify outcomes in particular cases, obtain copies of court decisions, contact public prosecutors requesting updates, and ultimately, leverage publicity on cases of copyright infringement and get the message into the public domain that copyright infringement is a serious violation of the law with serious legal consequences.

supply chain, that police retain flexibility to run raids on an *ex officio* basis.⁶ Any amendment which would remove such authority should be rejected. Industry reports that in the end of 2010, a new Directorate of Special Crimes ('Ditreskrimsus') was established to manage all economic crimes, including IPR infringements. In addition, some regional police commands have restructured their internal crime investigation departments, with some classified as 'Type A' Police Commands (headed by a two-star police general) which would separately handle economic crimes, including IPR infringement. IIPA views these developments positively and as an opportunity to empower and train specialized IP police units. At the same time, on the civil side, industry has awaited an implementing regulation establishing the Directorate of Investigation as an umbrella for civil servant investigators to conduct raids; this would be beneficial since it would provide impetus for the Indonesian Government to act on copyright piracy issues more readily rather than remaining largely passive to the problem.

Enterprise End-User Software Piracy Causes Significant Losses, But Enforcement Cooperation Improved: The willful use of unlicensed software by businesses and other organizations continues to cause the greatest losses to the business software industry in Indonesia. According to preliminary data from research firm IDC, the PC software piracy rate in Indonesia in 2010 was one of the highest in the world at 87%, and much higher than the median piracy rate for Asian markets. It also represents an increase over the 2009 rate of 86%. The preliminary data also indicates that the commercial value of unlicensed U.S. vendor PC software products in 2010 was \$487 million.⁷ Lowering software piracy would bring significant benefits to the Indonesian economy. A 2010 study done by IDC for the Business Software Alliance found that decreasing Indonesia's software piracy rate by ten points over a four year period would add US\$2.43 billion to GDP, generate US\$124 million in additional tax revenues and create 1,884 new IT jobs. The benefits would be even greater if the 10 point reduction was achieved in two years, yielding \$3.18 billion in added GDP and \$162 million in new tax revenues. The Business Software Alliance reports that its relationship with enforcement authorities improved significantly in 2010, especially with the police.⁸ In 2010, there were 16 *ex officio* raids initiated by the police against all types of software piracy (including by the Banten Regional Police Command which was also active in follow-up),⁹ and 27 raids initiated by police against enterprise end-user software piracy based on BSA complaints. Cases get bogged down, however, when presented to the public prosecutors, who lack knowledge and confidence in prosecuting defendants at the District Court level for unauthorized use of software in a business setting. Court cases are slow to proceed and rarely result in deterrent sentencing.¹⁰

Retail Piracy, Mall Piracy, Including Physical and Mobile Device Piracy: The copyright industries continue to report hard goods piracy as one of their greatest causes of concern, comprising 90% of the retail/mall marketplace for creative content. Jakarta and surrounding areas remain the retail base, distribution hub, and duplication center of the country. Physical piracy includes factory and burned-to-order CDs, VCDs, DVDs and CD-ROMs of music (the record industry notes the market in 2010 was markedly worse), movies (including pirate movies

⁶ Industry reports that approximately 70% of *ex officio* criminal actions are conducted by the Police outside Java.

⁷ BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Indonesia. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated U.S. software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

⁸ In 2010 BSA signed MoUs with some Regional Police Command units on joint enforcement actions against software piracy, namely Bali Regional Police, North Sumatra Regional Police and East Java Regional Police. Some lower police commands also continue to provide support to combat software piracy.

⁹ Industry continues to report that in some cases raids are kept hidden from right holders, as defendants hire highly suspect third-party case brokers to settle the cases with the police; for some police, they will only notify BSA when they cannot settle a case privately. Industry also reports occasional intervention from a higher level police officer to corrupt a particular case.

¹⁰ In 2009, we understand that criminal trials against corporate end-user piracy in the country were concluded in the Semarang District Court in Central Java and the South Jakarta District Court (two cases), compared with 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, and in November 2009, the 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\$1,120), 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.

in or claiming to be in Blu-ray format), software, and published materials, as well as loading software or other copyright materials illegally onto computers or mobile devices at the point of sale.¹¹ Optical disc replicators/duplicators are sold in these markets as well, facilitating home “burning.” All indicators suggest that criminal syndicates support illegal production and distribution, with burned recordable discs well outnumbering factory discs due to the lower expense and the fact it can be done out of the home. Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hotspots replete with pirate materials (notorious spots include Ratu Plaza, Pinangsia Plaza, Glodok, and Ambassador Mall). The Indonesian National Police (INP) ran hundreds of raids in 2010, mainly against small distributors, continuing the trend from 2009, in which INP reported 355 raids, involving 351 suspects, and resulting in seizures of over 2 million discs, mostly movies, followed by music discs, pornography, and software, and 149 duplicators (burners).

