

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia be moved to the Watch List in 2017, in recognition of positive efforts on the part of the Indonesian Government in 2016. IIPA further recommends that the U.S. Government develop steps for engagement with the Indonesian Government that would result in the termination of the current Generalized System of Preferences (GSP) investigation into Indonesia's intellectual property system and related market access concerns.<sup>1</sup>

**Executive Summary:** IIPA commends the Government of Indonesia for improving market access in 2016. In May 2016, the Government of Indonesia issued Decree 44, removing film and recording studios from the negative investment list (NIL) and enabling 100% foreign direct investment in film and sound recording production, and film distribution and exhibition. However, it is important that this positive movement not be undermined by the planned implementation and enforcement of aspects of the 2009 Film Law that would impose significant barriers to market entry, such as a prohibition on dubbing of imported films for theatrical distribution, exhibition, and broadcast on television; implement a 60% screen quota for Indonesian films; and otherwise restrict the film industry. The Government of Indonesia held to its commitment to combat online piracy by implementing and enforcing the Copyright Law and Regulations Nos. 14 and 26 of 2015, specifically by effectively enforcing against 85 websites that facilitated infringement of films and music; the Government has been asked to further enforce against additional sites causing serious harm to the creative industries. This dedication to anti-piracy efforts is a positive step, though the problem remains serious; in a one month period there were more than 2.5 times the page views to the top piracy sites in Indonesia as there were page views to the top legitimate sites. The past year has seen positive developments with respect to collective management of music performance rights and the launch of licensing activities. However, active monitoring continues to be needed to ensure collective licensing in Indonesia remains in right holders' control and is allowed to develop as an efficient, transparent and accountable activity. In 2017, IIPA asks the U.S. Government continue to engage the Indonesian Government to maintain focus in the coming year on continuing effective actions under the law to address primarily infringing websites; amending the Film Law or its implementing regulations to remove significant barriers to market entry; setting enforcement benchmarks (including judicial reform); and expanding cooperation to address the concerns of all of the copyright sectors.

### PRIORITY ACTIONS REQUESTED IN 2017

#### Enforcement:

- Devote additional resources to ensuring continued enforcement of the Copyright Law under Regulations Nos. 14 and 26 of 2015, including blocking of additional primarily infringing websites.
- Target the problem of primarily infringing websites, such as by developing an Infringing Website List (IWL) initiative similar to that used in countries like the U.K. to combat advertising by brands and advertising networks, which fuels primarily infringing websites' revenues and their existence, and addressing sites such as cyberlockers that are not covered by the current blocking regime.
- Combat Illicit Streaming Devices (ISDs) (set-top boxes used for piracy) and/or their associated apps, which promote or enable the dissemination, decryption, or receipt of unauthorized motion picture and television content, and which prey upon legitimate pay television and newly-emerging over-the-top (OTT) platforms, among others.
- Commit to judicial reforms in Jakarta and other commercial centers, and establish special IP criminal courts.

<sup>1</sup>For more details on Indonesia's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Indonesia's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



## Legislation:

- Eliminate provisions from the Film Law that serve as barriers to market access such as local screen quotas and the prohibition on dubbing imported films.
- Seek repeal of the broad copyright exception related to Internet uses (Copyright Law Article 43(d)).
- Clarify or remove Article 18 and Article 30 of the Copyright Law which provide that the rights in music and performances transferred by sale revert back to the author/performer after 25 years.
- Extend the copyright protection term for sound recordings, cinematographic works, and video games to at least 70 years, consistent with emerging global developments.
- Ensure that copyright infringement is considered a predicate offense under anti-organized crime laws.
- Clarify the government's e-commerce roadmap launched in 2016, including Circular Letter 5 (2016) on user-generated content (UGC), and any related regulations with respect to takedown requirements and sanctions for failure to comply with regulations, to ensure that the full scope of the making available/communication to the public right is preserved and available to right holders, and provide opportunities for stakeholders to comment and consult.

