

INDONESIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Indonesia remain on the Priority Watch List in 2014. IIPA also recommends that USTR conduct an Out-of-Cycle Review (OCR) later in 2015 to monitor progress on the proper implementation of the law, in line with the comments made in this filing, and other improvements noted in this filing in the areas of enforcement and market access. IIPA supports the continuation of the Generalized System of Preferences (GSP) investigation into Indonesia's intellectual property system and related market access concerns once that program is renewed.¹

Executive Summary: IIPA welcomed passage and final coming into force of a new Copyright Law in October 2014 (after it was signed by former President Yudhoyono). The new law contains some important new protections required to address current issues, such as mall piracy and burgeoning online infringement, although we understand the provision creating liability in cases of mall owners who facilitate and profit from the infringement of their tenants is suspended while it undergoes a Constitutional challenge. The law also adds specificity with respect to violations involving the circumvention of technological protection measures (TPMs) and criminal penalties that hopefully will provide a deterrent against these current violations causing significant commercial harm to right holders in Indonesia.

IIPA remains concerned about some provisions in the new law, and hopes that some of the remaining concerns may be addressed in implementing regulations, which should be swiftly adopted. Unfortunately, the piracy and enforcement situation in Indonesia remains very difficult. Right holders are often asked by enforcement officials to pay for raids; and criminal raids and prosecutions, even against well-identified and recognized notorious markets, are almost non-existent. Courts are seen only as a last resort and largely ineffective. USTR (in conjunction with other agencies and the Embassy team in Jakarta) should seek to implement a meaningful action plan that: encourages swift implementation and enforcement of the new Copyright Law, sets enforcement benchmarks (including judicial reform), and eases market access barriers.

PRIORITY ACTIONS REQUESTED IN 2015

Enforcement:

- Institute comprehensive enforcement reforms (under the oversight of the Anti-Corruption Commission) such as:
 - Establishing a separate Indonesian National Police unit dedicated to IP crimes with adequate funding;
 - Expanding the budget of the Penyidik Pegawai Negeri Sipil (PPNS) team, and increasing the number of copyright piracy raids annually;
 - Ensuring the Directorate of Special Crimes (Ditreskrimsus) and "Type A" Police Commands run sustained IPR police investigations with deterrent results;
 - Establishing a team of IP prosecutors to bring more cases, including high-profile anti-piracy cases; and
 - Establishing a National IP Task Force website tracking piracy prosecutions as part of an effort to increase transparency.
- Commit to judicial reforms in the Jakarta Commercial Courts; expand such courts in Medan, Semarang, Surabaya, and Makassar to adjudicate copyright cases; and establish special IP courts for criminal cases.
- Combat illegal photocopying, print piracy, and unauthorized translations, and legitimize use of published materials at schools and universities.

¹For more details on Indonesia's Special 301 history, previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Indonesia's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



- Take actions against those engaged in the unauthorized trafficking, dissemination, decryption, or receipt of pay-TV (or related devices/technologies).

Legislation:

- Ensure full, swift implementation of the new Copyright Law, in particular the new provisions in Chapter VIII (Articles 54 to 56), ensuring compliance consistent with Indonesia's international obligations (including under the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Seek immediate repeal of broad exception related to Internet uses (Article 43(d)).
- Ensure that copyright infringement is considered a predicate offense under anti-organized crime laws that permit broader criminal investigations and enhanced remedies.
- Make optical disc regulations more effective by: 1) routinely conducting off-hours unannounced inspections; 2) enforcing against source identification (SID) code violations; 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:

- Amend the Negative Investment List (NIL) to allow greater foreign direct investment in media sectors.
- Permanently remove the requirement to replicate locally all theatrical prints and home video titles released in Indonesia.
- Eliminate provisions from the Film Law that would, if implemented, impose local screen quotas, pre-production content review requirements, a prohibition on dubbing imported films, and other restrictions on the film industry.
- Repeal Broadcasting Law requirement that any advertising aimed at the local market must be locally produced.
- Reduce import tariff rate on films to pre-2010 levels.

