

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2013 and supports the U.S. government's current evaluation of whether Indonesia is complying with its obligations under the Generalized System of Preferences (GSP) trade program due to intellectual property rights and market access concerns.<sup>1</sup>

**Executive Summary:** The piracy situation in Indonesia remains severe, and enforcement authorities and courts within the country have not succeeded in sufficiently curtailing copyright infringement. Due to constrained budgets and resulting problems in enforcement through IPO PPNS, Indonesian National Police (INP), and the Commercial Court in Jakarta, 2012 saw fewer raids and very little movement on infringement cases, whether administrative, civil or criminal. The National IP Task Force, whose establishment had once held out hope for a more coordinated enforcement effort to beat back piracy in the country, has shown little activity. Growing Internet piracy has been met by only limited attempts to halt this spreading problem. Compounding these issues, Customs has now instituted new procedures by which a court case must be initiated before a suspected import shipment will be detained. If true, this would amount to a clear-cut TRIPS violation. In addition, market access restrictions remain significant and must also be addressed. The Indonesian government has issued a draft copyright law, which makes some modest improvements, for example, with respect to dealing with Internet piracy, but heads in the wrong direction on other matters. Most importantly, even if the government is able to enact an improved legal framework, in the absence of true enforcement and judicial reforms, IIPA members fear that the endemic piracy situation will remain the norm in Indonesia.

### PRIORITY ACTIONS REQUESTED IN 2013

#### **Enforcement Issues**

- Institute comprehensive enforcement reforms, through establishment of a separate INP unit with separate, adequate funding and salaries to reduce irregularities; expansion of IPO PPNS team budget and mandating a certain number of copyright piracy raids each year; and establishing a select group of IP prosecutors, with a mandate to handle more IPR cases; all with the oversight of the Anti Corruption Commission.
- Bring and conclude more high-profile piracy cases, including against Internet piracy, mobile device or mobile network piracy, pirate distributors, warehouses, factories, enterprises engaged in end-user software piracy, and hard disk loading, an illegal practice where computer dealers pre-install pirated software into new computers for sale to companies and consumers.
- Follow through on the National IP Task Force's "Campaign" to take deterrent action against all forms of piracy.
- Establish a National IP Task Force website tracking prosecutions completed, including parties to the case, legal bases for prosecutions, penalties assessed, and evidence found during raids.
- Implement programs to ensure government ministries use only licensed software and promote the use of software asset management best practices by private enterprises.
- Commit to judicial reforms in the Jakarta Commercial Courts, and expand such courts in Medan, Semarang, Surabaya and Makassar to adjudicate copyright cases, establish special IP courts for criminal cases.
- Ensure Directorate of Special Crimes ('Ditreskrimus') and "Type A" Police Commands run sustained IPR police investigations with deterrent results.
- Retain *ex officio* enforcement authority and provide transparency in raiding.

<sup>1</sup>For more details on Indonesia's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.



- Combat illegal photocopying, print piracy, and unauthorized translations, and work with right holder groups to legitimize the use of published materials at schools and universities.
- Provide Berne- and TRIPS-compatible presumptions of copyright ownership in practice.

### Legislative Issues

- Enact draft copyright law with changes noted in this submission.
- 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 source identification (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

- Now that Decree (BRTI) No. 177/2011 has been repealed, immediately initiate investigations into identifying parties involved in illegal ring tone and ring-back tone operations to restore the market to legitimate operators.
- Eliminate the “specific tariff” on imported films, and return to a duty consistent with the terms of the WTO Customs Valuation Agreement (CVA) determined on the basis of the underlying physical carrier medium.
- 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 film industry.
- Amend the Negative Investment List to allow direct foreign investment in the audio-visual sector.

## PIRACY 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. Piracy rates remain unacceptably high in Indonesia, at 86% unlicensed PC software usage, among the highest in the world, and even higher for other industries (e.g., mall/retail and music piracy) due to piracy of all kinds – whether physical, Internet, or mobile.<sup>2</sup>

**Retail Piracy, Mall Piracy, Including Physical and Mobile Device Piracy Remain Rampant, With Numbers of Raids and Seizures Down Once Again in 2012:** Indonesia’s notorious markets<sup>3</sup> remain replete with retail piracy in kiosks and malls including factory and burned-to-order CDs, VCDs, DVDs, and CD-ROMs of music, movies (including pirate movies in or claiming to be in Blu-ray format), software, videogames, and published materials. Also problematic is mobile device piracy, in which illegal copyrighted files are loaded onto various mobile devices or carriers. 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. As immediate steps, in addition to enforcement reforms discussed elsewhere in the report, the Indonesian government should adopt landlord liability for the infringing activity of tenants, and should ensure that the business licenses of stores and distributors engaged in infringement are revoked.

<sup>2</sup>A recent survey by Hong Kong-based Political and Economic Risk Consultancy (PERC) of 1,285 expatriate managers found that Indonesia scored worst, behind Vietnam and China, among all Asian countries in terms of protecting IPR. See *Indonesia No.1 in Copyright Piracy in Asia*, Daily Indonesia, August 29, 2010, at <http://www.dailyindonesia.com/news/top/2010/08/indonesia-no1-in-copyright-piracy-in-asia.php>.

<sup>3</sup>Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hotspots replete with pirate materials. Notorious markets in 2012 included Harco Glodok, Ratu Plaza, Pinangsia Plaza, and Ambassador Mall/ITC, and Mangga Dua Mall. Other notorious spots in the Jakarta area include Glodok Penampungan, Jalan Pinangsia, and Glodok Jakarta. Harco Glodok was listed once again by USTR as a “notorious market” in its Out-of-Cycle Review of Notorious Markets. See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. IIPA, in its Notorious Markets filing to USTR, also recommended Harco Glodok as a notorious market. See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf).