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.

Internet Piracy: Internet usage in Indonesia exceeds 30 million users or roughly 12% of the population, and has grown exponentially over the past several years. As a result, online piracy has become a problem,¹² including direct download sites and illicit P2P file sharing, mainly from servers located outside Indonesia (even though they are registered Indonesian businesses run by Indonesian nationals). The evasive behavior of online pirates in Indonesia, switching online locations and website names to avoid detection, using other fraudulent practices, and using offshore servers has created hurdles to effective enforcement. Without a current legal infrastructure on service provider liability, establishing responsibility for online infringements and fostering cooperation with right holders, e.g., through a statutory notice and takedown procedure in the hosted environment and ways to curb non-hosted infringements, right holders lack an effective remedy against online infringement.

Steps should be taken to encourage the active cooperation of Internet service providers with rights holders to prevent the use of networks for the commission of infringing acts, including but not limited to establishing fair and effective processes for dealing with repeat infringers. ISPs participated in a focus group meeting with right holders hosted by the Indonesia ISP Association (APJII), but issues such as the use of offshore servers were agreed to pose challenges under the current laws (for example, such activity is not covered under the Cyber Law). IIPA calls upon the Ministry of Communication and Information to support a strategy to deal with growing Internet piracy. It is also important to devise strategies to deal with fraud occurring over the Internet, such as the use of fake names, addresses, or identities.

¹¹ 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 increased in Indonesia. Mobile device piracy is a highly organized and sophisticated criminal activity, with main business services even offering franchises to smaller vendors.

¹² The independent film and television segment of the motion picture industry (IFTA) reports that online piracy remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming in Indonesia. These authorized distributors find it almost impossible to compete with the pirates. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions.

MARKET ACCESS AND RELATED ISSUES

Customs Valuation of Film Imports: Indonesian Customs has recently implemented (by means of Regulations issued in 2010) its 1995 Customs Law a radical revaluation of import duties on 35mm film which will cost the local and foreign film industries millions per year in additional taxes. The historical valuation of film imports is made on a per-meter basis against the carrier medium, in line with standard international practice. IIPA understands that Indonesian Customs has recently demanded payment of customs duties on the contractual amounts paid by the importer for the exclusive rights to commercially exploit the underlying content contained on the carrier medium (so-called "distribution rights"), i.e., the content of the film, in accordance with implementing regulations released in 2010. The government should reverse this decision and maintain its historical practice of valuation based on the carrier medium, in line with the accepted international practice.

Ill-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 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 Law is so ill-conceived that even local Indonesian filmmakers came out vehemently against it upon passage.¹³ 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. The Law would also aim to limit the number of imported films to the benefit of domestic films, among many other ill-conceived features of this law. Industry has been assured that the 60% quota will not be enforced and that the Law is "not intended to restrict" foreign films in Indonesia, but this questions the rationale behind the Law's passage. The Indonesian Film Society (*Masyarakat Film Indonesia*) has sought a constitutional review of the Law which may lead to a judicial review. "Implementing Regulations" have yet to emerge and are pending further public-private consultation between the Ministry of Culture and Tourism and the local filmmaking community. They should at least recognize international best practices including the ability of right owners to determine whether, how, and where their works are made available.

Local Printing Requirement: On March 22, 2010, Indonesia's Ministry of Culture & Tourism issued a further two year suspension (until January 1, 2012) of the 2008 MOCT Ministerial Decree No. 55 requiring the local replication of all theatrical prints and home video titles (e.g., DVDs) released in Indonesia. The Decree should formally and permanently be abrogated as soon as possible for several reasons. The regulation, if implemented, would harm local interests in several ways: 1) it would have serious negative consequences on the long-term viability of Indonesia's film industry, 2) it would threaten any incentive for the continued development of local cinemas, 3) it remains opposed by Indonesian filmmakers due to their own concerns about the quality of local labs matching that of overseas facilities, and 4) it could jeopardize arrangements local filmmakers have for post-production work overseas. Far from boosting the local industry as a whole, the Law would appear to be aimed at benefiting only the local duplication facilities. The Regulation also negatively affects foreign motion picture companies' release schedule for the country, and raises concerns over existing local facilities' ability to handle its volume and quality output requirements as well as the security issues.¹⁴

Negative Investment List: The Indonesian Government has claimed its amendments to restrictions of its "Negative Investment List" as a positive development, but the revision, by which "film processing labs" had their restrictions eased to 49%, is only applicable to ASEAN countries, discriminating against U.S. industry.¹⁵ "Film Technical Services" which remain subject to the 100% investment restrictions under the Negative Investment List include picture-taking studios, film dubbing, film duplicating, film making medium, film editing, and film subtitling.

