

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia be moved to the Watch List in 2018, in recognition of improvements made in the areas of market access and Internet enforcement. IIPA further recommends that the U.S. Government terminate the current Generalized System of Preferences (GSP) investigation into Indonesia's intellectual property system once it is satisfied that adequate progress has been made on the concerns outlined in this report.<sup>1</sup>

**Executive Summary:** The Government of Indonesia has recently shown commitment to improving IPR protection and market access. On June 12 and 13, 2017, the United States met with Indonesia under their Trade and Investment Framework Agreement (TIFA) and discussed a work plan for addressing U.S. intellectual property concerns, recognizing the urgency of needed progress in this area.<sup>2</sup> In 2017, the anti-piracy working group launched an Infringing Websites List program, which is designed to inform advertisers and marketers about websites that are primarily infringing and to encourage them not to support these pirate websites with advertising revenue. Website blocking, established by Regulations Nos. 14 and 26 of 2015, has proven an effective measure and demonstrates the government's cooperation with industry to combat piracy. Under these regulations, the government has enforced against hundreds of infringing websites that facilitated infringement of films and music; the government has been asked to further enforce against additional websites causing serious harm to the creative industries, and cooperation has been good. However, these Regulations should be improved by adding a provision to address the practice of "domain hopping." While the government's dedication to anti-piracy efforts is positive, the problem remains serious; on average in 2017 there were approximately 2.5 times the page views to the top piracy websites in Indonesia as there were page views to the top legitimate sites. While market access appeared to improve in 2016, when the Government of Indonesia issued Decree No. 44, removing film and recording studios from the negative investment list (NIL) and enabling 100% foreign direct investment in film and sound recording production and film distribution and exhibition, this could be undermined by planned implementation and enforcement of aspects of the 2009 Film Law that would impose significant barriers to market entry. These include a prohibition on dubbing of imported films for theatrical distribution, exhibition, and broadcast on television; the imposition of a 60% screen quota for Indonesian films; and other restrictions on the film industry. Finally, a number of troubling provisions in the 2014 Copyright Law remain unaddressed. Amendment is still needed to reconcile the Copyright Law provisions relating to the full transfer of rights with the provision on reversion of rights, which create legal and commercial uncertainty. In 2018, IIPA asks that the U.S. Government continue to engage the Indonesian Government to maintain focus on continuing effective actions under the law to address primarily infringing websites; provide clear guidelines to inhibit illegal live streaming and camcording in cinemas; amend the Film Law or its implementing regulations to remove significant barriers to market entry; set enforcement benchmarks (including judicial reform); and expand cooperation to address the concerns of all of the copyright sectors.

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<sup>1</sup>For more details on Indonesia's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Indonesia's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>U.S. Trade Representative, Press Release, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/june/united-states-and-indonesia-agree-step>.



## PRIORITY ACTIONS REQUESTED IN 2018

### Enforcement:

- Continue enforcement of the Copyright Law under Regulations Nos. 14 and 26 of 2015, including blocking of additional primarily infringing websites.
- Commit to judicial reforms in Jakarta and other commercial centers, and establish special IP criminal courts.
- Combat Illicit Streaming Devices (ISDs) (set-top boxes used for piracy) and/or their associated apps, which promote or enable the dissemination, decryption, or receipt of unauthorized motion picture and television content and prey upon legitimate pay television and newly-emerging over-the-top (OTT) platforms.

### Legislation:

- Amend Regulations Nos. 14 and 26 of 2015 on site blocking to prevent “domain hopping” by providing that additional domains, URLs or IP addresses that resolve to “materially the same website” as one already approved for blocking can be added to the blocking list quickly and easily.
- Eliminate Articles 18 and 30 of the Copyright Law, which provide that the rights in music and performances transferred by sale revert back to the author or performer after 25 years.
- Seek repeal of the broad copyright exception related to Internet uses (Copyright Law Article 43(d)).
- Eliminate provisions from the Film Law that serve as barriers to market access, such as local screen quotas and the prohibition on dubbing imported films.
- Provide clear guidelines explaining that live streaming and camcording in cinemas is illegal and violate exclusive rights.
- Extend the copyright protection term for sound recordings, cinematographic works, and video games to at least 70 years, consistent with emerging global developments.
- Ensure that the OTT regulations comport with Indonesia’s treaty commitments and international best practices that protect copyright and related rights and do not interfere with the exercise of these rights.
- Clarify the government’s e-commerce roadmap launched in 2016, including Circular Letter No. 5 (2016) on user-generated content (UGC), and any related regulations with respect to takedown requirements and sanctions for failure to comply with regulations; provide opportunities for stakeholders to comment and consult.