**Internet Piracy and Wireless Mobile Piracy:** The sea change we are witnessing in Indonesia, with 236.8 million mobile subscribers, or almost 98% penetration,<sup>4</sup> 55 million Internet users,<sup>5</sup> and more than 2.7 million fixed broadband lines,<sup>6</sup> means online and mobile piracy remains a growing problem,<sup>7</sup> including direct download sites and illicit P2P file sharing, mainly from servers located outside Indonesia. Some of the most notorious piracy websites in the world are servicing the Indonesian market.<sup>8</sup> The evasive behavior of online pirate services 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.

**Enterprise End-User Software Piracy Causes Significant Losses:** The software piracy rate in Indonesia remains extremely high at 86%, including widespread use of unlicensed software by businesses and other enterprises.<sup>9</sup> Lowering software piracy would bring significant benefits to the Indonesian economy.<sup>10</sup> Indonesian law contains a provision criminalizing end-user software piracy (Article 72(3)), and the draft copyright law has a similar provision. In contrast with some other industries' experiences, BSA reported that the police provided good support for enterprise end-user enforcement by conducting around 70 end-user raids in 2012. In addition, in a recent case (*Multisari vs. BSA*) where a raided company countersued BSA, alleging, among other things, that the raid was unauthorized, the Central Jakarta District Court on January 15, 2013 dismissed the countersuit. This is an encouraging ruling and bodes well for future end-user enforcement.

**Hard Disk Loading of Software and Other Copyright Materials Growing More Severe:** Hard disk loading, in which computers are loaded with the latest software or other copyright materials, all of it unauthorized, at the point of sale of the hardware, has grown severe in recent years in Indonesia. The Indonesian government should combat the massive problem of hard disk loading by engaging in continuous raiding against computer dealers and outlets that offer hard disk loading as a service. The government should also engage IT mall management, PC dealers, and local representatives of computer manufacturers to address the challenge. Sellers of new laptops without any software, which encourages piracy by companies and consumers, should be scrutinized.

**Book Piracy:** Piracy of published materials in Indonesia, especially academic books and journals, continues to be a major concern. A survey of the Greater Jakarta area revealed widespread infringement of academic books and journals at commercial copy shops in and around university campuses, as well as in university libraries. Online piracy of textbooks, reference, and trade books also appears to be increasing, likely from digital scans of analog books. While commercial-scale photocopying (mainly on and near university campuses) remains the primary

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<sup>4</sup>International Telecommunication Union, *Mobile-cellular Telephone Subscriptions per 100 Inhabitants 2000-2011*, at <http://www.itu.int/ITU-D/ict/index.html>, accessed on January 10, 2013.

<sup>5</sup>Internet users in Indonesia reaches 55 million people, The Jakarta Post, October 28, 2011, at <http://www.thejakartapost.com/news/2011/10/28/internet-users-indonesia-reaches-55-million-people.html> (citing Markplus Insight study).

<sup>6</sup> International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>7</sup>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 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.

<sup>8</sup> *4Shared.com* is a popular "one-click hosting" site or cyberlocker site, and ranks as the 17th most visited site in Indonesia (<http://www.alexa.com/siteinfo/4shared.com#>).

<sup>9</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Indonesia was 86%, representing a commercial value of unlicensed software of US\$1.47 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>10</sup>A 2010 study done by IDC for BSA 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.

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. The publishing industry hopes to work with the Indonesian government to devise and implement a plan to take meaningful action to address the rampant piracy observed in the market. As one step, the Indonesian government (Department of Education and Commission on Higher Education) should work with right holder groups to tackle the unauthorized photocopying problem by encouraging use of legitimate published materials at schools and universities. Publishers do note that some university professors have been encouraging students to buy only legitimate books. Universities should encourage all professors and teaching staff to do the same and should adopt university-wide appropriate use and copyright policies.

## **ENFORCEMENT UPDATES IN INDONESIA**

The enforcement system in Indonesia for copyright is broken and in need of reform. A new approach is required.

**Comprehensive Enforcement Reform:** A significant, multi-faceted enforcement reform process must now be instituted in order to have any chance to make significant progress against piracy in Indonesia in the near term. First, due to irregularities in the INP officers’ activities, we recommend that a separate, police team for IPR crimes, be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels, and oversight of the Anti Corruption Commission. Second, the IPO PPNS team budget should be expanded, and investigation officers should be mandated to conduct a certain number of copyright piracy raids each year, all under the oversight of the Anti Corruption Commission. Third, a select group of IP prosecutors should be established, with a mandate to handle more IPR cases, and with the oversight of the Anti Corruption Commission. All of these activities should be accomplished under the direction of the National IP Task Force, whose efforts to date have been minimal. Enforcement officials have reportedly been reluctant to conduct regular enforcement actions because of the presence of organized criminal gangs. 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 criminals.

**Comprehensive Judicial Reform:** A similar approach to that on enforcement is needed in the courts, which are largely ineffective in the civil area (the Commercial Courts) and completely ineffective when it comes to criminal cases. First, to improve the civil Commercial Courts, reducing irregularities will be critical, through the Anti Corruption Commission working with the Supreme Court Ethics Committee to reduce their prevalence. Second, very few civil Commercial Court judges are familiar enough with: how IPR cases are conducted, damages calculations, implementation of injunctions, issuance of “Anton Pillar” orders, conducting IPR border seizures, and managing the proper balance between procedural defects and achieving substantive justice. What remains are only rudimentary judicial remedies, with extremely low, non-compensatory (and non-deterrent) damages, no detention, removal or destruction of goods orders, and unenforceable verdicts. Provisional injunctions were introduced in 2012, but none have yet been granted. “Anton Pillar” orders appear unavailable under the current law, based on the latest rules, but on a positive note the new draft copyright law appears to provide for provisional injunctions. Once a pilot program of judicial reform has been firmly established in Jakarta, IIPA recommends that Commercial Courts outside Jakarta be addressed.