¹³ Liz Shackleton, *Indonesian Filmmakers Condemn New Film Law*, September 10, 2009, at ScreenDaily.com. 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.

¹⁴With respect to home video, the Decree would serve as a barrier as there is unlikely to be any capability to replicate Blu-ray locally in the near future.

¹⁵ The easing of the restriction would have helped a company (one of the duplicating labs which, not coincidentally, would have benefited most from the Print Decree) open a new print lab in Indonesia with backing from a Thai company.

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 No. 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 1) radio and television broadcasting service providers, radio and television broadcasting subscription service providers, and print media information service providers, and 2) film making businesses, film technical service providers, film export and import businesses, film distributors, and movie house operators and/or film showing services. The Broadcast Law allows foreign ownership up to a 20% cap, and 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).

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law Undergoing Review: Copyright protection in Indonesia is governed by the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (effective July 29, 2003).¹⁶ Indonesia joined the WCT on June 5, 1997 (in force March 6, 2002) and the WPPT on February 15, 2005.¹⁷ IIPA understands draft amendments have been prepared, possibly for introduction to the House of Representatives (Dewan Perwakilan Rakyat) by March 2011. IIPA encourages the Indonesian Government to ensure that any proposed changes are open for public consultation and comment, and notes the following key points for any amendments which come forward (including some longstanding issues):¹⁸

- Retain *ex officio* Authority: Apparently, DGIPR has proposed to change the status of the copyright infringement into a complaint-based crime, which under the Indonesian system, would mean removal of *ex officio* raid authority by the police on the basis of the Copyright Law. IIPA recommends retaining *ex officio* raids but imposing a transparency requirement to avoid abuse of power by police officers or the problem of “case broker” payoffs.
- Provide Minimum Criminal Penalties for All Forms of Copyright Infringement on a Commercial Scale: 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), but should be provided against sellers of pirate goods and other forms of piracy, e.g., enterprise end-user software piracy, and the Law should retain the maximum sentencing provisions.
- 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 should provide guidance, as it holds criminally liable 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.

¹⁶ Undang-Undang RI No. 19 Thn 2002 Tentang Hak Cipta.

¹⁷ Regulations dealing with “rights management information” 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. An April 2003 Report issued by the Indonesian Government indicated, “[t]he 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.” However, no articles in the Patent Law deal with protection of TPMs.

¹⁸ IIPA has in previous submissions commented in detail on the Copyright Law (2002), and provides herein only highlights of significant changes needed in the new amendments. Other issues previously mentioned include: 1) providing TRIPS-compatible protection for pre-existing works and related rights, 2) limiting the private copy exception to a single lawfully obtained copy, and 3) fixing the adaptation right which is curtailed in Indonesia Law in a Berne-incompatible way.

- Deal Effectively With Online Infringement: Given the recent growth of Internet connectivity in the country, any amendments should aim at removal of online infringements, promoting service provider responsibility and fostering cooperation with right holders. The law should ensure expeditious removal of infringing content, including statutory notice and takedown as well as effective and fair policies in place by ISPs for dealing with repeat infringers. The law should also ensure assistance to right holders in identifying and removing infringing content and P2P piracy. The law should avoid blanket immunities and ensure that injunctive relief is always available. While the government has enacted a Cyber Law, reported Article 27 does not impose a measure comparable to that in the Council of Europe Cybercrime Convention related to copyright infringement through use of a computer.¹⁹
- Include Anti-Camcording Piracy Provisions and Consider Standalone Provisions: The amendments should define the act of using an audiovisual recording device in cinemas to camcord or record a part of or whole film (or an attempt to do the same) as a strict liability criminal offense.
- Include Anti-Circumvention Provisions: As noted, Indonesia joined the WCT and WPPT, but has not implemented Article 27 of the Law on technological protection measures (TPMs). The WCT and WPPT require adequate and effective protections against the circumvention of TPMs used to protect against unauthorized access to, or unauthorized exercise of copyright in, works. Protections should cover the trafficking in circumvention technologies or devices as well the act of circumventing a TPM (and services related to both).
- 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, whether involving pirate distributors or cases in which the infringer achieved an unjust enrichment (e.g., enterprise end-user software piracy), it is 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. Indonesia should establish a statutory damages regime, on the election of the right holder, in civil cases, to foster greater deterrence and ensure adequate compensation is available to right holders in all cases.
- Confirm WCT- and WPPT-Compatible “Making Available” Right
- Provide Rights for Producers of Sound Recordings, Consistent 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), including an interactive “making available” right, as well as exclusive distribution and public performance rights. 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.
- Avoid Single Window Licensing: Apparently, the government is considering a plan to mandate collective licensing across copyright categories and set a joint tariff rate. Experience has shown that licensing markets function effectively where rights holders remain free to find the most efficient way to administer their rights. Freeing the market from any restrictions means that competition between different players is maintained and market powers can determine the best solutions for both right holders and users. To ensure that these conditions exist in Indonesia, right holders should be allowed to determine for themselves: which collecting society to join and entrust their rights; and whether or not to collect jointly with other right holders. Collective Management Organizations (CMOs) should be permitted to operate in a commercial manner, free from interference from the