PIRACY AND ENFORCEMENT UPDATES IN INDONESIA

Prior IIPA reports on Indonesia contain detailed discussions of piracy and enforcement issues. This report serves as an update to those reports and is not to be considered an exhaustive review of issues.²

Retail, Mall, Physical, and Mobile Device Loading Piracy Remain Rampant: Retail piracy in Indonesia's notorious markets, kiosks and malls³ remains extremely high. Unauthorized CDs, VCDs, DVDs, and CD-ROMs occupy an estimated 90% of the physical market for most industries, including music, movies (including pirate movies in or claiming to be in Blu-ray format), and video games. Unauthorized photocopying of published materials continues to be a significant problem, particularly around university campuses. Retail pirates also offer to load illegal copyrighted files on to various mobile devices or carriers. The landlord liability provisions in the Copyright Law is apparently suspended pending a Constitutional review. In the meantime, retail and mall piracy continue largely unabated. In 2013, the Governor of Jakarta issued a Decree that malls not allow the sale of counterfeit and pirated materials on their premises (which was sent to the mayors of five cities in Jakarta), but the Decree is not being enforced strictly and there are no consequences for not following the Decree. Although the national response team on infringement of IPR successfully carried out a raid at Glodok Plaza two years ago (resulting in seizure of 15 truckloads of pirated material), piracy activities are still ongoing.

Internet Piracy and Mobile Network Piracy Worsen, Requiring Swift Implementation of New Law: Peer-to-peer (P2P) downloading, streaming, cyberlocker, and direct download sites with pirated content dominate the online landscape in Indonesia. Worse yet, the money from advertising, albeit largely from gambling services, malware providers, transactional sex offers, and pornography sites, make offering pirated content a very lucrative and relatively low-risk enterprise. Estimates of Internet usage in Indonesia range between a little more than 71 million users (Indonesia Internet Service Providers Association, Q4 2013) to 83.7 million users (eMarketer, 2014), which in

²See, e.g., IIPA, *Indonesia*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301INDONESIA.PDF>.

³Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hot spots replete with pirate materials. Notorious markets identified by IIPA members in the fall of 2014 included Harco Glodok (MPAA).

either case approaches 30% of the population and represents double-digit growth year-on-year (Commerce Ministry data is more conservative, but may underestimate users based on per capita estimates of use by each connection and does not take into account mobile). Mobile penetration, which is an enabler of piracy (due to the proliferation of mobile apps facilitating infringing activity), has been at over 100% for several years, and well more than half of Indonesians having mobile phones access the Internet this way (Nielson, 2011). Speeds vary but averaging over 2 Mbps (and a smaller percentage having over 4 Mbps) (Akamai Technologies, Q1 2014), it is clear that an increasing number of Indonesian Netizens are now enjoying limited broadband capability.

These numbers indicate that significant opportunities exist for the launch of legitimate services for the distribution of copyright materials in Indonesia. Unfortunately, with the absence of an adequate legal or enforcement framework up to the present, online and mobile piracy services have proliferated and legitimate services cannot enter this market rigged with piracy. Notorious markets identified by IIPA members in the fall of 2014 and linked to Indonesia (either because they are located there or are extremely popular in the country) include *gudanglagu.com* (cited by RIAA) (878th), *4shared* (55th),⁴ *kickass.so* (57th).⁵ Other sites of concern include *subscene.com* (45th),⁶ and *nontonmovies* (103rd in Indonesia, 44th in Cambodia, and very popular in Singapore and Korea).⁷ The new law provides express authority to the Indonesian Government to order ISPs to disable access to websites on the basis of copyright infringement. This law should be swiftly implemented.

Book Piracy: Indonesia's market for publications shows great promise for growth, but piracy of published materials makes it one of the worst markets in Asia for publishers. Piracy comes in the form of unauthorized copies of academic textbooks. Industry continued its efforts to disrupt unauthorized photocopying at dozens of retail shops situated near universities. Enforcement activities have expanded beyond Jakarta to target shops in the Yogyakarta area. While many of the shops have stopped accepting requests to photocopy materials, a number of shops have refused to cooperate and continue to engage in unauthorized photocopying activities. University campuses remain central in the fight against unauthorized use of books, textbooks, journals, or other publications. Industry has engaged with directors and deans of campuses to ask them to join the fight against piracy, and these self-help initiatives have led to some improvements in policies for high-level universities, some of which now have policies in place not to allow photocopied books to be brought into the classroom. Academics have also been engaged, and some have taken steps to discourage the use of photocopied textbooks in their classes, banning illegally copied texts from examinations, and encouraging cost-sharing on legitimate texts as an alternative to piracy. The Ministries of Education and Culture should be encouraged to do more to help rights holder groups better address the problem of unauthorized photocopying. More universities should be encouraged to adopt appropriate use and copyright policies, and to better promote the use of legitimate published materials in schools and universities. These policies and messages would better serve students, professors and all university personnel, and be better received, coming from the universities' governing bodies. Online piracy of dictionaries and journal articles is also becoming a problem in Indonesia.