The criminal courts face similar hurdles. Despite the Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009 categorizing IP cases as “Important Cases” “in order to accelerate case prosecutions,”<sup>11</sup> in the few

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<sup>11</sup>The Attorney General has stipulated the following, as examples: 1) for IP infringement where the evidence of pirated CDs are less than 5,000, the cases are directly handled by the District Attorney; 2) for IP infringement where the number evidence of pirated CDs in the range of 5,000-10,000, the cases are directly handled by the High Attorney; and 3) for IP infringement where the evidence of pirated CDs are 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 (on file with IIPA).

cases that proceed to a conviction, most result in extremely low and non-deterrent criminal fines.<sup>12</sup> 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; we have no information due to general lack of transparency on the case which was brought more than two years ago. IIPA continues to recommend establishing a National IP Task Force website to track case results.<sup>13</sup>

**Berne and TRIPS-Compatible Presumptions Not Being Afforded:** Industry has reported that court processes are sometimes hampered by defendants simply placing in issue the copyright ownership of the infringed work or sound recording, and reversing the presumption without any proof to the contrary. Indonesia's Berne Convention obligations (as well as TRIPS obligations) require it to provide a presumption of copyright ownership, and that presumption cannot be rebutted unless the defendant shows proof to the contrary. Defendants should be asked to rebut the presumption, for example, by showing that they have a requisite license to conduct the relevant activities. The new draft copyright law would provide a Berne-compatible presumption of ownership on the books, and it is hoped that this would halt the overly burdensome and costly cases in which ownership is wrongly placed in issue.

**Comprehensive Internet Enforcement Approach Needed:** There remains no enforcement infrastructure in Indonesia to deal with online or mobile piracy, a situation which hopefully will change with the passage of the new copyright law. In 2011, the Ministry of Information and Communication Technology (MICT) announcement that it would disable access to websites that distribute pirated files, indicating its focus on the site *4shared.com*, which it said was a high-capacity website that provided videos, music and graphics, violating government regulations on copyright. The Minister also indicated that as part of the "Hail Our Music" initiative, music industry and ISPs would cooperate to seek closure of the most notorious sites (most of which are local services).<sup>14</sup> On October 15, 2012, the Directorate General of ICT Applications of MOCT sent a letter to *4Shared.com* demanding that they cease accepting, uploading, storing, or transferring content which causes losses to others particularly targeting violations of intellectual property rights. Unfortunately, the site is still accessible in Indonesia, as are pirated materials.

Despite the MOCT actions, in the absence of guidance from the law, ISPs have chosen to largely ignore piracy occurring within their reach. In addition to the passage of new legal measures which will help halt online infringements, steps should be taken to encourage more active, voluntary cooperation of ISPs with right holders to prevent the use of their networks for infringement, including but not limited to establishing fair and effective processes for dealing with non-hosted infringements and repeat infringers.<sup>15</sup>

## **MARKET ACCESS AND RELATED ISSUES**

**Immediately Initiate Investigations Into Identifying Parties Involved in Illegal Ring Tone and Ring-Back Tone Operations.** In October 2011, the Information and Communications Ministry issued Decree (BRTI) No. 177/2011 which was aimed at phone credit fraud, but which has virtually destroyed the mobile phone ring tone and ring-back tone market for the music industry. In the Decree, BRTI instructed telecommunications companies to: 1) stop offering content through SMS broadcast/pop-screen/voice broadcast until a time to be later determined; 2)

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<sup>12</sup>One exception was a case against replicators/duplicators of pirate CDs, VCDs, and DVDs who were sentenced in February 2011 to a fine of IR3 million and three years in prison, although the status of the case is unknown. Judgment No. 2537/Pid.B/2010 dated 28 February, 2011 against Ng Tek San, The North Jakarta District Court, February 11, 2011.

<sup>13</sup>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 to the public that copyright infringement is a serious violation of the law with serious legal consequences.

<sup>14</sup> See Tomi Tresnady, *Hari Ini, Kemenkominfo Tutup 20 Situs Musik Ilegal*, Okazone, July 27, 2011, at <http://music.okezone.com/read/2011/07/26/386/484624/hari-ini-kemenkominfo-tutup-20-situs-musik-ilegal> (citing 20 websites noted at a meeting between MOCI and the music industry).

<sup>15</sup>In late 2011, the Indonesian government held talks with ISPs about their significant role in digital transactions. 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). Yet, no resolutions have been achieved. 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, as there remain weaknesses in the administrative enforcement system in this regard (e.g., one may reportedly easily register a website by using a fake identification).

deactivate/unregister as of the date of issuance (October 18, 2011) each Premium Message Service, including but not limited to SMS/MMS premium subscriptions, ring tones, games, or wallpaper services. As a result of the Decree, all “pay SMS” messages (including those in which ring tones and ring-back tones are purchased) were made illegal. Ring-back tones were a significant market in Indonesia. The recording industry in Indonesia estimates it has lost almost the entire ring-back tone market due to this new and unprecedented restriction, on top of having to deal with infringing/unauthorized ring tone and ring-back tone businesses. We understand the Decree was repealed, but it is now incumbent upon the Indonesian government to immediately initiate investigations into identifying parties involved in illegal ring tone and ring-back tone operations to restore the market to legitimate operators.

**Eliminate “Specific Tariff” on Imported Films and Return to a Duty Consistent with the Terms of the WTO Customs Valuation Agreement Determined on the Basis of the Underlying Physical Carrier Medium:** In 2011, Indonesia instituted a burdensome new duty on imported films, based on a methodology inconsistent with the provisions of the WTO Customs Valuation Agreement. This methodology incorrectly seeks to apply the CVA’s “transaction method” and thus to capture the value of the IP royalties associated with the exhibition of the films. The transaction method should not be applied to the importation of films for theatrical release because, as defined by the CVA, no “transaction” actually occurs. As such, 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 virtually every market in the world, and not an arbitrary (and highly unusual) specific tariff based on the film’s running time.

