

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia be lowered to the Watch List in 2019, in recognition of improvements made in the areas of market access and Internet enforcement. IIPA further recommends that the U.S. Government terminate the 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:** With over 250 million people—the fourth most populous country in the world and one that is hungry for content—Indonesia is an up-and-coming Asia-Pacific market for the creative industries. For the motion picture and television industry, Indonesia ranks within the top 20 markets in terms of box office revenues. The government has instituted a number of positive changes to its copyright law, enforcement system, and investment framework, but much remains to be done. The country continues to grapple with high piracy rates and maintains some harmful market access barriers, which the government should address in the coming year.

Since 2017, when the Government of Indonesia agreed to an IPR work plan as part of the U.S. Trade and Investment Framework Agreement (TIFA), a number of steps have been taken to improve Indonesia's IPR protection and market access policies for some content industries, though not for others. The TIFA anti-piracy working group, including, among others, the Motion Picture Association, APROFI (Indonesia Producers Association), ASIRI (Indonesian Recording Industry Association), and PPPI (Indonesian Advertisers Group) together with BEKRAF (Creative Economy Agency), launched an Infringing Website List (IWL) program designed to encourage advertisers and marketers not to support pirate websites with advertising revenue. In addition, under the revised Copyright Act, and Regulations Nos. 14 and 26 of 2015, the Indonesian Government has issued numerous administrative orders to block over 480 copyright-infringing websites and those that primarily facilitate infringement. Although these Regulations are a good start, they should be clarified with a provision to address “domain hopping”—a common tactic pirates use to evade government-ordered site-blocking. In the meantime, Indonesia's piracy problem remains serious, despite the government's best efforts.

To support its battle against online piracy, IIPA recommends that the Government of Indonesia update aspects of its IPR legal framework as well. The key priorities would include (1) addressing illegal camcording and live streaming by clearly outlawing these activities, followed by a government commitment to implement measures and reduce instances of the same; and (2) revisiting a number of unaddressed provisions in the 2014 Copyright Law that create legal and commercial uncertainty, including amendments to reconcile provisions on the full transfer of rights with the provision on reversion of rights, amendments to provisions that create an overbroad exception to the making available right, and setting forth clear principles of secondary copyright liability. The government should also take the opportunity to extend the copyright term to the life of the author plus 70 years, or 70 years for sound recordings, in line with international best practices.

Indonesia's status as a fair market for the creative industries remains an open question. In 2016, the government took the very positive step of allowing 100% direct foreign investment in film and sound recording production, as well as film distribution and exhibition. IIPA notes, however, that the broadcasting and radio sectors remain closed and the government is reportedly drafting regulations on the over-the-top (OTT) sector. The 2009 Film Law remains a blight on the horizon, causing significant uncertainty for all rights holders and the local exhibitors. That law, if implemented, could impose a harmful prohibition on dubbing of imported films for theatrical distribution, exhibition,

<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/2019/02/2019SPEC301HISTORICALCHART.pdf>.



and broadcast on television; the imposition of a 60% screen quota for Indonesian films; and other restrictions on the film industry. It is in the government's interest to avoid creating new barriers that could undermine Indonesia's plan to attract foreign direct investment in the film sector. For the music industry, the mandatory multi-layered collective licensing system remains a problem, especially when the government-appointed national CMO (LMKN) determines tariffs and distribution matters without adequate rights holders' representation and are allowed to take as much as 10% of the collections from rights holders as "operational costs." Finally, the country has still not joined the WTO Information Technology Agreement (ITA) Expansion Agreement to establish best practices on digital customs issues.

## **PRIORITY ACTIONS REQUESTED IN 2019**

### **Enforcement:**

- Continue *ex officio* enforcement of the Copyright Law and Regulations Nos. 14 and 26 of 2015, including blocking of additional primarily infringing websites, across all content sectors.
- Combat illegal camcording and live streaming piracy by enacting regulations or guidelines confirming these activities' illegality, followed by implementation of a government program to enforce the laws strictly to reduce such instances.
- Ensure the IWL is operating properly to reduce or choke off advertising revenues to infringing websites.
- Monitor the marketplace to ensure that piracy devices and apps (including set-top boxes) are not used for piracy, and if they are, strictly enforce against such activities.