Signal Theft Remains a Serious Problem in Indonesia: Signal theft/pay-TV piracy remains a problem throughout the Indonesian archipelago. We understand the local pay-TV company, MNC Sky Vision, has instituted self-help in seeking prosecutions against dozens of individuals engaged in signal theft and set-top box (STB) piracy in 2014. It is critically important, with oncoming convergence of online networks and advances in digital technology, that the government play a supportive role in supporting legitimate pay-TV services and take actions against those engaged in the unauthorized trafficking, dissemination, decryption, or receipt of pay-TV (or related devices/technologies).

⁴*4shared.com* is a cyberlocker often used to host downloadable infringing content (including major U.S. motion picture titles) for other dedicated piracy sites. They also have an unfiltered search function.

⁵*Kickass.so* is a site designed for the purpose of commercially benefiting from piracy, and currently is the largest torrent site in the world.

⁶*Subscene.com* is a subtitle file download site. They host subtitle files of major motion pictures, but do not host the video files themselves.

⁷*Nontonmovie.com* is a user-generated content streaming site. The site has infringing content (including major U.S. motion picture titles) and can only be accessed in Indonesia.

Comprehensive Enforcement Reform: A significant, multi-faceted enforcement reform process must be instituted in order to make significant progress against piracy in Indonesia. The National IP Task Force recently launched a “campaign” against piracy, but the actual efforts have been minimal. Under the direction of the Task Force, and with the oversight of the Anti Corruption Commission, the following steps should be undertaken:

- First, a separate police team for IPR crimes should be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels.
- Second, the IPO PPNS team budget should be expanded in order to increase the number of copyright piracy raids each year.
- Third, Ditreskrim and “Type A” Police Commands should announce in early 2015 a plan for sustained IPR police investigations with deterrent results.
- Fourth, a select group of IP prosecutors should be established, with a mandate to handle piracy cases.
- Fifth, the National IP Task Force should create a website to track prosecutions, including identifying parties to the cases; legal bases for prosecutions; penalties assessed; and evidence found during raids.⁸

Enforcement officials have reportedly been reluctant to conduct regular enforcement actions because of the involvement of organized crime in piracy activities. It is critical that copyright piracy constitute a predicate offense for organized crime statutes, such that Indonesian officials will feel more secure in targeting such criminal groups.

Comprehensive Judicial Reform: The courts in Indonesia remain largely ineffective in both the civil and criminal areas.

Regarding civil courts, it is critical to improve the quality and consistency of civil Commercial Court rulings. To this end, the Anti-Corruption Commission should work with the Supreme Court Ethics Committee. Publishing court decisions is also necessary to improve transparency and reduce irregularities. Second, with the exception of Jakarta, very few civil Commercial Court judges are familiar enough with basic aspects of how IPR cases are conducted, including damages calculations; issuing provisional orders; implementing injunctions; or conducting IPR border seizures. As a result, they award: only rudimentary judicial remedies with extremely low, non-compensatory (and non-deterrent) damages; no orders to detain, remove, or destroy pirate goods; and unenforceable verdicts. Reform efforts in Jakarta, including enhanced training to create more familiarity with IP cases should be enhanced and extended to Commercial Courts outside Jakarta, especially in Medan, Semarang, Surabaya, and Makassar.

The criminal courts face similar hurdles. Despite the 2009 Attorney General letter categorizing IP cases as “Important Cases ... to accelerate case prosecutions,”⁹ in the few cases that proceed to a conviction, most result in extremely low and non-deterrent criminal fines. In one case, a Public Prosecutor in Lubuk Sikaping, Padang eventually (after a complaint to the National Public Prosecutor) brought a case against a suspect selling unlicensed music, seeking three years imprisonment. It was only due to the persistence of the industry that this case was brought, and only after significant delay.

COPYRIGHT LAW AND RELATED ISSUES

Indonesia’s new Law Concerning Copyright (2014) replaced the prior 2002 law and went into force in October upon signature of former President Yudhoyono. The Law now awaits implementing regulations. The new Law added some strong provisions to potentially provide immediate relief against burgeoning online and digital forms

⁸At present, 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 and create deterrence in copyright infringement cases.

