

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2020 mainly due to ongoing serious market access challenges. If, at the conclusion of the Generalized System of Preferences (GSP) investigation, the Government of Indonesia has not made adequate progress remedying the deficiencies identified below, IIPA requests suspension or withdrawal of Indonesia's GSP benefits, in whole or in part.<sup>1</sup>

**Executive Summary:** As the fourth most populous country in the world, Indonesia is an important and growing market for the creative industries. For the motion picture and television industry, Indonesia ranks within the top 20 markets for box office revenues. Several years ago the government made improvements to its copyright law, enforcement system, and investment framework, but progress stalled in 2019 because the government took troubling steps backwards on market access, and there are no official plans for further needed reforms for copyright protection and enforcement.

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), Indonesia has taken a number of steps to improve its IPR protection and market access policies for some content industries, though not for others. For example, the implementation of Regulations Nos. 14 and 26 of 2015 to disable access to piracy websites, and the launch of an Infringing Website List (IWL) program to encourage advertisers and marketers not to support piracy websites with advertising revenue, were positive steps. The Indonesian Government has issued numerous administrative orders to block hundreds of piracy sites, and, recently, the notorious piracy site *Indoxi* announced that it would cease operation voluntarily. The effectiveness of the site blocking regulations, however, is hindered by the lack of a comprehensive strategy for addressing online piracy, and lack of a process for addressing "domain hopping"—a common tactic pirates use to evade government-ordered site-blocking. The Government of Indonesia should address these concerns, and do much more to improve the efficiency and capacity of law enforcement in handling digital piracy cases.

IIPA recommends that in 2020 the Government of Indonesia build on past progress and increase efforts to combat online piracy by updating aspects of its legal framework to add effective remedies and to close existing gaps in protection. The Directorate General of Intellectual Property (DGIPR) is undertaking a partial revision of the Copyright Law focused on exceptions and limitations, film ownership, and collective management issues, and it is unclear whether this revision will enhance or weaken copyright protection. It is critical that any such revision complies with Indonesia's international obligations and meets international norms and best practices. Furthermore, any revision of the Copyright Law should revisit a number of problematic provisions that create legal and commercial uncertainty for the copyright industries, including by removing a provision on reversion of rights, removing an overbroad exception to the making available right, clarifying rights of making available and communication to the public, setting forth clear principles of secondary copyright liability, and improving protections for technological protection measures (TPMs). The government should also extend the copyright term of protection for sound recordings and all copyrighted works to 70 years, in line with international best practices. In addition, Indonesia should provide clear guidelines that camcording and live streaming are illegal and implement measures to reduce instances of these activities.

While the government in 2016 took the very positive step of easing its negative investment list and allowing 100% direct foreign investment in film and sound recording production, and film distribution and exhibition, Indonesia has unfortunately regressed back towards a protectionist path. Indonesia should reverse course and address the many

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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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



market access barriers, investment barriers, and discriminatory treatment against U.S. copyright materials that make it more difficult to do business and compete in the country. The broadcasting and radio sectors remain closed and the government is drafting regulations on the over-the-top (OTT) sector that include heavy-handed localization requirements and content review and classification restrictions. Indonesia's government doubled down on the harmful 2009 Film Law, which continues to cause significant uncertainty for all rights holders and the local exhibitors, issuing regulations in 2019 that affirmed many of the most harmful aspects of that law. Moreover, recent indications that the Government of Indonesia may not agree to further extensions of the WTO e-commerce moratorium on customs duties for electronic transmissions and may seek to charge duties on electronic transmissions are troubling, as such duties could significantly harm the country's market for creative digital content and related services. 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 may take as much as 10% of the collections from rights holders as "operational costs." Finally, Indonesia has still not joined the WTO Information Technology Agreement (ITA) Expansion Agreement to establish best practices on customs issues.