## THE NATURE OF PIRACY IN INDONESIA

Indonesian creators are suffering losses from high levels of piracy in the country, in a market that is just as difficult for U.S. book, film, music and video game creators. The Association of Indonesian Film Producers (APROFI) estimates that losses approach Rp 4.3 billion (US\$322,260) per film.<sup>2</sup> Local industries report that in a given month, 18 million copies of pirated films, music, and software are circulating in the Indonesian market—mostly online but also appearing in shopping malls and markets.<sup>3</sup> Indonesia's Recording Industry Association (ASIRI) reports that there are over 2.8 billion illegal song downloads annually, estimating losses of Rp 14 trillion (US\$1.05 billion) per year.<sup>4</sup>

**Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law:** The Indonesian Government should be commended for its actions to address Internet piracy in 2016. These improvements will benefit all creators, Indonesian and foreign alike. Working with APROFI and ASIRI, the government took effective action by disabling access to 85 primarily infringing sites in 2015 and 2016, following implementation of the Regulations Nos. 14 and 26 of 2015. In October 2016, a further set of infringing sites was submitted to the competent authorities for action. These actions have resulted in a significant reduction of audiovisual and music piracy in Indonesia on the sites involved, with very close to 100% compliance by Internet Service Providers (ISPs). Notably, access to the streaming/downloading site *Stafaband* (*stafaband.info*), identified by Recording Industry Association of America (RIAA) in the fall of 2015 as a notorious market for infringing sound recording files, was disabled as a part of this implementation.<sup>5</sup> In 2016, access was disabled to three more infringing sites that seem to be related to *Stafaband*,<sup>6</sup> or that are using *Stafaband*'s name (*downloadlagustafaband.top*; *stafaband.bz*; *stafamp3skullbursalagu4shared.com*).

Broadband Internet access in Indonesia is still nascent compared to other emerging markets, but is sharply rising, while mobile penetration has exceeded 100% for several years.<sup>7</sup> The legitimate commercial market for online

<sup>2</sup>See "Indonesian music sales now 95.7 percent piracy," Jakarta Post (Sept 18, 2015), <http://www.thejakartapost.com/news/2015/09/18/indonesian-music-sales-now-957-percent-piracy.html>. See also "Piracy is now a massive issue in Indonesia," Daily Seni, Astro AWANI (Oct. 4, 2015), <http://english.astroawani.com/entertainment-news/piracy-now-massive-issue-indonesia-75356>.

<sup>3</sup>See "Filmmakers, musicians join forces with police," Jakarta Post (September 19, 2015), <http://www.thejakartapost.com/news/2015/09/19/filmmakers-musicians-join-forces-with-police.html>.

<sup>4</sup>See "Rampant piracy paralyzes Indonesian music industry," Jakarta Post (Nov. 30, 2016), <http://www.thejakartapost.com/news/2016/11/30/rampant-piracy-paralyzes-indonesian-music-industry.html>.

<sup>5</sup>See "Govt blocks illegal music-sharing sites," Jakarta Post (Nov. 24, 2015), <http://www.thejakartapost.com/news/2015/11/24/govt-blocks-illegal-music-sharing-sites.html-0>.

<sup>6</sup>It is believed that users of *Stafaband* moved to these sites after *Stafaband.info* was blocked in 2015.

<sup>7</sup>International Telecommunications Union, *Measuring the Information Society Report (2016)*, available at <http://www.itu.int/en/ITU-D/Statistics/Pages/publications/mis2016.aspx>.