⁹Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009. The Attorney General has stipulated the following, as examples: 1) for IP infringement where the evidence of pirated CDs is less than 5,000, the cases are directly handled by the District Attorney; 2) for IP infringement where the evidence of pirated CDs is in the range of 5,000 to 10,000, the cases are directly handled by the High Attorney; and 3) for IP infringement where the evidence of pirated CDs is more than 10,000 (bulk production), the cases are directly handled by the Attorney General. Reports are to be submitted directly to the Attorney General. See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property Rights System of Indonesia: Progress and Achievements in 2010*, February 2011, at <http://www.regulations.gov/contentStreamer?objectId=0900006480e01d5d&disposition=attachment&contentType=pdf>.

of infringement, in line with Indonesia's international obligations under the TRIPS Agreement, the Berne Convention, and the WCT and WPPT.¹⁰ However, some provisions raise serious concerns, while other provisions require further clarification in implementing regulations. In several cases, needed changes were omitted.

Improvements in the New Law: Improvements in the Law Concerning Copyright (2014) include the following:

Enforcement Against Internet Infringements: Articles 54 through 56 of the Law retain a workable approach to addressing Internet-based infringements in Indonesia. Right holders believe this combination of administrative and judicial relief, when fully implemented, will allow the government to take effective action to halt online infringements. A new requirement (in Article 55) was added between the prior drafts and the final law, namely, that for any act involving an "entire" website, it shall be referred to a court for review within 14 days.

Temporary Reproductions: The Law contains confirmation of temporary copy protection (broad reproduction right "in any manner or form" accompanied with a narrow exception) in Article 49.

Technological Protection Measures (TPMs): The Law provides protection against circumvention of TPMs including criminal penalties for offenders (Article 112) (but coverage of all trafficking offenses, technologies, and access controls should be confirmed in IRs).

Communication to the Public/Making Available Rights: The Law provides a WCT-compatible "communication to the public" right, and a WPPT-compatible "making available" right. Article 27 provides, "phonograms made available to the public through wire or wireless means shall be deemed as a phonogram published for commercial purposes" and are only eligible for a single equitable remuneration. It should be confirmed in implementing regulations that this does not apply in cases of interactive transmissions, which are covered by the exclusive making available right set out in Article 24(2)(d), in order to ensure full WPPT-compatibility.

Ownership/Work-for-Hire Provisions: The Law provides ownership/work-for-hire provisions generally favorable to, and preserving of, existing and longstanding commercial arrangements of right holders/authors (except as noted below regarding termination of "true sale agreement" transfers).

Term Extension: The Law provides for extension of term of protection to life plus 70 for works calculated on the basis of an author (which would include books and musical works). Unfortunately, works "owned or held by a legal entity," as well as computer programs, video games, cinematographic works, phonograms and performances, among others, are only protected for 50 years. This unfair and discriminatory treatment by subject matter or ownership structure should be remedied by providing at least 70 years protection from publication, or 70 years from the life of the author, as the case may be.

Unauthorized Camcording of Movies: While no express provision was added, the Explanatory Memorandum to the new Law indicates the unauthorized use of an audiovisual recording device in a movie theater (camcording) can be addressed under the reproduction right. This important recognition by the Indonesian government of the serious nature of the problem of unauthorized camcording must now be followed on with enforcement, including fostering greater cooperation with cinema owners to fully uphold and enforce the Law, and targeted enforcement actions, and where warranted, prosecutions against those engaged in this highly damaging activity.¹¹

¹⁰Indonesia joined the WIPO Copyright Treaty (WCT) on June 5, 1997 (in force March 6, 2002) and the WPPT on February 15, 2005.

¹¹Preferably, an express provision should have been added, defining the act of using (or attempting to use) an audiovisual recording device in cinemas to camcord, record, or transmit a film, in whole or in part, as a strict liability criminal offense. The Asia Pacific Economic Cooperation (APEC) Ministers and Leaders, including from Indonesia, agreed in 2011 on "Effective Practices for Addressing Unauthorized Camcording," and the steps recommended therein should also be taken. These include: (1) educating the public about the problems posed to businesses and the consumer by unauthorized camcording; (2) working with the private sector to identify and prevent unauthorized camcording in cinemas; and (3) developing and implementing legal measures to effectively deter unauthorized camcording. *Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, 23rd APEC Ministerial Meeting, Hawaii, United States, 11 November 2011.