## **PRIORITY ACTIONS REQUESTED IN 2020**

### **Enforcement:**

- Continue *ex officio* enforcement of the Copyright Law and Regulations Nos. 14 and 26 of 2015, including establishing and implementing a dynamic system to block variants, new primary domains, redirects, mirrors, and proxy sites; and develop a comprehensive roadmap for addressing online piracy in consultation with both domestic and foreign copyright stakeholders.
- Combat illegal camcording and streaming piracy, including live streaming, by enacting regulations or guidelines confirming these activities' illegality, followed by implementation of a government program to strictly enforce the laws to reduce instances of these activities.
- 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 variants, new primary domains, redirects, mirrors, and proxy sites can be added to the blocking list quickly and easily.
- Revision of the Copyright Law should include the following amendments and/or implementing regulations:
  - 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)).
  - Clarify rights of making available and communication to the public in line with Indonesia's treaty commitments and international best practices.
  - Narrow the broad scope of the exception under Article 44 exempting a number of different uses for a wide array of purposes, ranging from education to criticism to "security and maintenance of government," because that exception appears to be broader than the three-step test, which confines exceptions and limitations pursuant to Indonesia's international obligations (e.g., WTO TRIPS Agreement (TRIPS) Article 13).
  - Ensure any new exceptions and limitations are confined to the bounds of the three-step test (e.g., TRIPS Article 13).
  - Maintain copyright ownership of audiovisual works in the producer who arranged for the work to be made and is best positioned to commercially exploit the work, consistent with international best practices.

- Provide clear guidelines explaining that live streaming and camcording in cinemas is illegal and violate exclusive rights.
- Extend the copyright protection term to the life of the author plus 70 years, and to at least 70 years for sound recordings and all works calculated from publication to be in line with international best practices and to avoid discrimination against local creators and artists.
- Strengthen the protection of TPMs consistent with Indonesia’s international treaty obligations and international best practices, including by ensuring the protection of access controls.
- 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.
- 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 clarify safe harbor provisions for platforms, if any.
- Ensure that any new OTT regulations comport with Indonesia’s international obligations 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 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.
- Join the expanded WTO Information Technology Agreement (ITA), and remove the tariff on physical imported films based on the running time of the film, which has resulted in high duties for many feature films.
- Support an extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.
- Remove the requirement in the Broadcasting Law that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced.

## THE NATURE OF PIRACY IN INDONESIA

High levels of piracy in Indonesia continue to inflict losses on Indonesian creators, as well as U.S. book, motion picture and television, music, and video game creators. While the Indonesian Government has made efforts to fight online piracy, all actions taken by the government are based on applications by or information from the industry. The most significant concern for the audiovisual industry continues to be online piracy, which consists of various types of websites, including linking, streaming, and torrent sites. Homegrown piracy sites and “brands” such as *Indoxxi* (“Indo Twenty One”),<sup>2</sup> *Nonton*, and *Dunia21* are harming the already fragile creative industry ecosystem.<sup>3</sup> Such 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. The government should address this issue of domain hopping by swiftly issuing orders related to the “hopped” domains. Indonesia should also improve its efforts to address other forms of piracy, which continue to negatively impact its marketplace for creative content, including the growing problem of illegal camcording and live streaming piracy, and Piracy Devices (PDs) and apps, which have emerged as a significant means through which pirated motion picture and television content is accessed.

**Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law:** Broadband Internet access in Indonesia is increasing, and mobile penetration is greater than one device per capita.<sup>4</sup> This evolution means there is enormous potential for the legitimate commercial market for online dissemination of copyright works: services like iTunes, Spotify, JOOX, Netflix, iFlix, CatchPlay, Vue, Genflix, HOOQ and several other international streaming services now operate in Indonesia. However, infringing cyberlocker, video linking and streaming sites, and

<sup>2</sup> USTR included Indoxxi on its list of “notorious markets” in the 2018 Out-of-Cycle Review of Notorious Markets, available at [https://ustr.gov/sites/default/files/2018\\_Notorious\\_Markets\\_List.pdf](https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf).

<sup>3</sup>Sites like these employ gambling advertising and sometimes pornography to lure users.

<sup>4</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>.

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 (Indonesia Producers Association) and ASIRI (Indonesian Recording Industry Association)), the government has taken effective action by disabling access to hundreds of piracy websites and over 1,500 pirate domains since the process began in 2016. Many of the domains that were the subject of these actions are related to notorious pirate sites like “Indo Twenty One” (i.e., *indoxxi*, *indoxx1*), *Nonton*, *Layarkaca*, or *Dunia21*. In late December 2019, the operators of *Indoxxi* announced plans to cease operations voluntarily, but it remains unclear whether all new primary domains, redirects, mirrors, and proxy sites will also cease infringing. The self-help actions of industry, with cooperation from the Indonesian Government, have resulted in reductions in visits to the blocked audiovisual and music piracy sites. Notably, traffic to the most popular music piracy websites, *Planetlagu* 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 most well-known piracy sites employ domain hopping to circumvent the results of site-blocking efforts. For example, *Planetlagu* constantly changes its domain names, 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 that 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*, remain significant threats due to their popularity and domain hopping, although IIPA will monitor whether *Indoxxi*'s announcement that it intends to cease operations, and recent government statements on the harms due to piracy, help drive consumers to legitimate offerings. The government should streamline the process for rights holders to ensure access to infringing sites is disabled, and to deal efficiently with the problem of domain hopping.