dissemination of copyright works is gaining a foothold: iTunes and several international streaming services operate in Indonesia, including Netflix, iFlix, CatchPlay, Vue, Genflix, and HOOQ. However, infringing cyberlocker, video linking and streaming sites, and direct download sites with pirated content continue to harm the market in Indonesia, inhibiting the growth of legitimate distribution in creative output of foreign and local right holders. Significant online markets for infringing content exist in Indonesia, as exemplified by *subscene.com*, a subtitle file download site that hosts subtitle files of major motion pictures, but does not host the video files themselves, and is the 39th most accessed site in Indonesia. The music industry reports that in 2016, cease and desist notices involving 75,740 infringing links were sent in Indonesia, with a takedown rate of 93.47%. These infringing sites are mostly free to users, but operating them is a lucrative and low-risk enterprise due to paid advertising from gambling services, malware providers, transactional sex offers, and pornography sites. Given the similarity of their languages, Indonesian-based pirate sites are often popular in Malaysia, and vice-versa.

**Illicit Streaming Devices:** ISDs<sup>8</sup> are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes in Indonesia. The devices may be promoted and/or advertised to enable infringement of copyright or other illegal activities. Chief among these activities are enabling users to access unauthorized motion pictures or television programming, often through apps to remote online sources, and which may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale, as an “after sale” service, or by the users themselves. ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The Indonesian Government must increase enforcement efforts, including cracking down on piracy apps and on device manufacturers who preload the devices with apps that facilitate infringement. Moreover, the government should take action against key distribution points for devices that are being used illegally.

**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 efforts to disrupt unauthorized photocopying at dozens of copy shops situated near universities in Jakarta and Yogyakarta were successful in educating copy shop operators, many of whom agreed to no longer copy entire textbooks. Unauthorized photocopying activities unfortunately continue, as a number of shops refused to cooperate. University administrators remain central in the fight against unauthorized use of books, textbooks, journals, or other publications. 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.

**Signal Theft:** Signal theft/pay-TV piracy remains a problem throughout the Indonesian archipelago. Local industry reports that illegal television channels host up to 100 pirated films at a time.<sup>9</sup> It is critically important, with the oncoming convergence of online networks and advances in digital technology, that the government take an active 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).

**Retail, Mall, Physical, and Mobile Device Loading Piracy:** Retail piracy in markets, kiosks, and malls remains a problem in the major cities across Indonesia.<sup>10</sup> USTR named Harco Glodok in Jakarta a Notorious Market in its 2016 out-of-cycle report, for its role as “the retail distribution point for a complex piracy and counterfeiting network.”<sup>11</sup> While the U.S. Copyright industries have shifted their priorities to improving the health of Indonesia’s online marketplace, unauthorized Optical Discs, CDs and DVDs continue to pervade the physical market for music,

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<sup>8</sup>In past filings, IIPA has referred to Illicit Streaming Devices (ISDs) as media boxes or set-top boxes. Because media boxes and set-top boxes have non-infringing uses, IIPA is changing our terminology to ISDs to make clear that we are referring to devices that are used to access pirated content.

<sup>9</sup>See Daily Seni, “Piracy is now a massive issue in Indonesia,” Astro Awani, (Oct. 4, 2015), <http://english.astroawani.com/entertainment-news/piracy-now-massive-issue-indonesia-75356>.

<sup>10</sup>Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hot spots replete with pirate materials.

<sup>11</sup>See USTR, 2016 *Out-of-Cycle Review of Notorious Markets* (December 2015), available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

movies (including those pirate movies in or claiming to be in Blu-ray format), and video games. Retail pirates also offer to load illegal copyrighted files on to various mobile devices or carriers. In 2013, the Governor of Jakarta issued a decree that malls must prohibit the sale of counterfeit and pirated materials on their premises (which was sent to the mayors of five municipalities of Jakarta), but the decree is not being enforced strictly. Instead, enforcement officials have consistently shown a lack of interest in enforcing against the widespread illegal activity taking place in Harco Glodok.

## **ENFORCEMENT UPDATES**

While the online enforcement environment in Indonesia has improved in 2016 with continued enforcement of the new copyright law implementing regulations, other enforcement areas remain challenging. There are few enforcement raids, fewer prosecutions, and the legal system continues to be challenging for right holders generally. The government should conclude the current online enforcement rounds and continue additional enforcement rounds in 2017 to allow legitimate online distributors the opportunity to increase their market share. It is important that the government maintain or establish regular channels of communications with all of the affected industries.