Provisions in the New Law Raising Concerns: IIPA has in the past raised, and once again raises, the following concerns with respect to the Law as enacted:

Internet Exception: The Law provides a broad exception under Article 43(d) for “making and disseminating copyright content through information and communication technology media that is non-commercial and/or non-profit in its effect on the author or related parties, or in which the author has expressed no objection to such making or disseminating.” Both parts of this provision set a terrible precedent and would act to discourage and severely undermine legitimate business models built on the rights of authors, right holders, and related right owners to control the manner and means in which they authorize the making and disseminating of content through information and communication technologies. This provision would collide with Indonesia’s international obligations under TRIPS, the Berne Convention, the WCT, and the WPPT. For these reasons, it should be deleted in its entirety.

Criminal Case Structure and Penalties Weakened: Under the new Law, criminal cases are now complaint-based. Right holders view this as an additional hurdle to effective enforcement; criminal cases should be prosecuted on an *ex officio* basis. In addition, the criminal provisions take steps backward from the previous law, in that they no longer provide minimum mandatory statutory criminal penalties. Without a minimum fine, right holders are concerned deterrent sentences will not be forthcoming. Specifically, some of the criminal penalties may be too weak to deter. For example, the maximum fine for TPMs/circumvention violations is US\$25,000, lower than that for many other offenses (and there is no multiplier if the violation is “done in the form of piracy” as for other offenses). Also, the landlord criminal liability provision (which we understand is now suspended pending a Constitutional review) is weak, with a maximum fine of only US\$8,260. Finally, Article 95 of the new Law creates a highly unusual provision which appears to mandate “mediation” (*mediasi*) before a piracy case (*pembajakan*) can be prosecuted. The purpose and operation of this provision in practice is highly unclear.

Exceptions and Limitations/Compulsory License: Article 44 of the new Law contains a broad exception exempting a number of different uses for a wide array of purposes, ranging from education to criticism to “security and maintenance of government.” On its face, the broad scope of the uses and purposes contained in this exception appears to go well beyond what is permissible under TRIPS, the Berne Convention, the WCT, and the WPPT, despite a well-intentioned, but ineffective, attempt to narrow the provision through inclusion of part of the Berne three-step test:

“The use, consumption, reproduction, and/or alteration of a work and/or object of related rights, in whole or in part, shall not be deemed a copyright infringement if the source is indicated or listed in detail for the purposes of ... (a) education, research, scientific writing, report preparation, written criticism, or review on an issue without prejudicing the interests of the author or copyright owner...”

Subsection (a)’s reference to the three-step test omits the limitation to “certain special cases” and uses that do “not conflict with a normal exploitation of the work by the copyright owner.” The three additional subsections included in this exception do not contain any safeguards required under the three-step test. IIPA thus recommends that the Indonesian government clarify the application of the full three-step test to each use and purpose contained in this exception through implementing regulations. Furthermore, implementing regulations should provide guidance to help prospective users determine whether their use falls within the appropriate bounds of the three-step test.

In addition, Article 84 of the Law includes a compulsory license which has been narrowed from previous drafts IIPA reviewed. Nonetheless, the provision applies to “works” and is not expressly limited to any subject matter. It should be further clarified and narrowed to ensure it does not collide with TRIPS, the Berne Convention, the WCT, and the WPPT.

Termination of Transfers: Articles 18, 30 and 122 of the Law provide for a possible “termination” of transfers with respect to literary works (books), performances, and musical works, but only in undefined cases of “true sale agreements.” Under these provisions the termination occurs at “25 years,” with a two-year transition period for works already past the 25 year mark as of the date of entry into force of the Law; and two-year transition past the

25 years if not yet reached (i.e., 27 years from the agreement). It is highly unclear how these provisions operate; for example, it is assumed that an author needs to invoke the termination in order for it to be effective. This should be made clear. It is also unclear when there is (or is not) a “true sale” agreement (an undefined phrase). In any event, the implementing regulations should ideally ensure that these termination provisions do not apply to foreign works. In the very least, it should be confirmed that the system requires an opt-in by the author.

RMI Violations: In a somewhat perplexing development, the Law provides that RMI violations only occur when affecting moral rights. The WCT and WPPT clearly require “adequate and effective legal remedies against ... acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of *any right covered by this Treaty [or the Berne Convention]*.” (bracketed text in WCT only; emphasis added).