**Music Piracy:** Stream-ripping is currently one of the most popular methods to obtain unlicensed music content online in Indonesia. Many extremely popular infringing websites provide stream-ripping function for users to download music files, including *Y2mate.com*, *MP3juices.cc*, *Yout.com*, and *Clip2mp3.org*.<sup>5</sup> Cyberlockers, most notably *Zippyshare.com*, which receives the highest traffic from Indonesia, *4shared.com*, *Uptobox.com*, and *Solidfiles.com* also remain very popular.

**Unauthorized Camcording of Movies:** Unfortunately, there was an increase in camcording incidents in 2019. 15 video captures of MPA member motion pictures were forensically matched to Indonesia in 2019, up from 5 in 2018.<sup>6</sup> Illegal camcording and live streaming piracy remain big concerns. The government should issue clear guidelines and regulations on illegal camcording and live streaming piracy, and take the initiative to reduce instances of these illegal activities as a priority.

**Piracy Devices and Apps:** 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. Often used 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. This content may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale as an “after sale” service, or loaded by the users themselves. PDs and apps are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. IIPA encourages the Indonesian Government to take steps to crack down on piracy apps and on device manufacturers or resellers who preload the devices with apps that facilitate infringement, and take action against key distribution points for devices that are being used illegally.

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<sup>5</sup>*Y2mate.com* received over 1 billion visits globally and *Clip2mp3.org* received over 32 million visits globally in 2019.

<sup>6</sup>There were also three audio matches of MPA member titles.

## **ENFORCEMENT UPDATES**

Although the Indonesian Government has taken significant strides to combat online infringement, notably through implementation of regulations for disabling access to piracy websites, more should be done. Indonesia should increase the capacity of its enforcement officials, who generally lack familiarity in investigating and handling digital forensic evidence, and do not understand the ease with which pirates are able to use anonymizing software and infrastructure to evade detection. Online piracy operators rarely receive deterrent level penalties. The government should develop a comprehensive roadmap for addressing online piracy in consultation with both domestic and foreign copyright stakeholders, and enhance industry efforts to disable access to infringing sites with additional enforcement actions in 2020, with the goal of encouraging consumers to migrate to legitimate offerings. This should include issuing revised website-blocking regulations 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)):** As discussed above, implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015 continued to be successful in 2019, although there is a need to address websites that circumvent the orders through domain hopping. These actions, which are initiated by rights holders, are the strongest form of self-help available to copyright owners in Indonesia. Emerging issues in 2020 include the ability to disable access to proxy portal sites and host sites (i.e., cyberlockers) where the primary purpose or primary effect of the site is to infringe or facilitate infringement of copyright. IIPA recommends that the government prioritize IP-related cases in issuing site-blocking orders, and improve the regulations to allow for “dynamic injunctions” to prevent domain hopping by providing that variants, new primary domains, redirects, mirrors, and proxy sites can be added to the blocking list quickly and easily.

**Infringing Website List (IWL):** In October 2017, APROFI (Indonesia Producers Association), ASIRI (Indonesian Recording Industry Association), and PPPI Jakarta (Advertisers Association), supported by BEKRAF (Creative Economy Agency), 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. Many of the IWL targets overlap with the list of targets for site blocking (discussed above). Starving piracy websites of advertising revenues is an important additional tool in addressing online piracy.

**Comprehensive Enforcement and Judicial Reform:** The National IP Task Force took the first steps towards 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, Indonesia should undertake comprehensive enforcement reform and should also implement judicial reforms. IIPA has outlined recommended steps for such comprehensive enforcement reform and judicial reform in prior filings.<sup>7</sup>

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright law in Indonesia is governed by the Law Concerning Copyright (Number 28 of 2014), which went into force in 2014, and replaced the prior 2002 law and Regulations Nos. 14 and 26 of 2015, which implemented key provisions concerning online and digital forms of infringement, including provisions intended to implement 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>8</sup>

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<sup>7</sup>See e.g., IIPA 2019 at 151.