## THE NATURE OF PIRACY IN INDONESIA

Indonesian creators are suffering losses from high levels of piracy in the country, in a market that is just as difficult for U.S. book, film, music and video game creators. The Association of Indonesian Film Producers (APROFI) estimates that losses approach Rp 4.3 billion (US\$322,260) per film.<sup>3</sup> Local industries report that in a given month, 18 million copies of pirated films, music, and software are circulating in the Indonesian market—mostly online but also appearing in shopping malls and markets.<sup>4</sup> Indonesia’s Recording Industry Association (ASIRI) reports that there are over 2.8 billion illegal song downloads annually, estimating losses of Rp 14 trillion (US\$1.05 billion) per year.<sup>5</sup>

**Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law:** The Indonesian Government should be commended for its actions to address Internet piracy in 2017. These improvements will benefit all creators, Indonesian and foreign alike. Working with APROFI and ASIRI, the

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<sup>3</sup>See “Indonesian music sales now 95.7 percent piracy,” Jakarta Post (Sept 18, 2015), <http://www.thejakartapost.com/news/2015/09/18/indonesian-music-sales-now-957-percent-piracy.html>. See also “Piracy is now a massive issue in Indonesia,” Daily Seni, Astro AWANI (Oct. 4, 2015), <http://english.astroawani.com/entertainment-news/piracy-now-massive-issue-indonesia-75356>.

<sup>4</sup>See “Filmmakers, musicians join forces with police,” Jakarta Post (September 19, 2015), <http://www.thejakartapost.com/news/2015/09/19/filmmakers-musicians-join-forces-with-police.html>.

<sup>5</sup>See “Rampant piracy paralyzes Indonesian music industry,” Jakarta Post (Nov. 30, 2016), <http://www.thejakartapost.com/news/2016/11/30/rampant-piracy-paralyzes-indonesian-music-industry.html>.

government took effective action by disabling access to hundreds of primarily infringing domains between 2015-2017, following implementation of the Regulations Nos. 14 and 26 of 2015. As of December 2017, 391 infringing domains related to the film sector have been verified for blocking. These actions have resulted in a significant reduction of audiovisual and music piracy in Indonesia on the websites involved, with a reduction of traffic to the specific sites blocked by 74-94% when measured six months after access was disabled. However, data shows traffic to piracy sites is nevertheless increasing, as the well-known piracy sites employ a strategy of “domain hopping”—redirecting domains to circumvent the results of site-blocking efforts. Notably, access to *Planetlagu.info*, the most popular infringing website in Indonesia in 2017, was blocked in the second half of 2017 and saw its traffic drop 97% from its peak of 36 million monthly visits. However, the operators quickly switched domain names: first to *planetlagu.site*, then to *planetlagu.name*, and currently, to *planetlagu.blog*. Thus, digital piracy remains a concern, with tens of thousands of infringing-content URLs identified each year by the recording industry and numerous instances of domain-hopping: websites, once blocked, can quickly revive under other domains (for example, *planetlagu.info* also reappeared as *laguaz.net* and *lagu123.net*).

Broadband Internet access in Indonesia is still nascent compared to other emerging markets, but is sharply rising, while mobile penetration has exceeded 100% for several years.<sup>6</sup> The legitimate commercial market for online dissemination of copyright works is gaining a foothold: iTunes, Netflix, iFlix, CatchPlay, Vue, Genflix, HOOQ and several other international streaming services operate in Indonesia. However, infringing cyberlocker, video linking and streaming sites, and direct download sites with pirated content continue to harm the market in Indonesia, inhibiting the growth of legal distribution of creative output of foreign and local right holders.

**Book Piracy:** Continued piracy of published materials in the country makes Indonesia one of the worst markets in Asia for publishers. Unauthorized photocopying of academic textbooks remains a significant concern for publishers. While industry efforts to disrupt unauthorized photocopying at dozens of copy shops situated near universities in Jakarta and Yogyakarta were successful, sustained unauthorized photocopying activities unfortunately continue. The Government of Indonesia should encourage university administrators to adopt appropriate use and copyright policies in order to better promote the use of legitimate published materials in schools and universities.

