

INDONESIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Indonesia remain on the Priority Watch List in 2014. IIPA also supports the continuation of the Generalized System of Preferences (GSP) investigation into Indonesia's intellectual property system and related market access concerns once that program is renewed.¹

Executive Summary: To create a healthy copyright market in Indonesia, its Copyright Law should be reformed; serious enforcement deficiencies addressed; and market access barriers lowered. IIPA is appreciative of the Indonesian Government's increased level of transparency in the legislative drafting process of proposed amendments to the Copyright Law, and has made several rounds of comments to the Government, most recently in December 2013. We understand the latest draft currently sits with the Parliament, but there is some indication that the bill will not be considered with priority before the April 2014 parliamentary and July 2014 presidential elections. While the legislation requires further amendments, we urge Parliament to accord it priority. Unfortunately, the enforcement situation in Indonesia remains very difficult. Right holders are often asked by enforcement officials to pay for raids; and criminal raids and prosecutions, even against well-identified and recognized notorious markets, are almost non-existent. USTR should seek to implement a meaningful action plan addressing key areas of copyright reform, enforcement benchmarks, and the easing of market access barriers.

PRIORITY ACTIONS REQUESTED IN 2014

Enforcement

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

Legislation

- Enact amendments to the Copyright Law with changes noted in IIPA comments and this submission, ensuring compliance with Indonesia's international obligations.
- Ensure that copyright infringement is considered a predicate offense under anti-organized crime laws that permit broader criminal investigations and enhanced remedies.

¹For more details on Indonesia's Special 301 history, previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Indonesia's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- Make optical disc regulations more effective by: 1) routinely conducting off-hours unannounced inspections; 2) enforcing against source identification (SID) code violations; 3) providing transparency in raids and results; 4) covering imports of raw materials; and 5) ensuring that the Department of Industry collects exemplars.

Market Access

- Amend the Negative Investment List (NIL) to allow direct foreign investment in the audio-visual sector.
- 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.
- Reduce import tariff rate on films to pre-2010 levels.
- Permanently remove the requirement to replicate locally all theatrical prints and home video titles released in Indonesia.
- Eliminate provisions from the Film Law that would, if implemented, impose local screen quotas, pre-production content review requirements, a prohibition on dubbing imported films, and other restrictions on the film industry.
- Ensure electronic commerce regulations do not require companies to locate data centers in Indonesia as a condition for market access.

PIRACY AND ENFORCEMENT UPDATES IN INDONESIA

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

Retail Piracy, Mall Piracy, Including Physical and Mobile Device Piracy Remain Rampant: Retail piracy in Indonesia's notorious markets, kiosks and malls³ remains extremely high (estimated around 90% for most industries). Unauthorized CDs, VCDs, DVDs, and CD-ROMs occupy an estimated 90% of the market for most industries, including music, movies (including pirate movies in or claiming to be in Blu-ray format), software, and video games. Unauthorized photocopying of published materials continues to be a significant problem, particularly around university campuses. Retail pirates also offer to load illegal copyrighted files onto various mobile devices or carriers. Absent landlord liability provisions in the copyright law, retail piracy continues largely unabated. While the Governor of Jakarta issued a Decree that malls not allow the sale of counterfeit and pirated materials on their premises (which was sent to the Mayors of five cities in Jakarta), anecdotal evidence suggests the Decree is not being enforced strictly (and there are no consequences for not following the Decree).

Internet Piracy and Wireless Mobile Piracy: According to the Indonesia Internet Service Providers Association, by the end of 2013, there were 62 million Internet users in Indonesia (up from 55 million in 2012), or almost 25% of Indonesia's population.⁴ Mobile penetration is well over 100%, with 282 million mobile subscribers,⁵ There are nearly 3 million fixed broadband subscriptions (up from 2.7 million in 2012).⁶ These numbers indicate that significant opportunities exist for the launch of legitimate services for the distribution of copyright materials in Indonesia. Unfortunately, with the absence of an adequate legal or enforcement framework, online and mobile piracy services have proliferated, including direct download sites (mainly from servers located outside Indonesia), and illicit peer-to-peer (P2P) file sharing. Some of the most notorious piracy websites in the world are servicing the Indonesian

²See, e.g., IIPA, *Indonesia*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301INDONESIA.PDF>.

³Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hotspots replete with pirate materials. Notorious markets recommended by IIPA in 2013 included Mangga Dua Mall, Ambassador Mall/ITC, and Ratu Plaza. See International Intellectual Property Alliance (IIPA), *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 78 Fed. Reg. 57924 (September 20, 2013), 78 Fed. Reg. 60367 (October 1, 2013) (Extending Deadline), October 25, 2013, at http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf. Other notorious spots in the Jakarta area include Glodok Penampungan, Jalan Pinangia, and Glodok Jakarta.

⁴*Pengguna Jasa Internet di Indonesia 82 Juta Orang*, December 10, 2013, at <http://koran-jakarta.com/?785-pengguna>.

⁵International Telecommunication Union, *Mobile-cellular Telephone Subscriptions per 100 Inhabitants 2000-2012*, at <http://www.itu.int/en/ITU-D/Statistics/Pages/default.aspx>, accessed on December 23, 2013.

⁶International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2012*, at <http://www.itu.int/en/ITU-D/Statistics/Pages/default.aspx>, accessed on December 23, 2013.

market.⁷ 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.

There remains no comprehensive enforcement infrastructure in Indonesia to deal with online or mobile piracy. Initial efforts through the Ministry of Information and Communication Technology (Kominfo) to demand that some of the most flagrant violators (like *4shared.com*) cease accepting, uploading, storing, or transferring pirated content have been unsuccessful. The Minister of Kominfo supported the “Hail Our Music” initiative by which the music industry and ISPs were to cooperate in 2012 to seek closure of the most notorious sites (most of which are local services).⁸ Following extensive consultations with the Indonesian Government, on April 30 2013, local film associations and film producers together submitted a request letter to the Directorate General of Intellectual Property Rights (DGIPR) to block seven rogue websites. The letter, which was then referred to Kominfo, has unfortunately not resulted in any action. In the absence of Government action and lacking requirements in the current Copyright Law, ISPs have chosen to largely ignore piracy occurring within their reach. New legal measures are clearly needed which will help halt online infringements, and steps should be taken to encourage more active and 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.

Unauthorized Use of Software by Enterprises Causes Significant Losses: The software piracy rate in Indonesia, including widespread unlicensed use of software by enterprises, remains among the highest in the world. In 2011, the software piracy rate in Indonesia was 86%, representing a commercial value of unlicensed software of US\$1.47 billion.⁹ Lowering software piracy would bring significant benefits to the Indonesian economy.¹⁰ Indonesian law contains a provision criminalizing end-user software piracy (Article 72(3)), and the draft copyright law has a similar provision. Unfortunately, enforcement has significantly waned in recent years in Indonesia. Despite a positive ruling in one enterprise end-user software piracy case,¹¹ the number of civil and criminal software cases remains far too low to deter unauthorized use of software by enterprises.

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 this massive problem by engaging in continuous raiding against computer dealers and outlets that offer hard disk loading as a service. The Indonesian 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 should be scrutinized, since such sales encourage piracy by companies and consumers.

Book Piracy: Piracy of published materials in Indonesia, especially academic books and journals, continues to be a major concern. Publishers undertook enforcement actions against some 76 photocopy shops on and around university campuses in the Jakarta area. The enforcement campaign was relatively successful, with some 46 shops agreeing to cease their unauthorized copying and distribution activities, while 18 others voluntarily changed their business models or shut down. There remain a number of shops that refuse to

⁷*4Shared.com* is a popular “one-click hosting” site or cyberlocker site, which provides access to large libraries of infringing files for download (hence it is also considered a download hub) and currently ranks as the 21st most visited site in Indonesia (<http://www.alexa.com/siteinfo/4shared.com#>, accessed on December 23, 2013).