**Joint Regulation of the Ministry of Law and Human Rights and the Ministry of Communications and Information Technology (Kominfo):** These two ministries worked with right holders to continue implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015, which implement provisions of the 2014 Copyright Law that address infringing websites. Industry groups report complaints electronically and/or in writing to Kominfo, for review by a verification team formed by the Director General of Intellectual Property. The verification team then makes recommendations to the Director General of Informatics Applications for the partial or full shutdown of infringing content. In all, access to 85 infringing sites reported by industry groups through October 2016 had been disabled and numerous additional infringing sites were referred to the government toward the end of 2016. So far enforcement has been promising, with excellent compliance by the seven largest ISPs.

**Public-private anti-piracy taskforce, collaboration with the National Police:** In September 2015, the National IP Task Force of the Creative Economy Agency (Bekraf), a group of officials from within the agency, and several film and music associations, including APROFI, ASIRI, and the Indonesian Association of Artists, Singers, Composers and Recording Businessmen (PAPPRI), announced plans to collaborate with the National Police's detective division on anti-piracy actions. The international film industry association has actively participated in Bekraf's anti-piracy task force. In 2016, the task force assisted with reports filed with the police, and coordinated with Kominfo and right holders on the site blocking actions.<sup>12</sup> IIPA encourages the task force to include other affected industries, such as book publishers, which are damaged by piracy but to date have not received as much attention as other industries.

**Infringing Website List (IWL):** As most online piracy websites are funded through advertising, IIPA recommends that the Government of Indonesia institute an IWL that would identify key piracy websites for the purpose of informing advertising brokers and networks, and the brands that advertise on them, that the sites are piracy websites, and encouraging them not to place ads on such sites. As an example, the United Kingdom's Police Intellectual Property Crime Unit (PIPCU) established such a program in recent years, and by all accounts it has been extremely successful, exponentially reducing ad revenues for infringing sites. While piracy websites will take money from any source to make a profit, starving them of such easy money can be an extremely effective tool in addressing online piracy. Various jurisdictions have created such programs, whether governmental or voluntary, and IIPA recommends that the Government of Indonesia follow suit. Discussions have begun towards this goal and should be accelerated in 2017.

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<sup>12</sup>See "Agency shuts down tens of illegal music and film websites," Jakarta Post (Oct. 11, 2016), <http://www.thejakartapost.com/life/2016/10/11/agency-shuts-down-tens-of-illegal-music-and-film-websites.html>.

**Comprehensive Enforcement Reform:** The National IP Task Force has taken the first steps toward the kind of multi-faceted enforcement reform process needed to make significant progress against piracy in Indonesia. 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 IP Office's civil service investigators (PPNS) team budget should be expanded in order to increase the number of copyright piracy raids each year.
- Third, Ditreskrimsus and "Type A" Police Commands should announce in early 2017 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.<sup>13</sup>

**Judicial Reform:** IIPA encourages judicial reform in Indonesia, including:

- The Anti-Corruption Commission should work with the Supreme Court Ethics Committee to appropriately draft guidelines for the court.
- Court decisions should be published to improve transparency.
- Training should ensue on IPR cases, including on calculating damages; issuing provisional orders; implementing injunctions; and conducting IPR border seizures. Training should not be limited to Jakarta, but extended to Commercial Courts outside Jakarta, especially in Medan, Semarang, Surabaya, and Makassar.

Despite the 2009 Attorney General letter categorizing IP cases as "Important Cases ... to accelerate case prosecutions,"<sup>14</sup> in the few cases that proceed to a conviction, most result in extremely low and non-deterrent criminal fines.