**Signal Theft:** Signal theft/pay-TV piracy remains a problem throughout the Indonesian archipelago. Local industry reports that illegal television channels host up to 100 pirated films at a time.<sup>7</sup> Pirate cable operators in the provinces routinely rebroadcast channels without authorization. It is critically important, with the oncoming convergence of online networks and advances in digital technology, that the government take an active role in supporting legitimate pay-TV services and take actions against those engaged in the unauthorized trafficking, dissemination, decryption, or receipt of pay-TV (or related devices/ technologies).

**Unauthorized Camcording and Live Broadcasting of Movies:** In recent years, camcording piracy has evolved to take advantage of mobile phones. Increasingly, piracy is taking the form of live streaming (broadcasting) of films directly from cinemas, using mobile social media apps, such as Facebook, Instagram & BIGO Live. The film industry reports that, in November 2017, a partial camcord/live stream was observed in Baturaja. In this instance, part of a film was captured and live-streamed on Facebook.

**Illicit Streaming Devices (ISDs):** ISDs<sup>8</sup> are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes in Indonesia. The devices are sometimes advertised as enabling infringement of

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<sup>6</sup>International Telecommunications Union, *Measuring the Information Society Report (2016)*, available at <http://www.itu.int/en/ITU-D/Statistics/Pages/publications/mis2016.aspx>.

<sup>7</sup>See Daily Senti, “Piracy is now a massive issue in Indonesia,” Astro Awani, (Oct. 4, 2015), <http://english.astroawani.com/entertainment-news/piracy-now-massive-issue-indonesia-75356>.

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

copyright or other illegal activities. Chief among these activities is enabling users to access unauthorized motion pictures or television programming, often through apps to remote online sources, and which may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale, as an “after sale” service, or by the users themselves. ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The film industry reports that stores located in the *Ratu Plaza*, *Glodok Plaza*, and *Plaza Pinanangsia* are selling ISDs, which are also offered for sale on e-commerce sales promoting the sale of ISDs: *Bukalapak.com*, *Lazada.co.id*, *OLX.co.id*, *Q0010.co.id* and *Tokopedia.com*. The Indonesian Government must take steps to crack down on piracy apps and on device manufacturers who preload the devices with apps that facilitate infringement. Moreover, the government should take action against key distribution points for devices that are being used illegally.

**Hard Copy Piracy:** Some industries report that retail piracy in markets, kiosks, and malls remains a problem in the major cities across Indonesia.<sup>9</sup> USTR named *Harco Glodok* in Jakarta a Notorious Market in its 2016 out-of-cycle report, for its role as “the retail distribution point for a complex piracy and counterfeiting network.”<sup>10</sup> While the U.S. Copyright industries have shifted their priorities to improving the health of Indonesia’s online marketplace, unauthorized Optical Discs, CDs and DVDs continue to pervade the physical market for music, movies (including those pirate movies in or claiming to be in Blu-ray format), and video games. Retail pirates also offer to load illegal copyrighted files onto various mobile devices or carriers.

## **ENFORCEMENT UPDATES**

While the online enforcement environment in Indonesia improved in 2017, with continued enforcement of the new copyright law implementing regulations, other enforcement areas remain challenging. There are few enforcement raids, fewer prosecutions, and the legal system continues to be challenging for right holders generally. The government should continue additional enforcement rounds in 2018 to allow legitimate online distributors the opportunity to increase their market share. Moreover, as discussed below, the website-blocking regulations should be revised to streamline applications to prevent “domain hopping.” It is important that the government maintain or establish regular channels of communications with all of the affected industries.

**Site-blocking (Joint Regulation of the Ministry of Law and Human Rights and the Ministry of Communications and Information Technology (Kominfo):** Implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015, which address infringing websites, continued to be successful in 2017. Industry groups report complaints electronically and/or in writing to Kominfo for review by a verification team formed by the Director General of Intellectual Property. The verification team then makes recommendations to the Director General of Informatics Applications for the partial or full shutdown of infringing content. In all, access to at least 391 infringing domains reported by industry groups through December 2017 had been disabled and numerous additional infringing websites were referred to the government toward the end of 2017. So far enforcement has been promising, with excellent compliance by the seven largest ISPs. The music industry reports that about two-thirds of all infringing websites requested be added to the blocking list are now inactive.