⁸See Tomi Tresnady, *Hari Ini, Kemenkominfo Tutup 20 Situs Musik Illegal*, Okazone, July 27, 2011, at <http://music.okezone.com/read/2011/07/26/386/484624/hari-ini-kemenkominfo-tutup-20-situs-musik-illegal> (citing 20 websites noted at a meeting between the Ministry of Communication and Informatics and the music industry).

⁹Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study, at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

¹⁰A 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 gross domestic product (GDP), generate US\$124 million in additional tax revenues and create 1,884 new IT jobs. The benefits would be even greater if the ten point reduction was achieved in two years, yielding US\$3.18 billion in added GDP and US\$162 million in new tax revenues.

¹¹The Indonesian police conducted 70 enterprise end-user raids in 2012, but far fewer in 2013. In a recent case (*Multisari vs. BSA*) in which 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. There was no appeal to this decision and the case is now closed.

cooperate, and further action will be undertaken against such shops. The Department of Education and Commission on Higher Education could do more to help right holder groups better address the problem of unauthorized photocopying. 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. Publishers note that some university professors have been encouraging students to buy only legitimate books, but this message would better serve students, professors and all university personnel, and be better received, coming from the universities' governing bodies.

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

- First, a separate police team for IPR crimes should be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels.
- Second, the IPO PPNS team budget should be expanded in order to increase the number of copyright piracy raids each year.
- Third, Ditreskrimsus and “Type A” Police Commands should announce in early 2014 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 more IPR 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.

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

Comprehensive Judicial Reform: The courts in Indonesia remain largely ineffective in both the civil and criminal areas. First, it is critical to improve the quality and consistency of civil Commercial Court rulings. To this end, the Anti-Corruption Commission should work with the Supreme Court Ethics Committee. Publishing court decisions is also necessary to improve transparency and reduce irregularities. Second, with the exception of Jakarta, very few civil Commercial Court judges are familiar enough with basic aspects of how IPR cases are conducted, including damages calculations; issuing provisional orders; implementing injunctions; or conducting IPR border seizures. As a result, they award: only rudimentary judicial remedies with extremely low, non-compensatory (and non-deterrent) damages; no orders to detain, remove or destroy pirate goods; and unenforceable verdicts. Once a pilot program of judicial reform has been firmly established in Jakarta, IIPA recommends that it be extended to Commercial Courts outside Jakarta, especially in Medan, Semarang, Surabaya, and Makassar, along with extensive practical training.

The criminal courts face similar hurdles. Despite the 2009 Attorney General letter categorizing IP cases as “Important Cases” “in order to accelerate case prosecutions,”¹² in the few cases that proceed to a conviction, most result in extremely low and non-deterrent criminal fines. In one case, a Public Prosecutor in Lubuk Sikaping, Padang eventually (after a complaint to the National Public Prosecutor) brought a case against a suspect selling unlicensed music, seeking three years imprisonment. It was only due to the persistence of the industry that this case was

¹²Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009. The Attorney General has stipulated the following, as examples: 1) for IP infringement where the evidence of pirated CDs is less than 5,000, the cases are directly handled by the District Attorney; 2) for IP infringement where the evidence of pirated CDs is in the range of 5,000 to 10,000, the cases are directly handled by the High Attorney; and 3) for IP infringement where the evidence of pirated CDs is more than 10,000 (bulk production), the cases are directly handled by the Attorney General. Reports are to be submitted directly to the Attorney General. See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property Rights System of Indonesia: Progress and Achievements in 2010*, February 2011, at <http://www.regulations.gov/contentStreamer?objectId=0900006480e01d5d&disposition=attachment&contentType=pdf>.

brought, and only after significant delay. IIPA continues to recommend establishing a National IP Task Force website to track case results.¹³

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 statutory presumption of ownership without any proof to the contrary. Indonesia's Berne Convention (and 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, and it is hoped that this would halt the overly burdensome and costly cases in which ownership is wrongly placed in issue. A presumption of subsistence of copyright should also be provided.