## COPYRIGHT LAW AND RELATED ISSUES

IIPA congratulates the Indonesian Government for passage of the Law Concerning Copyright (2014), which replaced the prior 2002 law and went into force in October 2014, and for Regulations Nos. 14 and 26 of 2015, which implemented key provisions of the law regarding online and digital forms of infringement, including provisions in line with Indonesia's international obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).<sup>15</sup> However, some provisions raise serious concerns, while other provisions require further clarification in implementing regulations. In several cases, critical changes were omitted.

### Provisions in the New Law Raising Concerns

IIPA raises the following concerns with respect to the Law as enacted:

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<sup>13</sup>At 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.

<sup>14</sup>Attorney 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, available at <http://www.regulations.gov>, under document ID# USTR-2010-0037-0059.

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

**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, WCT, and WPPT. For these reasons, it should be deleted in its entirety.

**Criminal Case Structure and Penalties Weakened:** For criminal cases, the Law raises significant concerns and take steps backward from the previous law, including by making criminal cases complaint-based, rather than prosecuted on an *ex officio* basis; removing minimum mandatory statutory criminal penalties; and allowing for non-deterrent fines, including for landlord criminal liability. Finally, Article 95 of the 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 unclear.

**Exceptions and Limitations/Compulsory License:** Article 44 of the 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, WCT, and 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 provision that 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 is consistent with obligations under TRIPS, the Berne Convention, WCT, and 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.” It is 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, and confirm that the system requires an opt-in by the author.

**RMI Violations:** In a somewhat perplexing development, the Law provides that rights management information (RMI) violations occur only when affecting moral rights. 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. IIPA suggests 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 recordation 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 recordation 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. Moreover, greater clarity is needed that recordation is not always feasible for industries and right holders that control a high number of works.

**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 is subject to a 30-day review process. This would clearly not provide for "expeditious" remedies as required by TRIPS.

#### Other Needed Legal Reforms:

**Unauthorized Camcording and Live Broadcasting of Movies.** While no express provision was added, the Explanatory Memorandum to the 2014 Copyright 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 should be followed with enforcement, including fostering greater cooperation with cinema owners to fully uphold and enforce the Law, through targeted enforcement actions and, where warranted, prosecution against those engaged in this highly damaging activity.<sup>16</sup> The Motion Picture Association of America (MPAA) reports that two audio camcords were traced to two different local cinemas in Jakarta in 2016. Moreover, mobile penetration has led to new types of piracy; in 2016, several cases were reported of illegal live broadcasting of local films through mobile applications directly from cinemas. These reports demonstrate the need for enforcement to stem online piracy.

**Term extension.** The term of protection for sound recordings, cinematographic works, and video games should be extended to at least 70 years, in line with international norms. This will not only provide greater incentives

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<sup>16</sup>Preferably, an express provision would 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.

for production, but also will provide producers with a stronger incentive to invest in local industry, spurring economic growth and tax revenues and enabling producers to continue offering content to local consumers in the latest formats. After the 2014 Copyright Law amendment, certain categories of works are protected for 70 years, including books, music, dramas, artworks such as drawings, and architectural works, but the protection for other categories, including sound recordings, cinematographic works, and video games, remains at 50 years. There is no justification for such different treatment, and protection should be extended accordingly.

**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 Indonesia's organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.

## E-Commerce Roadmap and UGC Prohibitions

**E-Commerce Roadmap:** In November 2016, Kominfo released its "E-Commerce Roadmap," which lists 30 key initiatives related to the development of e-commerce in Indonesia. The first regulatory document related to the roadmap is the Circular Letter discussed below.