**Permanently Remove the Requirement to Locally Replicate All Theatrical Prints and Home Video Titles Released in Indonesia:** IIPA greatly appreciates the continued suspension of the longstanding Decree requiring the local replication of all theatrical prints and home video titles (e.g., DVDs).<sup>16</sup> However, we look forward to working with the Indonesian government to obtain formal and permanent elimination of this requirement as soon as possible. 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 its volume and quality output requirements as well as lab and duplication facility security issues. 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 local filmmakers have for post-production work overseas. The Decree remains opposed by local Indonesian filmmakers.

**Eliminate Problematic Provisions from the Film Law:** The 2009 Film Law contains provisions that, if implemented, 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) Articles 10 and 20 that require the maximization of Indonesian resources (potentially including a local print replication requirement); 2) Article 17 which establishes a pre-production content review requirement that obliges film makers to notify the government of the title, story content, and production plan that would be especially burdensome for co-productions; 3) 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 4) Article 40 restricting foreign entities from engaging in film distribution, exhibition, export, and import businesses.

**Lift Prohibitions and Restrictions on Foreign Company Participation or Investment in Importation, Direct Distribution, Exhibition, or Retailing in Copyright Products in Indonesia:** Presidential Decree 118 of 2000 stipulates that all importation and distribution of films and video products is restricted to wholly-owned Indonesian companies. The specific sectors of the media business that the Indonesian government has excluded from foreign investment include radio and television broadcasting service providers, radio and television broadcasting

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<sup>16</sup>Ministry 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). The Decree was once again (for the fourth time) suspended, for one year, until January 1, 2014.

subscription service providers, print media information service providers, filmmaking businesses, film technical service providers, film export and import businesses, film distributors, and movie house operators and services. The motion picture and music sectors are particularly hard hit by this ban. 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). 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.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection in Indonesia is governed by the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (effective July 29, 2003).<sup>17</sup> Indonesia joined the WIPO Copyright Treaty (WCT) on June 5, 1997 (in force March 6, 2002) and the WIPO Performances and Phonograms Treaty (WPPT) on February 15, 2005.

**2012 Copyright Bill:** The Indonesian government has drafted the “Bill of the Republic of Indonesia Concerning Copyright 10 October 2012” (“2012 Copyright Bill” or “Bill”), which is intended to modernize Indonesia’s copyright law and fully implement Indonesia’s treaty obligations. The government is commended for having made this draft available for review and comments, although we note that there may be an even more recent draft to which we are not privy. The following are some preliminary and non-exhaustive comments of the IIPA on the version of the 2012 Copyright Bill that we have reviewed:

**Technological Protection Measures (TPMs):** Draft Article 48 of the Bill provides a rudimentary approach to protection against unlawful circumvention of technological protection measures (called “Technological control measures” in the translation we possess) used by copyright owners to protect their works or objects of related rights. Article 48, like the current law, does not provide a sufficient scope of TPM protections. For example:

- “Technological control measures” are undefined, and it is unclear whether “used for the protection of Works or Related Rights” would cover all access controls as well as copy controls. “Technological control measures” should be defined as any technology, device, or component that controls access to Works or Related Rights, or protects exercise of any right in Works or Related Rights as provided by this Law.”
- Trafficking in circumvention devices, technologies, components, or services is not expressly covered. The law should make it illegal for anyone to “manufacture, import, export, distribute, offer to the public, otherwise traffic in circumvention technologies, products, or components.”
- The phrase “other causes permitted by the prevailing laws and regulations” in Draft Article 48 should be deleted, leaving a finite enumerated list of cases in which the act of circumvention of a TCM is permitted.
- The Bill also fails to criminalize violations of Article 48 on circumvention of “technological control measures.” This should be remedied as well.

**Chapter VIII (Draft Articles 50-52) on Internet Infringements:** IIPA is generally supportive of the approach taken in the Draft, which creates a notification system to the Minister of Information regarding Internet infringements which then determines whether such infringements will be taken down or access to them disabled. In these draft articles, much will depend on the meaning of “sufficient evidence.” IIPA believes this approach undertaken by the Indonesian government in the Bill should be made in conjunction with a more common ISP notice and takedown system and taking steps to encourage the active cooperation of ISPs with right holders to prevent the use

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<sup>17</sup>*Undang-Undang RI No. 19 Thn 2002 Tentang Hak Cipta.* In addition, the Indonesia government also points to a *Fatwa* indicating that infringement is forbidden by Islamic law. The Indonesian Ulema Council (*Majelis Ulama Indonesia/MUI*) has released a religious decree (*fatwa*) emphasizing that —any kind of IPR infringement, including but not limited to, using, disclosing, producing, utilizing, selling, importing, exporting, distributing, giving out, providing, publishing, reproducing, copying, counterfeiting, and hijacking others’ IPR illegally is *haram*, or legally forbidden by Islamic law. (MUI Decree No. 1/MUNAS VII/MUI/15/2005 concerning IP Protection).

of networks for the commission of infringing acts, including but not limited to establishing fair and effective processes for dealing with repeat infringers.

**Landlord Liability:** The piracy situation in Indonesia could be alleviated somewhat by establishing landlord liability, so that mall owners would no longer be able to ignore or avoid information about piracy activities occurring on their premises and for which they are receiving a financial benefit. A basis for such liability already exists in the Civil Code. Namely, a landlord's acts of contributing to infringement may be considered as an "unlawful act" under Article 1365 of the Civil Code. In addition, Article 1366 of the Civil Code creates liability for illegalities caused by omission to act and imprudence (so potentially allows liability for landlords who know or should know about infringing activities). Article 1367 of the Code covers damage caused by acts of persons under one's responsibility or supervision, which again, could be a landlord's tenants. However, liability may be avoided if the party can prove that they have taken necessary steps to prevent it and the current act could not be prevented by them. IIPA proposes that the drafters clarify landlord liability in the 2012 Copyright Bill. An example of draft language to accomplish this follows:

"In accordance with Articles 1365, 2366 and 1367 of the Civil Code, anyone who deliberately provides an opportunity, means or information for any civil act of copyright infringement may also be liable for the act itself, including landlords who, knowingly or with constructive knowledge, allow infringing acts to be committed on their premises and fail to take steps to prevent such acts, such as immediately terminating the tenancy."