### **Legislation:**

- Amend or clarify 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.
- Repeal 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 and may damage local exhibitors, 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.
- Narrow the scope of applicability of Circular Letter No. 5 (2016), and revise the Circular Letter to clarify takedown requirements, establish punishments and sanctions for failure to comply with regulations, and set forth safe harbor provisions for platforms, if any.
- Extend the copyright protection term to the life of the author plus 70 years (and for corporate works or related rights, to at least 70 years) to be in line with international best practices and to avoid local creators and artists' being discriminated against.
- Ensure that any new OTT regulations comport with Indonesia's treaty commitments and international best practices that protect copyright and related rights, do not interfere with the exercise of these rights, and promote competition through light-touch regulation on commercial and content review matters.
- Improve the collecting society regulations by ensuring that the management of the National CMO (LMKN) is well represented by music rights holders, and in the long run, eliminate the LMKN, which is an unnecessary extra layer to the CMO system.

## 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, motion picture and television, music and video game creators. While the Indonesian Government has made efforts to fight online piracy, for example, through implementing administrative site blocking orders, all actions taken by the government are based on applications by or information from the industry. Popular sites engage in domain hopping, *i.e.*, even after several administrative site blocking actions brought by the industries and implemented by the government, the sites remain available through alternative domains. This issue of domain hopping should be addressed by the government by swiftly issuing orders related to the “hopped” domains.

Illegal live streaming in the cinemas through social media apps, including the live streaming of the blockbuster *Jurassic World: Fallen Kingdom*, and instances of unauthorized camcording of major releases have also been reported in 2018. The government should issue clear guidelines and regulations on, and should take the initiative to reduce instances of, illegal camcording and live streaming piracy as a priority. Indonesia must also improve its efforts to address other forms of piracy, which continue to negatively impact its marketplace for creative content. For example, Piracy Devices (PDs) and apps have emerged as a significant means through which pirated motion picture and television content is accessed. In addition, although Indonesia’s market for publications shows great promise for growth, piracy of published materials makes it one of the worst markets in Asia for publishers. Signal theft and pay-TV piracy remains a problem throughout the Indonesian archipelago, as does retail piracy.

**Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law:** The Indonesian government should be commended for its recent actions to address Internet piracy. These improvements will benefit all creators, Indonesian and foreign alike.

Broadband Internet access in Indonesia is low compared to other emerging (and less geographically dispersed) markets, but the Indonesian market has leapt to the mobile Internet stage and mobile penetration has exceeded 100% for several years.<sup>2</sup> The legitimate commercial market for online dissemination of copyright works is gaining a foothold: iTunes, Spotify, JOOX, 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 legal distribution channels from reaching their full potential.

Following implementation of Regulations Nos. 14 and 26 of 2015, and working with the motion picture and music industries (including local associations, APROFI, and ASIRI), the government has taken effective action by disabling access to over 480 primarily infringing websites between 2015 and 2018. These actions have resulted in significant reductions in visits to the blocked audiovisual and music piracy sites. Notably, traffic to the most popular music piracy websites, *Planetlaga* and *Laguaz*, dropped substantially in 2018. *Laguaz.net*, the second most visited piracy music service in Indonesia, ended its service in November 2018. On the other hand, these drops in traffic are intermittent as well-known piracy sites employ a strategy of domain hopping—redirecting domains to circumvent the results of site-blocking efforts. For example, *Planetlaga* constantly changes its domains, although its monthly visits are now only a small fraction (around 2 million monthly visits) as compared to the peak in 2017 (around 36 million monthly visits). Infringing music apps have also become a problem. For example, two app developers, *xyzmedia* and *9media*, created hundreds of mobile apps available on the Android market and offer infringing music streaming services to mobile users. In addition, the motion picture and television industry reports that two of the most popular infringing sites, *indoxxi* and *lk21*, are the most significant threats due to their popularity and domain hopping. The government can easily add additional domains to those blocked and should streamline the process for rights holders in the case of

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<sup>2</sup> International Telecommunications Union, *Measuring the Information Society Report (2018)*, available at <https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2018/MISR-2018-Vol-1-E.pdf>.

domain hopping. Accordingly, notwithstanding the government's positive actions, more progress is necessary to ensure adequate and effective intellectual property rights protection and enforcement.