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).¹⁴ In 2012 and 2013, the Indonesian Government engaged in a drafting exercise toward modernizing the statute and fully implementing Indonesia's many treaty obligations. The process has been relatively transparent, and stakeholders have been invited to express their views which have been duly considered.

While some prior concerns raised by IIPA were addressed in the latest draft (October 2013, which to our knowledge currently sits with the Parliament), many were not. In some respects the draft still does not create an efficient IPR enforcement system that effectively combats copyright infringements from raid to trial. The draft also contains provisions that do not comply with Indonesia's international obligations under the TRIPS Agreement, the Berne Convention, and the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).¹⁵ In further revisions, the drafters should make changes to avoid unintended consequences which could cause commercial harm to local and foreign right holders in Indonesia, and/or call into question Indonesia's commitments to its international obligations with respect to copyright protection and enforcement. The following are some key remaining issues of concern.

Internet Exception: Draft Article 44(d) provides an exception which appears to allow, without permission or payment, the "making and dissemination of the content of Copyright through information and communication technology media that is non-commercial and/or non-profit to the Author or related parties, or the Author has no objection to such making or dissemination." This provision, if adopted as drafted, would set a terrible precedent and could devastate legitimate business models in the Internet environment which are built precisely 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. As drafted, this provision collides with Indonesia's international obligations under TRIPS, Berne, the WCT, and the WPPT. It must be deleted.

Technological Protection Measures (TPMs): Draft Article 53, like previous drafts, provides a rudimentary approach to protection against unlawful circumvention of TPMs (called "Technological control measures" in our translation) used by copyright owners to protect their works or objects of related rights. However, the following additional changes must be made to ensure Indonesia fully complies with the requirements of the WCT and WPPT:

¹³All 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.

¹⁴*Undang-Undang RI No. 19 Thn 2002 Tentang Hak Cipta*. In addition, the Indonesian 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).

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

1) “Technological control measure” should be defined in Article 1 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”; 2) trafficking in circumvention devices, technologies, components, or services should be expressly covered;¹⁶ 3) exceptions should be limited to a finite enumerated list of cases in which the act of circumvention of a TPM is permitted (the phrase “other causes permitted by the prevailing laws and regulations” should be deleted); and 4) the draft should include criminal penalties for violations.

Chapter VIII (Draft Articles 55-57) on Internet Infringements: As Indonesia is quickly developing its IT infrastructure and its citizens are increasingly accessing the Internet, online piracy is becoming a more important and complex issue for the Government to address. The latest draft provides a notification system to the Minister of Information regarding Internet infringements which can lead to the takedown of infringing material or disabling access to sites in appropriate circumstances.¹⁷ However, the voluntary “notice and takedown” provisions of the previous draft should be restored, along with preservation of injunctive relief against non-compliant ISPs, constructive knowledge as a trigger for takedown, a repeat infringer policy, and the sufficiency of email notices, to provide the necessary incentives for ISPs and right holders to cooperate to prevent acts of infringement over the Internet. The final law should also include provisions that make clear the circumstances under which an ISP (including a mobile operator) will be liable for its users’ acts of infringement.

Communication to the Public: There is differential treatment of “communication to the public” among works, performances, and phonograms. Such treatment should be unified, and as to performances and phonograms, at least along the lines of WPPT Articles 14 and 15. Exclusive rights over digital related rights should be afforded, with any flexibilities applying only to analog or non-interactive communications to the public.

Criminal Penalties: The criminal provisions in the latest draft unfortunately take steps backward from the current law. They no longer provide minimum mandatory statutory criminal penalties. Without a minimum fine, deterrent sentences will not be forthcoming. Also, ambiguities in the treatment of infringement of software should be clarified, and the possibility to impose both a fine and imprisonment, especially for repeat offenders, should be maintained.