¹⁹ The Council of Europe Cybercrime Convention contains, in Article 10, “Offences related to infringements of copyright and related rights,” an obligation to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and Article 11 contains the obligation to “establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission” of Article 10 offenses.

government. There should be no mandatory process for tariff pre-approval. Such a mandatory process is bound to disrupt royalty collection and prejudice right holders by requiring them to bear unnecessary costs associated with rate-setting procedures, and by denying from them the ability to collect royalties set in free and open market conditions.

- 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).
- Importation Right: The law should provide right holders the ability to authorize imports.

Other issues which should be dealt with in an amendment or through regulation:

- Availability of Interlocutory Injunctions: IIPA members have long awaited an amendment making available interlocutory injunctions ('Anton Piller Orders') against IPR infringers. If not dealt with in the amendment, an implementing regulation should be implemented by the Supreme Court on an urgent basis, to allow right holders to file for injunctions with the Commercial Courts.
- Establishment of the Directorate of Investigation: The establishment of the Directorate of Investigation as an umbrella for the civil servant investigators to conduct raids should be accomplished immediately.

Strengthen 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 as a predicate crime for remedies under its organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.

Optical Disc Regulations Should be Strengthened and Made GATT/WTO-Consistent: The Optical Disc Regulation (2005)²⁰ should be updated to: 1) prohibit the unlawful use of or manipulation of source identification (SID) code, including gouging off SID Codes and/or total non-use of SID codes; 2) provide for centralized licensing of production of prerecorded or blank optical discs; 3) remove the Regulations' requirement that imported, pre-recorded discs be marked with identification code, which violates GATT/WTO rules and could have other negative ramifications; 4) adequately cover stampers and masters; 5) expressly cover (imports and) exports of discs, equipment and raw materials; 6) expressly authorize forcible entry in an inspection in case a suspect target refuses entry; 7) require the government to keep records of "permits" and raids run; and 8) expressly impose 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,²¹ and another on reporting by registered producers.²² 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.

²⁰ "Government Regulation Number 29 of 2004 Concerning High Technology Production Facilities for Optical Discs" (in force April 5, 2005).

²¹ 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.

²² 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.

TRAINING AND PUBLIC AWARENESS

In 2010, as in previous years, the copyright industries conducted and participated in various training and public awareness activities in Indonesia. The business software industry regularly works with Indonesian police conducting capacity building and education on software licensing and enterprise end-user software piracy, technical aspects in conducting raids, and evidence seizure/preservation methods. In 2010, BSA provided capacity building for police investigators serving in Bali, North Sumatra and East Java Regional Police Commands.

The motion picture industry focused its recent activities on public awareness of the importance of strong copyright protection to the development of the local film industry. For example, in late 2009 MPA hosted (with the Indonesian Embassy) a screening in Washington of the Indonesia movies *Garuda di Dadaku* and *Naga Bonar Jadi*. MPA also supported the 'Democracy Video Challenge,' in which one Grand Prize Winner (from more than 1,600 young artists from 110 countries) came from Indonesia. MPA provided support for the Asia-Pacific Screen Awards (APSA). On August 9, 2010 (and in conjunction with the local film body Balinale), MPA held a Film Forum & Workshop in Jakarta, attended by over 50 Indonesian filmmakers and students who learned about film industry development and infrastructure. In October 2010, MPA supported Balinale on the Bali Film Festival, securing a number of U.S. movies including *Eat, Pray, Love*.

The local recording industry group, ASIRI, remained active in training courses for Indonesian Police Department cadets. ASIRI also focused on arranging group discussions on the draft amendments to the Copyright Law, raising the chief concerns that 1) *ex officio* authority must be maintained, and 2) right holders should not be forced into collective management schemes, including single licensing windows.²³

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 DGIPR in implementing the laws.

GENERALIZED SYSTEM OF PREFERENCES

The GSP statute expired on December 31, 2010. In the past, Indonesia enjoyed preferential trade benefits under the program. One of the criteria of the program is that the country provides "adequate and effective protection for intellectual property rights." In 2010, \$1.86 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 11.4% of its total imports to the U.S. Indonesia needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible, once it is reauthorized, to continue to receive favorable treatment under the GSP program.

²³ On November 22, 2010, ASIRI arranged a focus group discussion attended by professionals, lecturers, IPR experts, producers, the CMO for composers and music publishers, a regional police officer and IFPI. On December 6, 2010, a follow-up discussion was held with at least 100 attendees including lecturers, music producers, professionals, and students.