**Public-private anti-piracy taskforce, collaboration with the National Police:** In September 2015, the National IP Task Force of the Creative Economy Agency (Bekraf), a group of officials from the agency, and several film and music associations, including APROFI, ASIRI, and the Indonesian Association of Artists, Singers, Composers and Recording Businessmen (PAPPRI), announced plans to collaborate with the National Police’s detective division on anti-piracy actions. The international film industry association has actively participated in Bekraf’s anti-piracy task force. In March, APROFI launched an anti-piracy video aimed at consumers.<sup>11</sup> IIPA

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<sup>9</sup>Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hot spots replete with pirate materials.

<sup>10</sup>See USTR, *2016 Out-of-Cycle Review of Notorious Markets* (December 2015), available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

<sup>11</sup>See Film Producers Association Launches Anti-Piracy Campaign, *Jakarta Globe*, March 15, 2017, available at <http://jakartaglobe.id/features/film-producers-association-launches-anti-piracy-campaign/>.

encourages the task force to include other industries, such as book publishers, which is damaged by piracy but to date has not received as much attention as other industries.

**Infringing Website List (IWL):** In October 2017, APROFI (Film Producers Association), ASIRI (Indonesia Recording Association) and PPPI Jakarta (Advertisers Association), supported by BEKRAF, launched an Infringing Website List (IWL) program. The IWL identifies key piracy websites for the purpose of informing advertising brokers and networks, and the brands that are advertised on them, of the illegal nature of these websites, and encouraging them not to place advertisements on such sites. While piracy websites will take money from any source to make a profit, starving them of such easy money can be an extremely effective tool in addressing online piracy. IIPA commends the Government of Indonesia for supporting this joint effort to reduce funding to primarily infringing websites and will continue to monitor the progress and results.

**Comprehensive Enforcement Reform:** The National IP Task Force has taken the first steps toward the kind of multi-faceted enforcement reform process needed to make significant progress against piracy in Indonesia.<sup>12</sup> Under the direction of the Task Force, and with the oversight of the Anti-Corruption Commission, the following steps should be undertaken:

- First, a separate police team for IPR crimes should be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels.
- Second, the IP Office's civil service investigators (PPNS) team budget should be expanded in order to increase the number of copyright piracy raids each year.
- Third, Ditreskrimsus and "Type A" Police Commands should announce a plan for sustained IPR police investigations with deterrent results.
- Fourth, a select group of IP prosecutors should be established, with a mandate to handle piracy cases.
- Fifth, the National IP Task Force should create a website to track prosecutions, including identifying parties to the cases; legal bases for prosecutions; penalties assessed; and evidence found during raids.<sup>13</sup>

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

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

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

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<sup>12</sup>See Bekraf Forms Special Task Force to Counter Piracy, Tempo.co, Oct. 11, 2016, <https://en.tempo.co/read/news/2016/10/11/056811298/Bekraf-Forms-Special-Task-Force-to-Counter-Piracy>.

<sup>13</sup>At present, case records are manually written into a log book in each District Court, making it difficult to identify outcomes in particular cases, obtain copies of court decisions, contact public prosecutors requesting updates, and ultimately, leverage publicity and create deterrence in copyright infringement cases.

<sup>14</sup>Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009. The Attorney General has stipulated the following, as examples: 1) for IP infringement where the evidence of pirated CDs is less than 5,000, the cases are directly handled by the District Attorney; 2) for IP infringement where the evidence of pirated CDs is in the range of 5,000 to 10,000, the cases are directly handled by the High Attorney; and 3) for IP infringement where the evidence of pirated CDs is more than 10,000 (bulk production), the cases are directly handled by the Attorney General. Reports are to be submitted directly to the Attorney General. See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property Rights System of Indonesia: Progress and Achievements in 2010*, February 2011, available at <http://www.regulations.gov>, under document ID# USTR-2010-0037-0059.

## COPYRIGHT LAW AND RELATED ISSUES

Passage of the Law Concerning Copyright (2014), which replaced the prior 2002 law and went into force in October 2014, and Regulations Nos. 14 and 26 of 2015, which implemented key provisions concerning online and digital forms of infringement, including provisions in line with Indonesia's international obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) are both welcome steps toward improving copyright protection and enforcement in Indonesia.<sup>15</sup>

However, some provisions of the Copyright Law raise serious concerns. Others require further clarification in implementing regulations. In several cases, critical changes were omitted.