Prohibition on Purchase of Infringing Materials Should Include Software and Video Games: Draft Articles 10(1) and 114(1) are welcome, but software and video games must be included to effectively address the manufacture, distribution and sale of illegal optical discs (e.g., CDs, DVDs, CD-ROMs, etc.).

Landlord Liability Should be Broadened: Draft Articles 10(2) and 114(2) are also positive proposals to impose landlord liability, but these provisions should be broadened to include all premises, rather than just “shopping centers,” which may be difficult to define. Additionally, aiding and abetting liability in conformance with Indonesia’s Criminal Code should be available in criminal copyright infringement cases generally, not just landlord liability cases.

Ex Parte Civil Searches: The TRIPS Agreement requires Indonesia to have available the possibility of *ex parte* relief (“Anton Pillar” orders). Draft Articles 106 through 109 provide for so-called “temporary injunctions” but it must be clarified that these can be obtained *ex parte* in appropriate circumstances, and the onerous procedures set out in Article 108 and 109 must be liberalized in order to meet TRIPS requirements.

Compensatory Damages and Statutory Damages: Draft Articles 99 through 105 deal with claims for compensatory damages arising out of copyright infringement cases. Unfortunately, as is well known from the experience of the industry, the costs of bringing civil cases usually far outweigh any damages recovery.¹⁸ Indonesia

¹⁶Draft Article 53 should make it illegal for anyone to “manufacture, import, export, distribute, offer to the public, otherwise traffic in circumvention technologies, products, or components.”

¹⁷The wording in draft Articles 56(3) and 57(1) leave it unclear as to whether the Minister’s order can be made to disable access to an entire site or whether it can only apply to links to infringing contents on the site. This should be clarified to allow disabling access with appropriate fair process.

¹⁸We further note that draft Article 99(2) only covers some right holders’ monetary remedies (i.e., to only “income earned from the organization of speeches, scientific meetings, performances or exhibition of the work which constitute a copyright infringement, or as to products of related rights”). It must be confirmed (...continued)

must ensure the law 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” and should also consider the imposition of pre-set statutory damages in order to achieve the goals of deterrence and full compensation.

Seizure and Destruction of Infringing Articles: Draft Articles 99 *et seq.* make no mention of the remedies of seizure and destruction of infringing articles in civil proceedings, and the express remedy of “destruction” of infringing goods in criminal cases has been removed from draft Article 122. These provisions should be revised in order to meet the standards of TRIPS Articles 46 and 61.

Coverage of End-User Piracy of Software and Hard-Disk Loading: Coverage of commercial reproduction of computer programs in draft Article 9(3) is welcome and appears to cover most forms of end-user piracy and hard disk loading, but should be clarified to include under “commercial purposes” an unfair commercial advantage such as that enjoyed by an enterprise that uses software without paying for it.

Duration: It is very positive that under draft Article 59 of the latest draft, authors of many categories of works receive protection for their life plus seventy years. This term should be matched for other works and subject matter, both to ensure that those other works and subject matter do not have conflicting terms, and to make sure Indonesia can avoid discrimination against its own authors and right holders.

Collective Management: Right holders should be permitted to organize the management of their own performance rights freely, fairly, and transparently, in the most cost-effective manner and in accordance with international best practices. In consideration of these basic principles, the latest draft law is much improved over previous drafts with respect to the establishment of collective management organizations (CMOs). It appears the CMO establishment is now voluntary under draft Article 88(3) and that different types of CMOs will be permitted, but that if there is more than one CMO for any field, royalties shall be administered by one central CMO (CCMO). Care should be taken in this regard, for example, music videos owned by record companies should be administered by a different CMO than the CMO for “cinematographic works.” Furthermore, as noted in previous comments, there should be a mechanism in place to enable right holders on their own initiative to request the revocation of the operation permit of a CMO, which should not be limited to the conditions under draft law (i.e., in the discretion of the Minister).