**Music Piracy:** Stream-ripping is now the most popular method to obtain unlicensed music content online in Indonesia. Many new infringing websites provide stream-ripping function for users to download music files. For example, *clip2mp3.org* started its service in October 2018 and has already gained almost 10 million monthly visits in December 2018. Some stream-ripping services have been blocked by administrative orders, but soon are revived due to domain hopping. The government must improve the law to address domain hopping without the need for filing new applications.

**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.

**Unauthorized Camcording and Live Broadcasting of Movies:** In recent years, camcording piracy has evolved to take advantage of mobile phones. In 2016, Indonesia ranked 13<sup>th</sup> in the world in terms of mobile revenue.<sup>3</sup> In 2018, there was a rise in piracy in the form of live streaming (broadcasting) of films directly from cinemas, using mobile social media apps, such as Facebook Live, Instagram and BIGO Live. As noted above, the motion picture and television industry reports that in 2018, a one-hour live stream through Facebook Live of the blockbuster *Jurassic World: Fallen Kingdom* was detected at Cinemaxx Lippo Plaza Manado City. A forensic report also found an illegal camcording incident involving *Slender Man* from one of the XXI cinemas (Beachwalk XXI) in Denpasar, Bali. Illegal camcording and live streaming piracy remain big concerns, and the government should issue clear guidelines and regulations on, and should take the initiative to reduce instances of, illegal camcording and live streaming piracy as a priority.

**Piracy Devices and Apps:** Piracy Devices (PDs) include 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, often on smart TVs in homes. The devices are sometimes advertised as enabling infringement of 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. PDs and apps 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 Pinangasia* are selling PDs, which are also offered for sale on e-commerce sites promoting them and their related add-ons or apps such as *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 or resellers 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.

**Signal Theft:** Signal theft and 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. 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).

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<sup>3</sup><https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2018/MISR-2018-Vol-1-E.pdf>, p. 69.

**Hard Copy Piracy:** Some industries report that retail piracy in markets, kiosks, and malls remains a problem in the major cities across Indonesia. 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 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 continued to improve in 2018, 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 rights holders, generally. The government should continue additional enforcement rounds in 2019 to allow legitimate online distributors the opportunity to increase their market share. Moreover, the website-blocking regulations should be revised to streamline applications to prevent domain hopping.

**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 2018. Industry groups report piracy sites electronically and 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 has been disabled to more than 400 infringing websites (and many more domains) reported by industry groups through December 2018. So far there has been excellent compliance by the largest ISPs. For the record industry, all 133 websites submitted for website blocking from 2015 to 2017 are inaccessible in Indonesia. Unfortunately, while the Indonesian Government is quite willing to issue administrative site blocking orders based on industry information about infringing sites, the government does not accept website blocking applications against infringing cyberlockers. Such a policy should be reviewed so that those sites which are blatantly infringing or facilitating infringement of IP rights and not merely passive hosting platforms, are also blocked.

IIPA recommends that the government prioritize IP-related cases in issuing site-blocking orders, and improve the regulations to allow for "dynamic injunctions" to address the practice of domain hopping by providing that additional domains, URLs, or IP addresses that resolve to "materially the same website" as one already blocked can be added to the blocking order quickly and easily.

**Public-private Anti-piracy Taskforce, Collaboration with the National Police:** In September 2015, the National IP Task Force of 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 motion picture and television industry association has actively participated in BEKRAF's anti-piracy task force. In May 2018, the motion picture and television industry sponsored a very well attended educational event highlighting the impact of piracy in the local film industry and the effectiveness of site blocking in reducing piracy traffic, which included discussions by government officials, BEKRAF, academics, producers, and exhibitors. IIPA encourages the task force to address book publishers' issues, as they are equally damaged by piracy that, to date, has not been addressed.

**Infringing Website List (IWL):** In October 2017, APROFI, ASIRI, and PPPI Jakarta (Advertisers Association), supported by BEKRAF, launched an 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.