On December 30, 2016, Kominfo issued Circular Letter 5 (2016), which sets out guidelines for e-commerce platforms hosting UGC, and for those who upload UGC content. Included among the specific types of prohibited content is content that infringes intellectual property, and content that contains "goods or services that contain hacking services content and/or provide access without rights." It is unclear exactly what is meant by this, but it could mean content that demonstrates or effects circumvention of TPMs. The Circular Letter provides for a form of notice and takedown, requiring platforms to offer a reporting facility that allows them to receive complaints about prohibited content and requires them to conduct an examination of the report, delete or block the objectionable content, notify the merchant (uploader) that the content has been flagged, and provide a means for the merchant to disclaim that the uploaded content is not prohibited. Mere notice and takedown is not sufficient. The law should require service providers to do more than takedown upon receiving a notice, rather, they should ensure that take down means stay down. Once a specific instance of a particular infringed work is notified to a service provider, that service provider should take steps to ensure that all other copies of, or URL links to, that same work: (a) are also removed, and (b) do not appear in the future. It appears that for content that infringes intellectual property, the blocking or deletion period need not be carried out for 14 days, which is excessively slow.<sup>17</sup> The Circular Letter also requires platforms to monitor user activities on UGC platforms. It does not specify any punishments or sanctions for users or platforms that fail to comply. The Director General of Kominfo has indicated that further comprehensive regulations for all Internet platforms will follow, and these proposals will be open to public consultations. IIPA urges the Government of Indonesia and Kominfo to provide opportunities for stakeholders to comment and consult on further regulations, specifically with respect to clarifying the takedown requirements, establishing punishments and sanctions for failure to comply with regulations, and setting forth safe harbor provisions for platforms, if any.<sup>18</sup>

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<sup>17</sup>If the content were deemed "urgent," then a one day period might apply, but intellectual property is not listed as one of the defined types of "urgent" protected content and thus would have to be deemed "urgent" by other laws and regulations.

<sup>18</sup>Such provisions should clarify that any safe harbor covers only truly neutral and passive activities. Service providers that take an active role, for example by optimizing the presentation of content or promoting it, and can intervene in the making available of content, should not be protected. The law should also clarify that safe harbors, if introduced, should provide protection only from monetary damages and criminal penalties, but the service provider can be subject to injunctive relief regardless of whether the safe harbor provisions apply. It is also critical to state expressly in the law that even entirely passive and neutral sites and services that are also structurally infringing cannot benefit from safe harbor protection.

## Amended Law for Information & Electronic Transactions

The Ministry of Communication and IT announced an amended Law for Information & Electronic Transaction (UU ITE) Number 11 Year 2008, effective November 28, 2016.<sup>19</sup> While the revisions for the most part do not directly implicate IPR (focusing on defamation, cyber bullying, and the “right to be forgotten”), some of the provisions for enforcement and penalties may serve as models for anti-piracy efforts. Revised provisions give the government the authority to block negative content or to order ISPs to do so. The revisions also synchronize confiscation, arrest and detention procedures with the Criminal Code.

## MARKET ACCESS AND RELATED ISSUES

**Issue Clear Guidelines on Implementation of the Decree Removing Film and Recording Sectors from the Negative Investment List and Continue Removing Barriers to Entry for Other Sectors:** In a very positive development, in May 2016, the Government of Indonesia issued Decree 44, removing film and recording studios from the negative investment list (NIL) and enabling 100% foreign direct investment in film and sound recording production, and film distribution and exhibition. This positive move should be accompanied by the issuance of clear guidelines on the implementation process of the Decree. However, many media sectors remain on the (NIL), preventing direct foreign investment in other Indonesian media industries.<sup>20</sup> The same investment access opened to the film industry should be afforded to the radio and television broadcasting service sectors.

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). While the removal of the film industry sectors from the NIL begins this process, broader investment in the distribution structure for all media sectors would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials.

**Eliminate Problematic Provisions from the Film Law:** The Government of Indonesia is in the process of drafting implementing regulations for its Film Law No. 33 Year 2009, and plans to introduce the draft regulations to Parliament shortly. The Film Law includes 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. Notably, the local filmmaking industry opposes the Film Law. The Film Law includes a 60% local content (screen time) quota, and a ban on the dubbing of imported films except those for educational or research purposes.<sup>21</sup> The draft regulations would include a gradual implementation of the screen time quota, and would not impose sanctions if local cinemas are unable to meet the requirement, which to a small degree lessens the impact of the quota. However, the dubbing restrictions remain unchanged.