**Aiding and Abetting:** Similar to landlord liability, there is no clear provision on aiding and abetting with respect to criminal copyright infringements in the 2012 Copyright Bill. The concept of aiding and abetting can be found in Indonesia's Criminal Code, Articles 55 and 56. Those Articles mention participation in punishable acts, namely, anybody who with others deliberately provides an opportunity, means or information for the commission of a crime may also be liable for the act itself. Aiding and abetting liability should be brought into the Bill, including landlord liability. An example of draft language to accomplish this follows:

"In accordance with Article 55 and 56 of the Criminal Code, anyone who deliberately provides an opportunity, means or information for the commission of a crime may also be liable for the act itself, including landlords who, knowingly or with constructive knowledge, allow criminal acts to be committed on their premises and fail to take steps to prevent such acts, such as immediately terminating the tenancy."

**Minimum Criminal Penalties, Including Against Unlawful Circumvention of TPMs:** The criminal provisions in the 2012 Copyright Bill have unfortunately taken a major step backward from the current law, in that they no longer would provide for minimum criminal penalties. While the increase in the maximum fine in Draft Article 107 to 500 billion Rp. is helpful (US\$51,550), without a minimum fine, deterrent sentences will not be forthcoming. IIPA recommends a statutory minimum fine for copyright matters of 10,000,000 Rp. (US\$1,030) and recommends that judges take into account the economic seriousness of copyright crimes and ensure that penalties are deterrent. The maximum should be applied to Articles 106, 108, 111, 112, and 116. In addition, the minimum prison sentence (which under the current law is one month under Article 72(1)) should be restored, e.g., in Articles 106, 107, 108, 111, 112, and 116.

**Ex Officio Criminal Authority:** The Bill bifurcates the criminal offenses into those considered to be complaint-based, and those which do not require a complaint. The former category includes offenses involving moral rights and offenses involving the tampering with rights management information. All other copyright offenses would remain general crimes, meaning they are not complaint-based, and authorities can continue to act *ex officio*. We also note that Article 48 violations are not subject to criminal remedies under the Bill. This should be fixed in the next iteration, and such offenses should not be complaint-based.



**Coverage of End-User Piracy of Software and Hard Disk Loading:** IIPA appreciates coverage of commercial reproduction of computer programs in Draft Article 8(3) and believes this covers most forms of end-user piracy and hard disk loading. To ensure full coverage, IIPA recommends adding after the phrase “may not” the words “upload, store, or” before the word “reproduce.” It would also be important to clarify that “commercial purposes” would include an unfair commercial advantage such as that enjoyed by a person or enterprise that uses software without paying for it to produce other goods and services. This could be accomplished through explanatory notes.

**Ex Parte Civil Searches:** The TRIPS Agreement requires Indonesia to have available the possibility of *ex parte* relief (“Anton Pillar” orders). Preliminary injunctions are provided for through Draft Articles 100-103 and the related government regulation enacted in 2012. Anton Pillar orders appear to be provided for in Draft Article 100, but the government should clarify that the “provisional decision” can be made on an *ex parte* basis. Unfortunately, the procedures for obtaining a preliminary injunction or “Anton Pillar” order, particularly, those set out in Draft Articles 102 and 103 are too prescriptive, and contain timeframes that are too tight and conflict with other legal rules, e.g., requiring legalized documents and evidence from abroad. The TRIPS Agreement requires that procedures concerning the enforcement of intellectual property rights “shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.” For example, the bond set out in Article 101(e) is too high, and along with the forfeiture provision in Draft Article 103(5), cannot pass the TRIPS test. Other provisions are unclear. For example, Draft Article 103(4)(c) enables reporting of injunctions to the police or PPNS officers at the IPO. It is unclear how this will work in practice.

**Internet Exception:** Draft Article 39(d) of the Draft allows “making and dissemination” of Internet content on two conditions: 1) that it is “for non commercial and or not profitable to the Author” or 2) the Author declared having no objection to such making or dissemination.” This provision raises serious concerns. “Making and dissemination” of content even for “non commercial” or “not profitable” uses will conflict with a normal exploitation of the work and is not in compliance with Indonesia’s international obligations. Draft Article 39(d) should be deleted.

**Compensatory Damages and Statutory Damages:** Draft Article 92 (*et seq.*) of the Bill deals with claims for compensatory damages arising out of copyright infringement cases. Unfortunately, as is well known from experience of the industry, the costs of bringing civil cases usually far outweighs any damages recovery. Indonesia must ensure the Bill meets its international obligations to provide for “damages adequate to compensate for the injury the right holder has suffered because of an infringement” and “expenses, which may include appropriate attorney’s fees.” It is also understood that in appropriate cases, “recovery of profits and/or payment of pre-established damages” should be available on the basis of strict liability. IIPA proposes that “compensation” be further defined, perhaps in Article 1. An example of draft language to accomplish this follows:

“Compensation may include material damages such as the lost profits of the copyright or related rights holder or the profits earner by the infringer. The profits of the infringer may be calculated either by reference to the equivalent profits of the copyright or related rights holder or by providing expert financial evidence for that industry. Compensation may also include immaterial damages such as harm to reputation or other intangible losses.”