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

- First, a separate police team for IPR crimes should be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels.
- Second, the IP Office's civil service investigators (PPNS) team budget should be expanded in order to increase the number of copyright piracy raids each year.
- Third, Ditreskrimsus and "Type A" Police Commands should announce 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. 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.

**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>4</sup> few cases proceed to a conviction, and most result in extremely low and non-deterrent criminal fines.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright law in Indonesia is governed by 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).<sup>5</sup> Some provisions of the Copyright Law raise serious concerns that remain unaddressed. Others require further clarification in implementing regulations.

### **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 [available] 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 an undesirable precedent and could be interpreted at some

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<sup>4</sup>Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009.

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

point to undermine rights to control the manner and means in which rights holders authorize the making available and disseminating of their content through information and communication technologies. This provision on its face collides 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 reversion of right 25 years after the transfer of right with respect to literary works, performances, and musical works." 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. In any event, these provisions should be removed.

**Criminal Case Structure and Penalties Weakened:** For criminal cases, the Law raises concerns and takes 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" before a piracy case 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. Subsection (1)(a) and (d)'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 two other subsections included in this exception do not contain any safeguards required under the three-step test. IIPA recommends that the Indonesian Government clarify the application of the full three-step test to each use and purpose contained in this exception through amendment of the provision itself or by 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.

**Rights Management Information (RMI) Violations:** The Law provides that 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).

**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 ground for refusal. There has been a concern about abuse of the voluntary copyright registration process in Indonesia because many invalid copyrights get registered, including by IP infringers, so it is hoped that this substantive examination 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 or applies in bad faith. 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, recordation is not feasible for industries and rights holders that control a large number of works.

**Provisional Measures:** Under Article 108 of the Law, preliminary (provisional) injunctions will take too long to obtain. Under the Indonesian law, there are no legal remedies available to the claimant before the submission of the claim, such as preliminary injunctions. However, a claimant can request the attachment of the defendant's assets during the proceedings in the context of a full trial.

**Statutory Damages:** There are no statutory damages under Indonesian copyright law. In the case of copyright infringement, the copyright holder can claim a justifiable amount by way of compensation. Compensatory and punitive damages are available under the Civil Procedure Code. However, damages can only be granted based on what the parties request in their claim, and judges are prohibited from granting damages that exceed what the parties previously requested. The successful party must prove losses with sufficient and actual evidence, and the claim is limited to the amount requested.

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

The site blocking regulations are a welcome addition to the enforcement regime and are working very well, with over 480 websites being blocked to date. However, there is currently no way to prevent domain hopping other than to file a separate application to block the "hopped" domains, which is time consuming and cumbersome. 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 the report and recommendation for the original website, without the need for a separate application. This would bring Indonesia's regulation in line with other countries' site-blocking provisions or rulings, which allow for such "dynamic" injunctions (examples include the United Kingdom and Singapore). 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."

### **Draft Broadcasting Law, Data Localization Decree, OTT Laws**

A new broadcasting law is under development by the legislature and awaits publication sometime in 2019. It is anticipated that the new law will address convergence issues, such as the intersection between traditional broadcasting/pay-TV and OTT.

Indonesia is also currently updating its data localization laws and a draft decree implementing law GR82 is being considered for approval. The draft GR82 decree outlines data localization and protection obligations commensurate with the importance of the data (i.e. national security, high risk, and low risk). We understand the draft decree is being considered for approval, along with guidelines on data classification. The drafters should avoid mandates for the location of servers or data for audiovisual content services. We also understand that a draft OTT regulation is being considered, which also contained some potentially problematic provisions. The draft should take a soft approach to OTT regulation (e.g., no local base requirement, no mandated national payment gateway, and no data localization) and avoid measures that could stifle business developments and/or add burdensome barriers to market entry.