### Concerning Provisions in the Copyright Law

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

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

**Termination of Transfers:** Articles 18, 30, and 122 of the Law provide for a possible reversion or "termination" of transfers with respect to literary works (books), performances, and musical works, but only in undefined cases of "true sale agreements." It is unclear how these provisions operate. For example, the provisions do not state explicitly that an author needs to invoke the termination in order for it to be effective. Nor do they address what happens to existing contracts at the time of termination. It is also unclear when a "true sale" occurs (an undefined phrase). In any event, these provisions should be removed.

**Criminal Case Structure and Penalties Weakened:** For criminal cases, the Law raises significant concerns and take steps backward from the previous law, including by making criminal cases complaint-based, rather than prosecuted on an *ex officio* basis; removing minimum mandatory statutory criminal penalties; and allowing for non-deterrent fines, including for landlord criminal liability. Finally, Article 95 of the Law creates a highly unusual provision which appears to mandate "mediation" (*mediasi*) before a piracy case (*pembajakan*) can be prosecuted. The purpose and operation of this provision in practice is unclear.

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

"The use, consumption, reproduction, and/or alteration of a work and/or object of related rights, in whole or in part, shall not be deemed a copyright infringement if the source is indicated or listed in

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

detail for the purposes of ... (a) education, research, scientific writing, report preparation, written criticism, or review on an issue without prejudicing the interests of the author or copyright owner..."

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

In addition, Article 84 of the Law includes a compulsory license provision that applies to "works" and is not expressly limited to any subject matter. It should be further clarified and narrowed to ensure it is consistent with obligations under TRIPS, the Berne Convention, WCT, and WPPT.

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

**Censorship Provision:** Article 50 of the Law contains a censorship provision that, while not necessarily denying copyright protection (as was the case in China and which was found to be in violation of China's WTO obligations), is extremely broad and potentially problematic.

**Registration, Invalidity, and Recordation Requirement:** While registration of copyright remains voluntary under the Law, the substantive examination for voluntary registration will apparently address whether a work is "substantially similar" to another work previously registered as a grounds for refusal. There remains considerable concern about abuse of the voluntary copyright registration process in Indonesia because many invalid copyrights get registered, including by IP infringers. It is hoped that this new provision will enable the authorities to review and invalidate false applications or registrations. IIPA suggests that a more forceful deterrent be introduced, including fines and penalties, against anyone who knowingly files a false application. Also, nothing with respect to the registration or recordation system may create prohibited formalities. Article 83 appears to impose a requirement to record licenses, with lack of recordation meaning a license "shall have no legal effect on third parties." This would seem to suggest a Berne-prohibited formality, if, for example, lack of recordation was used to deny the exercise of copyright from a particular licensor or licensee. Implementing regulations should clarify that in no way will a failure to record transfers and other changes deny copyright protection to the registrant. Moreover, greater clarity is needed that recordation is not always feasible for industries and right holders that control a high number of works.

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

## Regulations Nos. 14 and 26 of 2015 (Site Blocking)

While the relatively new site blocking regulations are a welcome addition to the enforcement regime, there is currently no way to prevent "domain hopping." The regulations should be amended to provide for a quick and easy process of adding additional domains that resolve to "materially the same website" to a report and recommendation without a separate application. This would bring Indonesia's regulation in line with other countries' site-blocking

provisions. Specifically, new subsection (3) to Article 6 of the Regulations should be amended to provide: "Additional domains, URLs or IP addresses that resolve to materially the same website in the report shall be added to the receipt report register of Copyright infringement and / or related rights, when reported to, and verified by, the Director General of Intellectual Property, from time to time, and subject to the same recommendation."

## Broadcasting Law

A new Broadcasting Law is under development by the legislature and awaits publication sometime in 2018. It is anticipated that the new law will address convergence issues, such as the intersection between traditional broadcasting/pay TV and OTT. A draft regulation aimed at OTT services is overly broad and raises concerns for unintended implications on other sectors. The draft regulation requires that all OTT platforms (including foreign platforms, and defined very broadly to potentially include all kinds of internet services, not just OTT services), have local bases, use national payment gateways, and localize their data, with the objective of securing tax from foreign platforms. There is no timeline for finalizing or issuing revised regulations. Revised regulations, if any, should narrow the scope to comply with international norms on OTT and should not over regulate, but rather should promote commercial development of this sector, consistent with stated government policy to attract foreign investments.