IIPA also recommends a provision on statutory damages. An example of draft language to accomplish this follows:

“In the absence of clear information relating to the income derived from the infringement, a judge may award a minimum statutory compensation of at least Rp100.000.000,00 (one hundred million Rupiah) per infringement.”

**Work for Hire:** Draft Article 32(3) reverses the ordinary work for hire presumption which would provide that when a work is made by an employee in the context of employment, the employer should be deemed the author and copyright holder, unless otherwise agreed. Since Draft Article 32(3) may pose certain conflicts with regard to other

Draft Articles and sub-sections, we urge the drafters to reverse the effect of this provision, by deleting “party making such work” and replacing it with “employer.”

**Over Broad Exception for “Use, Taking or Reproduction and change of a Work”:** Draft Article 40(1) of the Bill represents an overly broad exception that cannot pass muster under international treaties to which Indonesia is a party. While the exception in 40(1)(a) enumerates the second part of the three-step test as a safeguard, this provision remains objectionable since “use, taking or reproduction and change” of a work “in whole” or even “in part” will conflict with a normal exploitation of the work. The provision is not limited to published materials. This provision should be revised, and we recommend referencing Article 15 of the current law for guidance.

**Exception for “Research and Computer Program Development”:** Draft Article 41(1) sets out an exception for “research and Computer Program development” that is too broad. To the extent the purpose of “research” is to observe, study, or test the functioning of the computer program, that may be acceptable. However, “Computer Program development” would be too broad as is. If the drafters wish to retain “Computer Program development,” it should meet the requirements of the three-step test and be in keeping with existing norms on the subject, e.g., the stricter standards of Article 6 of the European Directive on the legal protection of computer programs, Directive 2009/24/EC of 23 April 2009. Without those safeguards, and without assurances that “Computer Program development” will not unreasonably prejudice the right holder’s legitimate interests or conflict with a normal exploitation of the computer program and otherwise will not harm the commercial interest of the author or copyright holder, including but not limited to the confidential nature of the source code and/or technological control measures, the exception for “Computer Program development” should be deleted.

**License Agreement Recordal – Prohibited Formality:** Draft Article 78(3), in deeming that a license agreement “shall have no legal effects on the third party,” has created a prohibited formality which is in violation of the Berne Convention. Linking Draft Article 77 criteria to the ability to record in Draft Article 78(2) only compounds this problem.

**Compulsory Licenses Not Berne-Compatible:** The Berne Convention allows for compulsory licensing in only extremely narrow circumstances. The compulsory licenses set out in the 2012 Copyright Bill do not meet the Berne criteria. The Article 79 compulsory license, for example, must be limited to works “published in printed or analogous forms of reproduction” to be consistent with the Berne Convention Appendix. The provisions that follow must then meet all the stringent requirements of the Berne Convention Appendix.

**Registration and Invalidity:** IIPA understands from local right holders that there is considerable concern about abuse of the voluntary copyright registration process in Indonesia. While a voluntary registration system is Berne-compatible, we understand that in Indonesia, many invalid copyrights get registered, including by IP infringers, because there is no examination process. Revocation of invalid copyright registrations is both expensive and involves time consuming litigation. Draft Article 67 provides a safeguard against false registration, namely, there is no presumption of the truth of the subject matter contained in the application or registration. In addition, Draft Article 89 provides for invalidity of registrations. However, given the abusive practices of infringers obtaining false registrations, we believe Draft Article 89 should be modified to authorize DGIPR to review and invalidate false applications or registrations. In addition, we suggest creating a more forceful deterrent, including fines and penalties, against anyone who knowingly files a false application.

**Other Problems with Registration System in Indonesia:** According to Draft Articles 71 and 73 of the Draft, registration creates an obligation to record transfers and other changes which are not otherwise required for unregistered copyright works. To the extent failure to record transfers or other changes would deny copyright protection to the registrant, this could constitute a prohibited formality under the Berne Convention and should be deleted.

**Complaint Procedures (Draft Articles 93-99):** IIPA recommends removing the articles related to “Complaint Procedure” from the Bill and having them separately issued as detailed rules of court procedure. The

timeframes set out in these Articles are too inflexible for a statute and create practical problems for litigants. The TRIPS Agreement requires that procedures concerning the enforcement of intellectual property rights “shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.”

**Civil Court Orders:** Draft Article 92 makes no mention of civil court orders. IIPA proposes that language equivalent to the criminal provisions in article 120, covering the seizure and destruction of infringing goods, items and the tools for their production, be included in this civil provision.

**Rights Management Information:** The 2012 Copyright Bill applies provisions related to rights management information only to moral rights. Draft Articles 5 and 6 on RMI should be expanded to cover all copyright in order to meet the requirements of the WCT and WPPT. To accomplish this, IIPA proposes changing “the moral rights as described in Article 4 paragraph (1)” to “copyright and related rights under this law.” In addition, Draft Article 6(3) should be expanded to prohibit trafficking in RMI. To accomplish this, IIPA proposes adding to Draft Article 6(3) the following:

“It shall also be prohibited to distribute or import for distribution rights management information knowing that it has been altered without authority, or distribute, import for distribution, broadcast, communicate or make available to the public copies of works, knowing that rights management information has been removed or altered without authority.”

**Restriction on Ability to Contract:** Draft Article 77 sets forth some general principles about licenses involving copyright. Based on the way they are written, and depending on how they are interpreted and/or implemented, they may constitute unreasonable restraints on the ability of parties to freely contract. For example, Draft Article 77(1) prohibits license agreements that “cause detrimental effect on the economy of Indonesia.” Draft Article 77(2) prohibits any clauses “which may cause detrimental effects on the parties” or contain clauses “causing unhealthy business competition.”