## Other Needed Legal Reforms

**Unauthorized Camcording and Live Broadcasting of Motion Pictures and Television Content:** The Explanatory Memorandum to the 2014 Copyright Law indicates that 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: (i) fostering greater cooperation with cinema owners to fully uphold and enforce the Law; (ii) taking and supporting targeted enforcement actions; and, (iii) where warranted, proceeding with prosecutions against those engaged in this damaging activity.<sup>6</sup> The motion picture and television industries reported a jump in camcording to seven total incidents in 2018 (five video camcording incidents, and two audio captures), which is a significant rise in camcording piracy in Indonesia. Moreover, mobile penetration has led to new types of piracy. In 2018, live streaming directly from a cinema was observed in Manado City. These reports demonstrate the need for enforcement against such forms of piracy, and regulations should be introduced that would provide a clear legal basis to prohibit live streaming and camcording in cinemas and to strengthen enforcement remedies available.

**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 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 varied treatment, and protection should be extended accordingly.

**Strengthening the Organized Crime Statute:** Since many operators of piracy websites are engaged in other criminal activities, 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 and asset seizure, 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 user-generated content (UGC) and for those who upload UGC content and contains de facto ISP safe harbors. 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 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. 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

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<sup>6</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.

property, the blocking or deletion period need not be carried out for 14 days, which is excessively slow. The Circular Letter also requires platforms to monitor user activities on UGC trading 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 narrowing the scope of applicability of this Circular Letter, 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>7</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>8</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 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, as well as film distribution and exhibition. This very positive move should be accompanied by the issuance of clear guidelines on the implementation process of the decree and removal of market barriers. Also, many media sectors remain on the NIL, preventing direct foreign investment in other Indonesian media industries.<sup>9</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 NIL, 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 by local distributors and exhibitors. 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.

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<sup>7</sup>Such provisions should clarify that any safe harbor covers only truly neutral and passive activities. 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>8</sup>The full text of the law, and an English translation, are available at: <https://www.bu.edu/bucflp/files/2012/01/Law-No.-11-Concerning-Electronic-Information-and-Transactions.pdf>.

<sup>9</sup>The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

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 2009 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 be interpreted in such a way that would result in 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 CMO-related organizational issues including tariffs. In December 2018, the government amended the Regulation for Collective Management Institutions (Regulation No. 36/2018). This amended regulation does not improve the collective licensing issues faced by the music industry. CMOs for musical works and sound recordings continue to be placed under the single-window entity called LMKN as a "national CMO" that adds an unnecessary extra layer to the collective licensing system. LMKN sets the tariff, collects the remuneration (through agents), and decides how the collections are split among different groups of CMOs; yet, the management of LMKN is not well represented by rights holders, with the majority being government officials, academics, and copyright specialists. Rights holders thus have little control over LMKN's governance and operations. Despite that LMKN delegates the collection function to some of the CMOs, the regulation permits LMKN to deduct 10% from the collections as operation costs at the expense of rights holders' interests. Further, the problem of the government's accreditation of numerous CMOs to manage the same categories of rights remains, which has caused unnecessary confusion and inefficiencies in collective licensing.

**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, the Indonesian Broadcasting Commission's (KPI) statements raised concerns about the possible deleterious effects of such a requirement. The rule, if implemented, would have harmful effects on Indonesian consumers' access to foreign TV channels. The timeline for revising the Broadcasting Law to address this concern remains unclear.

**Customs Valuation:** Indonesia imposes a tariff on imported films that is based on the running time of the film, resulting in high duties for many U.S. feature films. Indonesia should join the expanded WTO Information Technology Agreement (ITA) to address this issue and to stay consistent with international best practices.

**Content Review:** In October 2015, KPI notified platform operators regarding pre-release content review (i.e., censorship) and classification requirements for programs on all TV channels. KPI suggested that non-compliance may violate the Broadcasting Ethics and Broadcast Program Standard, thus subjecting operators to fines and imprisonment. If implemented, these requirements would negatively impact the pay-TV industry by raising costs, creating new barriers to entry, and reducing consumer choice.

**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 November 2018, USTR, pursuant to the 2012 investigation, held a public hearing to review country practices in Indonesia regarding intellectual property rights and market access issues, and to 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>10</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 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, and recordation requirement appear to be out of compliance with Indonesia’s international obligations.

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<sup>10</sup>19 U.S.C. §§ 2462(c)(4) and (5).