Censorship Provision: Article 50 of the Law contains a censorship provision which, while not necessarily denying copyright protection (as was the case in China and which was found to be in violation of China’s WTO obligations), is extremely open-ended and could be problematic.

Registration, Invalidity, and Recordal Requirement: While registration of copyright remains voluntary in the Law, the substantive examination for voluntary registration will apparently address whether a work is “substantially similar” to another work previously registered as a grounds for refusal. There remains considerable concern about abuse of the voluntary copyright registration process in Indonesia, since apparently, many invalid copyrights get registered, including by IP infringers. It is hoped that through this new provision, the authorities will be able to review and invalidate false applications or registrations. We suggest that in implementing regulations, a more forceful deterrent be introduced, including fines and penalties, against anyone who knowingly files a false application. Also, nothing with respect to the registration or recordal system may create prohibited formalities. Article 83 appears to impose a requirement to record licenses, with lack of recordal meaning a license “shall have no legal effect on third parties.” This would seem to suggest a Berne-prohibited formality, if, for example, lack of recordal was used to deny the exercise of copyright from a particular licensor or licensee. It should be clarified in implementing regulations that in no way will a failure to record transfers and other changes deny copyright protection to the registrant.

Provisional Measures: Under Article 108 of the Law, it appears that preliminary (provisional) injunctions will take too long to obtain. It also appears the Article does not expressly provide for any *ex parte* procedure, which would make it in practice unworkable and would call into question Indonesia’s TRIPS obligations. The application for provisional relief is, according to the Article, not acted upon for “up to five days,” is “informed to both parties,” (i.e., not *ex parte*), with defendants appearing seven days thereafter, and a 30-day review process. This would clearly not provide for “expeditious” remedies as required by TRIPS.

Other Needed Legal Reforms:

Strengthening the Organized Crime Statute: While not included in the latest amendments, since 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, copyright infringement should be 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.

Strengthening the Optical Disc Regulations and Making them GATT/WTO-Consistent: The Optical Disc Regulation (2005), a Ministry of Trade Regulation on the importation of machines and raw materials, and a Regulation on reporting by registered producers, address optical disc piracy. The Regulations need to be updated to: 1) prohibit the unlawful use of or manipulation of SID code, including gouging off SID Codes and/or total non-use of SID codes; 2) provide for centralized licensing of production of pre-recorded or blank optical discs; 3) remove the requirement that imported, pre-recorded discs be marked with identification codes, which violates GATT/WTO rules and could have other negative ramifications; 4) adequately ensure stampers and masters are subject to seizure; 5) expressly cover imports and exports of discs, equipment and raw materials; 6) expressly authorize entry for an

inspection in case a suspect target refuses entry (and penalties for such refusal); 7) require the government to keep records of “permits” and raids run; 8) permit only those industries directly related to the optical disc industry to import optical grade polycarbonate; 9) expressly impose corporate liability on individuals; and 10) provide clear enforcement authority or grounds for routine inspections on manufacturers’ or importers’ premises.

MARKET ACCESS AND RELATED ISSUES

Further Lift Prohibitions and Restrictions on Foreign Company Participation or Investment in Importation, Direct Distribution, Exhibition, or Retailing in Copyright Products in Indonesia: Most media sectors remain on the Negative Investment List (NIL) in Indonesia, preventing direct foreign investment in the Indonesian media industries, and particularly harming the motion picture and music sectors in Indonesia.¹² For example, sound recording production, film production and distribution remain at a 100% local capital investment level. Although in 2014, the Indonesia Investment Coordinating Board (BKPM) announced some changes in certain areas, we have thus far been unable to confirm the changes in any corresponding schedules. Our understanding is that four aspects of film technical services (film studios; film processing laboratories; sound designing and dubbing facilities; and film printing and duplication services) are now open to direct foreign investment of up to 49%, and that film exhibition will also be opened to foreign investment as determined by the Ministry of Finance and BKPM, as long as the exhibitor is a publicly listed entity. These are helpful changes, but other market openings should be afforded to: radio and television broadcasting service providers; radio and television broadcasting subscription service providers; print media information service providers; film export and import businesses; film distributors; and foreign sound recording distributors.

IIPA notes the longstanding promise made by the Indonesian Government 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). Broader investment in the distribution structure would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials.