## Other Needed Legal Reforms:

**Unauthorized Camcording and Live Broadcasting of Movies.** While no express provision was added, the Explanatory Memorandum to the 2014 Copyright Law indicates the unauthorized use of an audiovisual recording device in a movie theater (camcording) can be addressed under the reproduction right. This important recognition by the Indonesian Government of the serious nature of the problem of unauthorized camcording should be followed with enforcement, including: fostering greater cooperation with cinema owners to fully uphold and enforce the Law; through targeted enforcement actions; and, where warranted, prosecution against those engaged in this highly damaging activity.<sup>16</sup> The film industry reports that four camcords were traced to different local cinemas in Jakarta in 2016 and 2017. Moreover, mobile penetration has led to new types of piracy; in 2016, several cases were reported of illegal live broadcasting of local films through mobile applications directly from cinemas. These reports demonstrate the need for enforcement to stem online piracy. Moreover, regulations should be introduced that would provide a clear legal basis to prohibit live streaming and camcording in cinemas.

**Term extension.** The term of protection for sound recordings, cinematographic works, and video games should be extended to at least 70 years, in line with international norms. This will not only provide greater incentives for production, but also will provide producers with a stronger incentive to invest in local industry, spurring economic growth and tax revenues and enabling producers to continue offering content to local consumers in the latest formats. After the 2014 Copyright Law amendment, certain categories of works are protected for 70 years, including books, music, dramas, visual art, and architectural works. However, the protection for other categories including sound recordings, cinematographic works, and video games, remains at 50 years. There is no justification for such different treatment, and protection should be extended accordingly.

**Strengthening the Organized Crime Statute:** While not included in the latest amendments, since it has been established that criminal syndicates behind pirate enterprises which manufacture and distribute Optical Discs are also involved in many other forms of crime such as trafficking in persons, illegal logging, and illegal gambling,

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<sup>16</sup>Preferably, an express provision would have been added, defining the act of using (or attempting to use) an audiovisual recording device in cinemas to camcord, record, or transmit a film, in whole or in part, as a strict liability criminal offense. The Asia Pacific Economic Cooperation (APEC) Ministers and Leaders, including from Indonesia, agreed in 2011 on "Effective Practices for Addressing Unauthorized Camcording," and the steps recommended therein should also be taken. These include: (1) educating the public about the problems posed to businesses and the consumer by unauthorized camcording; (2) working with the private sector to identify and prevent unauthorized camcording in cinemas; and (3) developing and implementing legal measures to effectively deter unauthorized camcording. *Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, 23rd APEC Ministerial Meeting, Hawaii, United States, 11 November 2011.



copyright infringement should be included as a predicate crime for remedies under the Indonesian organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.

## E-Commerce Roadmap and UGC Prohibitions

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

On December 30, 2016, Kominfo issued Circular Letter No. 5 (2016), which sets out guidelines for e-commerce platforms hosting UGC and for those who upload UGC content. Included among the specific types of prohibited content is content that infringes intellectual property, and content that contains “goods or services that contain hacking services content and/or provide access without rights.” It is unclear exactly what is meant by this, but it could mean content that demonstrates or effects circumvention of TPMs. The Circular Letter provides for a form of notice and takedown, requiring platforms to offer a reporting facility that allows them to receive complaints about prohibited content and requires them to conduct an examination of the report, delete or block the objectionable content, notify the merchant (uploader) that the content has been flagged, and provide a means for the merchant to disclaim that the uploaded content is not prohibited. Mere notice and takedown is not sufficient. The law should require service providers to do more than takedown upon receiving a notice; rather, they should ensure that take down means stay down. Once a specific instance of a particular infringed work is notified to a service provider, that service provider should take steps to ensure that all other copies of, or URL links to, that same work are also removed. It appears that for content that infringes intellectual property, the blocking or deletion period need not be carried out for 14 days, which is excessively slow.<sup>17</sup> The Circular Letter also requires platforms to monitor user activities on UGC platforms. It does not specify any punishments or sanctions for users or platforms that fail to comply. The Director General of Kominfo has indicated that further comprehensive regulations for all Internet platforms will follow, and these proposals will be open to public consultations. IIPA urges the Government of Indonesia and Kominfo to provide opportunities for stakeholders to comment and consult on further regulations, specifically with respect to clarifying the takedown requirements, establishing punishments and sanctions for failure to comply with regulations, and setting forth safe harbor provisions for platforms, if any.<sup>18</sup>

**Amended Law for Information & Electronic Transactions:** The Ministry of Communication and IT announced an amended Law for Information & Electronic Transaction (UU ITE) No. 11 Year 2008, effective November 28, 2016.<sup>19</sup> While the revisions for the most part do not directly implicate IPR (focusing on defamation, cyber bullying, and the “right to be forgotten”), some of the provisions for enforcement and penalties may serve as models for anti-piracy efforts. Revised provisions give the government the authority to block negative content or to order ISPs to do so. The revisions also synchronize confiscation, arrest, and detention procedures with the Criminal Code.