**Collective Management Restriction:** The Bill contemplates the establishment of collective management organizations (many of which now exist in Indonesia). The Bill would limit the number of CMA’s to be established. Draft Article 82(3) indicates the public may “only set up one (1) Collective Management Association by the type of Work or Related Rights.” It at least appears that the government has, through this proposal, scrapped its plan to mandate collective licensing across copyright categories, and set a joint tariff rate through the establishment of a “National Collective Management Organization,” which is a positive development.<sup>18</sup> Of course, it must be ensured that such CMAs are voluntary and not mandated for any author or right holder. The existing language under Article 82(3), which seems to suggest that the categorization is based on “type of Work or Related Right,” may create problems for some industries. For example, music videos owned by record companies may be deemed administered by the CMA for “cinematographic works.” To avoid this problem, it is suggested that the text in Article 82(3) should be amended so that each type of work or object of related rights should be permitted its own CMA.<sup>19</sup>

Furthermore, the only recourse to change or remove a poorly performing CMA under the Draft Bill is to request the Minister to exercise his discretion to revoke the operational permit upon the non-compliance of the three conditions set out in draft Article 85(2). There should be a mechanism in place to enable right holders on their own

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<sup>18</sup>Experience has shown that licensing markets function effectively where right holders remain free to find the most efficient way to administer their rights and engage in face to face negotiations to secure authorized distribution of the copyrighted property. 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 if and which collecting society to join and entrust their rights, and whether or not to collect copyright remuneration jointly with other right holders. Collective Management Organizations (CMOs) should be permitted to operate in a commercial manner, free from interference from the government. Further, there should not be any mandatory process for tariff pre-approval which 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 that are set in free and open market conditions. The local record industry group ASIRI held a seminar in late 2010 to explain why right holders should not be forced into collective management schemes, including single licensing windows.

<sup>19</sup>So, for example, to ensure that “music video” is not considered part of “cinematographic works,” Article 82(3) might provide that the one voluntary CMA can be set up by the “type of work or object of related rights.”

initiative to request the revocation of the operation permit of the CMA, which should not be limited to the three conditions under draft Article 85(2). It should be noted the difficulty with this process, since the draft provides for only one CMA (per work or related right), meaning right holders cannot establish another CMA to create competition with the poorly performing CMA. Under draft Article 82(4), it is critical to maintain the voluntary nature of CMAs under the law in Indonesia. Draft Article 82(4), governing the payment of royalty by users, seems to suggest that once users make payments to right holders directly or via the CMA, they have met the requirements for use. The draft is silent as to whether the CMA must have been voluntarily chosen by the particular right holder to collect on their behalf. The law should clarify (directly in the Draft Bill or in implementing regulations) that the CMA may only act on behalf of the right holders if the right holder has granted authorization to collect on its behalf to the CMA.

**Right Owners Should Retain Freedom to Make Commercial Decisions With Their Licensees:** Article 75(5) provides that “the amount of royalty ... and the procedure of granting thereof shall be made with due observance of the applicable normal practice.” Article 75(6) states that “at the request of the parties, the Minister may determine the amount of royalty if the parties deem the applicable normal practice as described in paragraph (5) not to meet justice.” First, “normal practice” should be understood as the price reasonably related to that normally charged in the country for the use of the work or object of related rights. Second, it seems, but is not entirely clear, that both parties must request the Minister for such a determination. This is extremely important, since otherwise, it could amount to a statutorily-mandated royalty, and would stifle free business negotiations between right owners and their licensees in the future. For clarity’s sake, it is suggested that Article 75(6) be deleted from the draft.

**Definition of Computer Program:** IIPA recommends deleting “to make the computer work and serve its certain functions or achieve certain results” from the definition of “computer program” in Draft Article 1. Computer programs must be protected as literary works under the Berne Convention regardless of their quality or their ability to achieve certain results. The change ensures full compliance and follows the modern trend not to equate a computer program with its “functions” or “results.”

**Broadcast Exception:** Draft Article 47 sets out what appears to be a reduction of Berne Article 10*bis*. By including “communication” and the phrase “other facilities” the provision may run afoul of the Berne strictures.

**Censorship Provision Should be Removed from Bill:** Draft Article 115 does not relate to copyright and should be removed from the Bill.

**Omission of Anti-Camcording Piracy Provisions:** The 2012 Copyright Bill does not, but should, define 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 APEC Ministers and Leaders, including from Indonesia, recently agreed on “Effective Practices for Addressing Unauthorized Camcording,” and the steps recommended therein should also be taken.<sup>20</sup>

**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).

**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

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<sup>20</sup>Effective Practices for Addressing Unauthorized Camcording, 2011/AMM/014app05, 23<sup>rd</sup> APEC Ministerial Meeting, Hawaii, United States 11 November 2011. The document notes,

Steps that affected economies may take to address the challenges of unauthorized camcording in cinemas 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.

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),<sup>21</sup> a Ministry of Trade Regulation on the import of machines and raw materials,<sup>22</sup> and another Regulation on reporting by registered producers,<sup>23</sup> were enacted and issued to address rampant 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 prerecorded or blank optical discs; 3) remove the 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 entry in 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; and 8) expressly impose corporate liability on individuals. The Regulation on import reportedly covers optical disc production machinery, raw materials (optical grade polycarbonate) and, unfortunately, finished discs (in addition to blank discs). This importation Decree is not working as intended in that it allows anyone to import polycarbonate, whereas under the OD Regulation, only those industries directly related to the optical disc industry were permitted to import polycarbonate. The Indonesian government should give assurances that this Regulation will not be used as a tool to keep legitimate copyright owners or authorized distributors from importing discs into Indonesia.<sup>24</sup> In addition, a fatal flaw of the regulatory framework is that it does not provide clear enforcement authority or grounds for routine inspections on manufacturers’ or importers’ premises. Spot, unannounced, inspections are needed.