Permanently Remove the Requirement to Locally Replicate All Theatrical Prints and Home Video Titles Released in Indonesia: A 2008 Decree would require the local replication of all theatrical prints and home video titles (e.g., DVDs).¹³ While the Decree has been suspended several times (including again for 2015), it is past time to formally and permanently eliminate this requirement, which is opposed by local Indonesian filmmakers as well as by international producers and distributors. The specter of the Decree threatens to have serious negative consequences on the long-term viability of Indonesia’s film industry, threatens the continued development of local cinemas, and jeopardizes arrangements for local filmmakers to carry out post-production work overseas. If the Decree was ever implemented, it would negatively affect foreign motion picture companies’ release and distribution schedule for the country, and would raise concerns over existing local facilities’ ability to handle the volume and quality output requirements, as well as lab and duplication facility security issues.

Eliminate Problematic Provisions from the Film Law: The 2009 Film Law, which has not yet been implemented, contains provisions that would limit foreign participation in various aspects of the film businesses and as such would be inconsistent with the U.S.-Indonesia Letter Agreement on Market Access for Films and Videos. The local filmmaking industry opposes the Law. The Law includes a 60% local content (screen) quota for local exhibitors, and a ban on the dubbing of imported films. Other restrictions include: 1) limits on the number of imported films; 2) Articles 10 and 20, which require the maximization of Indonesian resources (potentially including a local print replication requirement); 3) Article 17, which establishes a pre-production content review requirement that obliges filmmakers to notify the government of the title, story content, and production plan (this would be especially burdensome for co-productions); 4) Articles 26-28, under which distributors are required to provide “fair and right”

¹²The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

¹³Ministry of Culture and Tourism (MOCT) *Ministerial Decree No. 55, PM No. 55/PW.204/MKP/2008 on Utilisation of Domestic Film Technical Services in Making and Duplicating Activities of Local Film and Duplication of Imported Film* (2008).

treatment to exhibitors and could be interpreted to mandate provision of prints to theaters on demand (a potential “must supply” obligation); 5) Article 40, restricting foreign entities from engaging in film distribution, exhibition, export, and import businesses; and 6) Article 44, which bans dubbing of imported films.¹⁴ The Law includes some ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct such as restrictions on vertical integration that could have unintended consequences including restricting foreign participation in the market and curbing business efficiency. If implemented, the industry would expect the same repercussion as experienced in other markets with like provisions: limits on the local industry’s exposure to the expertise and skills of foreign producers, lost revenues to local theaters, and a huge opening to the purveyors of pirated content.

Advertising Restrictions: Indonesia’s Broadcasting Law (2002) includes a requirement that any advertising aimed at the local market must be locally produced. Although the requirements have never been implemented (due largely to concerns that the indigenous capacity to produce advertisements is insufficient to meet the demands of the market), and although regulations issued in 2007 provided a series of exemptions, recent public hearings organized by Indonesian regulators calling for its implementation have raised concerns about the possible deleterious effects of such a requirement.

Customs Valuation: In 2010, the Indonesian Government sought to impose a methodology for determining the customs duty on theatrical prints imported into Indonesia that would have sought to capture the royalties paid on the films. Not only was this formulation inconsistent with the WTO Customs Valuation Agreement, but U.S. industry believes that the regime which replaced this proposal may also be inconsistent. A new specific tariff that is based on the running time of the film has since been imposed, resulting in a new barrier to the Indonesian market in the form of a significant increase in the amount of customs duties paid for the importation of foreign films. The Indonesian government should properly apply the computed methodology, in which the valuation of film imports is made on a per-meter basis against the physical carrier medium, as is the norm in most markets around the world.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

On August 1, 2013, the GSP program expired, thus placing on hold the investigation into the country practices in Indonesia regarding intellectual property rights (which had commenced in July 2012). Once the program is renewed, it is expected that the investigation will continue into whether Indonesia qualifies for GSP beneficiary status. Under the statute the President of the United States had to consider for GSP beneficiary status “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 U.S.C. §§ 2462(c)(4) and (5). Countries like Indonesia should not expect to continue to receive trade preferences if they do not live up to their end of the bargain by providing adequate and effective protection for the intellectual property rights of U.S. creators, and/or if they fail to afford equitable and reasonable market access to U.S. creative products and services.

¹⁴Dubbing of imported films into a local language is a commercial decision that should be based on business considerations.