## MARKET ACCESS AND RELATED ISSUES

**Issue Clear Guidelines on Implementation of the Decree Removing Film and Recording Sectors from the Negative Investment List and Continue Removing Barriers to Entry for Other Sectors:** In May 2016, the

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

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

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

Government of Indonesia issued Decree No. 44, removing film and recording studios from the negative investment list (NIL) and enabling 100% foreign direct investment in film and sound recording production, and film distribution and exhibition. However, many media sectors remain on the NIL, preventing direct foreign investment in other Indonesian media industries.<sup>20</sup>

IIPA notes the longstanding promise made by the Indonesian Government that it would open investment in media companies to foreigners as soon as the Indonesian market was opened to the direct distribution of any other foreign goods (which occurred many years ago). While the removal of the film industry sectors from the NIL begins this process, broader investment in the distribution structure for all media sectors would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials. The same investment access opened to the film industry should be afforded to the radio and television broadcasting service sectors

**Eliminate Problematic Provisions from the Film Law:** Directly counter to the positive step of removing film from the Negative Investment List, the Ministry of Culture and Education has drafted implementing regulations to enforce the 2009 Film Law, which would impose significant new barriers in the film market. These draft regulations have many troubling provisions.

First, the draft regulations include a 60% screen quota for Indonesian films and measures to limit the importation of foreign films. If implemented, such protectionist measures would likely lead to lost revenue in local theaters and to limited choices for Indonesian consumers. Such measures would also limit local industry's exposure to the expertise and skill of foreign producers. Moreover, such quotas often leave a huge opening for the purveyors of pirated content.

Second, IIPA also objects in principle to Article 43 of the 2009 Film Law which, if enforced, would ban dubbing of imported films. This is a discriminatory and protectionist policy, which is contrary to the interests of Indonesia's own citizens. Dubbing of imported films into a local language is a commercial decision that should be based on business considerations and market forces.

Third, the Film Law includes some ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct, such as restrictions on vertical integration. These could have unintended consequences such as restricting foreign participation in the market and curbing business efficiency. Indonesia should revise the draft regulations and incorporate international best practices, notably recognizing the exclusive right of rights owners to determine whether, how and where their works are made available. Doing so will avoid creating new barriers that could undermine Indonesia's plan to attract foreign direct investment in the film sector.

**Collective Management Organizations:** After the introduction of broadcasting and public performance rights into the law in 2014, the government has focused on organizational issues regarding CMO-related organizational issues, tariffs, and other collective management issues. However, concerns remain about the government's rate-setting process and overall excessive governmental intervention in the collective management area, including the government's accreditation of numerous CMOs to manage the same categories of rights, which has caused unnecessary confusion and inefficiencies in collective licensing. Active monitoring continues to be needed to ensure collective licensing in Indonesia remains in right holders' control and is allowed to develop as an efficient, transparent and accountable activity.

**Advertising Restrictions:** Indonesia's Broadcasting Law (No. 32 Year 2002) includes a requirement that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced. This is a concern for the pay-TV industry. Although regulations issued in 2007 provided a series of exemptions, statements by the

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

Indonesian Broadcasting Commission (KPI) in 2015 calling for its implementation have raised concerns about the possible deleterious effects of such a requirement.

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

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

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

In September 2017, USTR, pursuant to the 2012 investigation, held a public hearing to review country practices in Indonesia regarding intellectual property rights and market access, and determine whether Indonesia still qualifies for beneficiary status under the GSP. Under the statute, the President of the United States must consider, in making GSP beneficiary determinations, “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.”<sup>21</sup> IIPA, recognizing the progress Indonesia has made towards meeting the GSP criteria, recommends that the U.S. Government terminate the investigation once it is satisfied that adequate progress has been made by the Indonesian Government to remedy the deficiencies outlined in this report.

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

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

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<sup>21</sup>19 U.S.C. §§ 2462(c)(4) and (5).