## **GENERALIZED SYSTEM OF PREFERENCES**

In December 2011, IIPA submitted a petition to have the GSP status of Indonesia reviewed with respect to eligibility criteria listed in subsections 502(b) or 502(c) of the 1974 Act (19 U.S.C. 2462(b) and (c)).<sup>25</sup> See 64 Fed. Reg. 20047. In particular, among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “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 USC 2462(c)(4) and (5). In 2011, Indonesia exported goods valued at \$1.96 billion to the U.S. receiving preferential duty-free treatment under the GSP Program, representing 10.3% of its total exports to the U.S., according to U.S. government statistics. In the first eleven months of 2012, Indonesia exported goods valued at almost \$2.04 billion to the U.S. receiving preferential duty-free treatment under the GSP Program, representing more than 12.3% of its total exports to the U.S., according to U.S. government statistics. IIPA believes the Indonesian government is not meeting the eligibility criteria due to: 1) lack of adequate and effective intellectual property rights protection and enforcement which has resulted in high, in some cases extremely high, levels of physical and online piracy; and 2) lack of equitable and reasonable access to the Indonesian market, through many statutory or, in some cases, in-practice barriers, including barriers imposed on the motion picture industry.

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<sup>21</sup>Government Regulation Number 29 of 2004 Concerning High Technology Production Facilities for Optical Discs” (in force April 5, 2005). This Regulation requires reporting of annual production of optical discs to the Minister of Trade.

<sup>22</sup>Regulation of the Minister of Trade No. 11/M-DAG/PER/3/2010 regarding the Importation Requirements on Machine, Machine Apparatus, Raw Materials, Empty Optical Discs and Preloaded Optical Discs. This Regulation requires importers of optical discs to provide an annual reporting to the Directorate General of Foreign Trade of the Ministry of Trade.

<sup>23</sup>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.

<sup>24</sup>The government of Indonesia reported in its 2011 Special 301 submission the existence of 34 “legally registered OD manufacturers in Indonesia in 2010; comprising of 26 filled optical discs manufacturers, 3 empty optical discs manufacturers, and 5 stamper companies.” The government noted that among the 44 inspections of plants conducted in 2010, 15 plants were found to have “disobeyed” the Regulations, with one company “suspended/frozen” due to “indication of piracy and no production code,” and two companies “suspended” due to “expired registration.”

<sup>25</sup>International Intellectual Property Alliance, *Request for Review of the Intellectual Property Rights Practices of Indonesia in the 2011 Annual GSP Country Practices Review*, 76 Fed. Reg. 67531 (November 1, 2011); 76 Fed. Reg. 76477 (December 7, 2011) (extending deadline to December 30, 2011), Docket No. USTR-2011-0015, December 30, 2011, at [http://www.iipa.com/pdf/2011\\_Dec30\\_Indonesia\\_GSP\\_Submission.pdf](http://www.iipa.com/pdf/2011_Dec30_Indonesia_GSP_Submission.pdf).

On July 12, 2012, the United States Trade Representative announced the results of the 2011 annual GSP review, indicating that it had “accepted for review” a country practice petition on Indonesia regarding intellectual property rights.<sup>26</sup> IIPA then filed its request to appear at the GSP hearing which was held on October 2, 2012.<sup>27</sup> It is essential to the continued growth and future competitiveness of these industries that our trading partners, including Indonesia, provide free and open markets and high levels of protection to the copyrights on which this trade depends. Unfortunately, piracy and lack of equitable and reasonable market access in countries like Indonesia harm U.S. creators and contribute to the maintenance of an imbalanced playing field. Countries like Indonesia cannot 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. IIPA looks forward to continuing engagement with the U.S. government as it deliberates on IIPA’s GSP petition regarding Indonesia.

## **OTHER U.S. ENGAGEMENT**

We thank the U.S. government for its continued engagement through the Indonesia-U.S. Comprehensive Partnership plan “to promote better protection and enforcement of intellectual property rights,” through the Trade and Investment Framework Agreement, and through the ICITAP program.<sup>28</sup> We understand that Indonesia’s Minister of Trade is at least looking into the possibility of the Trans-Pacific Partnership for the country, but has not fully studied it or made any decision at this stage.<sup>29</sup> Indonesia’s eventual participation in the TPP could foster improvements in the IP climate in the country and aid in the elimination of discriminatory barriers described in this report.

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<sup>26</sup>See Office of the United States Trade Representative, *Generalized System of Preferences (GSP): Results of the 2011 Annual GSP Review; Notice of Hearing and Public Comments for Country Practice Petitions Accepted as Part of the 2011 Annual GSP Review*, July 12, 2012, at <http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-17023.pdf>.

<sup>27</sup>International Intellectual Property Alliance, *Pre-Hearing Brief, and Request to Appear at the Public Hearing on Indonesia, Regarding Generalized System of Preferences (GSP): Results of the 2011 Annual GSP Review; Notice of Hearing and Public Comments for Country Practice Petitions Accepted as Part of the 2011 Annual GSP Review*, 77 FR 41209 (July 12, 2012) (dates revised in 77 FR 49476 (August 16, 2012)), September 18, 2012, at [http://www.iipa.com/pdf/2012\\_Sep18\\_Indonesia\\_GSP\\_Pre-Hearing\\_Brief\\_Request\\_to\\_Appear.pdf](http://www.iipa.com/pdf/2012_Sep18_Indonesia_GSP_Pre-Hearing_Brief_Request_to_Appear.pdf).

<sup>28</sup>The “International Criminal Investigative Training Assistance Program” (ICITAP) commenced in October 2006, comprising an anti-piracy enforcement initiative and an optical disc piracy initiative. The program led in the past to some concrete positive results in terms of facilitating better enforcement against copyright infringements. It has 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.

<sup>29</sup>*Minister: No Decision on Trans Pacific Partnership Yet*, Republika Online, January 31, 2013, at <http://www.republika.co.id/berita/en/jakarta-region-others/13/01/31/mhmmzw-minister-no-decision-on-trans-pacific-partnership-yet>.