Two other key problems appear from the latest draft. First, rate setting should be done in a way that approximates a hands-off free market negotiated rate. Article 81(4) provides that “the amount of royalty as described in paragraph (3) and the procedure of granting thereof shall be pursuant to the grant of a royalty license between the copyright holder or the owner of rights related to copyright and the licensee.” This is consistent with free market principles. However, Article 81(5) states that “the Minister may, at the request of the parties, give consideration in making the royalty determination whether the prevalent practice in force does not meet the elements of justice.” It is unclear whether either party can make a request to the Minister, or whether it must be requested by all parties. If the former is true, the determined rate will surely not approximate a voluntarily negotiated rate, which is likely to stifle free negotiations between right owners and licensees in future. For this key reason, Article 81(5) should be deleted. Second, the 30% cap on costs under draft Article 92 is disfavored by industry and inappropriate as drafted. In the least, the provisions need to be rewritten to provide that cost deductions are based on actual expenses subject to this 30% cap and that a CMO is obligated to progressively reduce its costs significantly downward from this 30% cap. In addition, to the extent there is a central CMO, the cap for the CCMO must be significantly below 30% (otherwise, it would amount to double-dipping, to the detriment of right holders). Both CMOs and CCMOs should also have an express legal obligation to operate efficiently.

Over-Broad Exceptions/Compulsory Licenses: Several of the draft provisions for exceptions to copyright protection must be re-examined and revised to ensure compliance with international treaties to which Indonesia is a

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that all right holders have a general right to damages. Furthermore, the unfair commercial advantage enjoyed by an entity that uses software without paying for it should be a factor in considering compensatory damages.

party, or to other relevant international norms, e.g., in the case of exceptions for “computer program development,” to 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. Similarly, compulsory license provisions incompatible with Berne/TRIPS standards should be eliminated from the draft.

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. Given these abusive practices, DGIPR should be authorized 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. Also, nothing with respect to the registration system may create prohibited formalities. According to draft Article 77, there is an obligation to record transfers and other changes. 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.

Omission of Anti-Camcording Piracy Provisions: The latest draft 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 Asia Pacific Economic Cooperation (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.¹⁹

Other needed legal reforms that are related to the Copyright Law include:

Strengthening the Organized Crime Statute: Since it has been established that criminal syndicates behind pirate enterprises which manufacture and distribute optical discs are also involved in many other forms of crime such as trafficking in persons, illegal logging, and illegal gambling, copyright infringement should be included as a predicate crime for remedies under its organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.

Strengthening the Optical Disc Regulations and Making them GATT/WTO-Consistent: The Optical Disc Regulation (2005), a Ministry of Trade Regulation on the importation of machines and raw materials, and another Regulation on reporting by registered producers, 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 for an inspection in case a suspect target refuses entry (and penalties for such refusal); 7) require the Government to keep records of “permits” and raids run; 8) permit only those industries directly related to the optical disc industry to import polycarbonate; and 9) expressly impose corporate liability on individuals.. 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.

¹⁹Effective Practices for Addressing Unauthorized Camcording, 2011/AMM/014app05, 23rd 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.

MARKET ACCESS AND RELATED ISSUES

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.²⁰ The specific sectors of the media business that the Indonesian Government has excluded from foreign investment in its Negative Investment List (NIL) include: radio and television broadcasting service providers; radio and television broadcasting 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. IIPA notes the longstanding promise made by the Indonesian Government that it would open investment in media companies to foreigners as soon as the Indonesian market was opened to the direct distribution of any other foreign goods (which occurred many years ago). Broader investment in the distribution structure would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials. In June 2013, IIPA submitted comments to Indonesia's Minister of Trade, Gita Wirjawan, setting out the reasons Indonesia's NIL should be revised and restrictions on copyright businesses eased.²¹ While IIPA had understood that certain changes would be made to the NIL in 2013, reportedly no changes have been finalized to date.