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” treatment to exhibitors and could be interpreted to mandate provision of prints to theaters on demand (a potential “must supply” obligation); and 5) Article 40, restricting foreign entities from engaging in film distribution, exhibition, export, and import businesses.<sup>22</sup> The Film Law also includes

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<sup>19</sup>The full text of the law, and an English translation, are available at: <https://www.bu.edu/bucflp/files/2012/01/Law-No.-11-Concerning-Electronic-Information-and-Transactions.pdf>.

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

<sup>21</sup>Dubbing of imported films into a local language is a commercial decision that should be based on business considerations.

<sup>22</sup>Decree 44 regarding the Negative Investment List should supersede this Article 40, but to avoid confusion, Article 40 should be removed in any amended version of the Film Law.

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.

In writing implementing regulations, the government should recognize international best practices, notably the exclusive right of right holders to determine whether, how, and where their works are made available. Doing so will avoid creating new barriers that could undermine Indonesia's plan to attract foreign direct investment in the film sector. Moreover, it is reported that the government has a longer-term plan to amend the 2009 Film Law over the next three to five years. IIPA recommends that the Indonesian Government consider the importance of an open and level playing field in the film sector, and remove the troublesome restrictions on foreign participation in any amended version of the Film Law.

**Advertising Restrictions:** Indonesia's Broadcasting Law (No. 32 Year 2002) includes a requirement that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced. Although regulations issued in 2007 provided a series of exemptions, statements by the Indonesian Broadcasting Commission (KPI) in 2015 calling for its implementation have raised concerns about the possible deleterious effects of such a requirement. The Broadcasting Law has been critiqued for being outdated, and unofficial reports are that it will be revised soon, but no timeline has been provided by the government as to when such revisions will be finalized. IIPA recommends that revisions be completed quickly to remove these restrictions, as they would have harmful effects on Indonesian consumers' access to foreign TV channels.

**Customs Valuation:** Indonesia recently imposed a new specific tariff that is based on the running time of the film, including film in video format, resulting in a significant increase in the amount of customs duties paid for the importation of foreign films. Indonesia should join the WTO Information Technology Agreement (ITA) Expansion Agreement to address this issue.

**Local Replication Requirement:** Regulation No. PM 55 issued by the Minister for Culture and Tourism (MCOT) in 2008 required that all theatrical prints and home video titles released in Indonesia be replicated locally effective January 1, 2009. However, the effective date was repeatedly postponed, and this regulation never went into effect. In December 2015, the new government transferred the film sector responsibility from MCOT to a newly formed Ministry of Culture and Education, and claimed unofficially that PM 55 is no longer enforceable as MCOT no longer exists. While this regulation is no longer a priority as it appears to be defunct, and because following the digital conversion in 2013 all studio prints are now replicated locally in the format of DCPs, the harmful regulation should be permanently and officially abrogated.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

In July 2012, USTR initiated an investigation into the country practices in Indonesia regarding intellectual property rights and market access, and whether Indonesia still qualifies for beneficiary status under the GSP. Under the statute, the President of the United States must consider, in making GSP beneficiary determinations, "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."<sup>23</sup> IIPA recommends that the U.S. Government develop steps for engagement with the Indonesian Government that would result in the termination of the GSP investigation.

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<sup>23</sup>19 U.S.C. §§ 2462(c)(4) and (5).

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

While passage of the Copyright Law of 2014 made good progress toward fulfilling Indonesia's obligations under TRIPS, the Berne Convention, WCT, and WPPT, several provisions of the Copyright Law raise serious concerns under these agreements. As set forth in more detail above in the "Copyright Law and Related Issues" section, the broad exceptions and compulsory license provision, limited RMI violations provision, recordal requirement, and unworkable provisional measures provision appear to be out of compliance with Indonesia's international obligations.