Immediately Initiate Investigations Into Identifying Parties Involved in Illegal Ring Tone and Ring-Back Tone Operations: While the October 2011 Kominfo Decree (BRTI) No. 177/2011 making pay SMS messages illegal was repealed in 2012,²² it is now incumbent upon the Indonesian Government to crack down on parties involved in illegal ring tone and ring-back tone operations. Until this occurs, legitimate operators remain effectively barred from full participation in this market.

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

Permanently Remove the Requirement to Locally Replicate All Theatrical Prints and Home Video Titles Released in Indonesia: In November 2013, the Indonesian Government once again suspended application of the 2008 Decree requiring the local replication of all theatrical prints and home video titles (e.g., DVDs).²³ While this renewed suspension is appreciated, it is past time to formally and permanently eliminate this requirement, which is opposed by local Indonesian filmmakers as well as by international producers and distributors. The specter of the Decree threatens to have serious negative consequences on the long-term viability of Indonesia's film industry, threatens the continued development of local cinemas, and jeopardizes arrangements for local filmmakers to carry out post-production work overseas. If the Decree was ever implemented, it would negatively affect foreign motion picture companies' release and distribution schedule for the country, and would raise concerns over existing local facilities' ability to handle its volume and quality output requirements, as well as lab and duplication facility security issues.

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

²¹These comments were later communicated to Indonesia's Vice Minister of Trade, Dr. Bayu Krisnamurthi, upon his visit to the United States, and to Indonesia's Ambassador to Singapore.

²²In the 2011 Decree, the Indonesian Telecommunications Regulatory Agency, BRTI, instructed telecommunications companies to: 1) stop offering content through SMS broadcast/pop-screen/voice broadcast until a time to be later determined; 2) 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.

²³Ministry 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 fifth time) suspended, for one year, until January 1, 2015.

Eliminate Problematic Provisions from the Film Law: The 2009 Film Law, which also has not yet been implemented, contains provisions that would limit foreign participation in various aspects of the film businesses and as such would be inconsistent with the U.S.-Indonesia Letter Agreement on Market Access for Films and Videos. The local filmmaking industry opposes the Law. The Law includes a 60% local content (screen) quota for local exhibitors, and a ban on the dubbing of imported films. Other restrictions include: 1) 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 filmmakers to notify the Government of the title, story content, and production plan (this 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.

Avoid Data Localization Requirements: Indonesia is in the process of implementing electronic commerce regulations that could require companies to locate data centers in the country as a condition for market access. This type of data localization requirement impedes the ability of foreign companies to provide software and other digital services in Indonesia and limits the ability of enterprises and consumers in the country to take advantage of these innovative technologies.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

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

INDUSTRY ENGAGEMENT AND OUTREACH

In addition to engagement in the Special 301 process and the GSP petition, IIPA and copyright associations engaged in significant outreach in Indonesia and with the Indonesian Government to address the problems contained in this submission. Upon the invitation of DGIPR, IIPA visited Indonesia in April 2013 to speak at the “Improving Indonesia’s Competitiveness Through IP Compliance and the Implementation of the Unfair Competition Act (UCA),” and met with DGIPR, the Ministry of Trade, and others. The motion picture industry engaged in educational outreach in 2013 consisting of film workshops and other industry initiatives. The Motion Picture Association of America’s local association (MPA) worked closely with the local screen community to stage a number of events in celebration of World IP Day. On April 27, 2013, in partnership with @America and the U.S. Embassy, and with support from Layar TV, MPA hosted the first “green screen” workshop for young people, and on April 29, they partnered with Blitz Megaplex, Margate House Films and the U.S. Embassy for a special screening of a new Indonesian feature film, Java Heat. In October 2013, MPA supported the 2013 “Balinale” held in Bali and in November 2013, MPA supported the first Indonesian Filmmakers Gathering at the Jakarta International Film Festival (JiFFest).