<sup>8</sup>Indonesia joined the WIPO Copyright Treaty (WCT) on June 5, 1997 (in force March 6, 2002) and the WIPO Performances and Phonograms Treaty (WPPT) on February 15, 2005.

## Concerning Provisions in the Copyright Law

The Directorate General of Intellectual Property (DGIPR) is currently undertaking a partial revision of the Copyright Law, focusing on copyright ownership and collective management issues, as well as exceptions and limitations. The first phase focuses on (1) exceptions and limitations for education, libraries, and archives, and (2) clarifying copyright ownership in films. Next year, DGIPR intends to establish a CMO for films in cinemas and on VOD. It remains to be seen whether this revision will result in enhanced or weakened copyright protections. Any new exceptions must be confined to the three-step test, consistent with Indonesia's international obligations (e.g., TRIPS Article 13). On copyright ownership in films, in accordance with best international practices, the copyright should reside with the producer who arranged for the film to be made and is best positioned to commercially exploit the film, unless there is an agreement to the contrary. Finally, consistent with international best practices, any CMO must be voluntary, transparent, and governed by rights holders, without interference by Indonesia's government.

Furthermore, any revision of Indonesia's Copyright Law should address certain provisions that raise serious concerns, including, in some cases, clarifying such provisions through implementing regulations. These include the following:

**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 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. On its face, this provision 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.

**Clarification of the Making Available/Communication to the Public Right:** Article 27 of the Copyright Law provides equitable remuneration rights to producers and performers for broadcasting and communication to the public of sound recordings. However, the law defines communication to the public to include making available. To the extent this diminishes the right of making available to a mere remuneration right, it is inconsistent with Articles 23 and 24, which provide exclusive rights for performers and producers to make available their sound recordings, and it contravenes Indonesia's obligations under the WPPT.

**Criminal Case Structure and Penalties Weakened:** For criminal cases, the Law raises concerns as it took steps backward from the previous law. The Law makes criminal cases complaint-based, rather than prosecuted on an *ex officio* basis; removes minimum mandatory statutory criminal penalties; and provides for non-deterrent fines, including for landlord criminal liability. Finally, Article 95 of the Law creates a highly unusual provision that 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. The

references in Subsections (1)(a) and (d) to the three-step test omit the limitations of “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 and TPM Provisions:** 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). The scope of the RMI provisions should be expanded accordingly. Protections for TPMs should be strengthened consistent with Indonesia’s obligations under the WCT and the WPPT, and with international best practices, including by ensuring the protection of TPMs that control access to copyrighted works (i.e., access controls).

**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 previously registered work as a ground for refusal. This substantive examination is intended to enable the authorities to review and invalidate false applications or registrations to address a concern about abuse of the voluntary copyright registration process through registration, including by IP infringers, of invalid copyrights. IIPA suggests introducing a more forceful deterrent, including fines and penalties, against anyone who knowingly files a false application or applies in bad faith. Additionally, the registration and recordation system potentially violates the prohibition of formalities under the Berne Convention. 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 a failure to record transfers and other changes will not 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 take too long to obtain. Under the Indonesian law, there are no legal remedies, such as preliminary injunctions, available to the claimant before submitting the claim. A claimant, however, 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. Judges, however, may only grant damages 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.

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

As noted above, 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 prevent domain hopping by providing that variants, new primary domains, redirects, mirrors, and proxy sites can be

added to the blocking list quickly and easily. 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, France, India, and Singapore). Specifically, new subsection (3) to Article 6 of the Regulations could be amended to provide: "Additional domains, sub-domains, URLs or other IP addresses whose sole or predominant purpose is to enable or facilitate access to 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."

## 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 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>9</sup> As noted above, camcording incidents increased in 2019. In addition to increased enforcement efforts, regulations should be introduced that would provide a clear legal basis to prohibit camcording (as well as live streaming) 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 provide greater incentives for production and give producers a stronger incentive to invest in local industry, thus spurring economic growth and tax revenues; and enable 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.<sup>10</sup> 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 was 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. Prohibited content includes content that infringes intellectual property and content that contains "goods or services that contain hacking services content and/or provide access without rights." This language is unclear, but it could refer to content that demonstrates or effects circumvention of TPMs. The Circular Letter provides for a form of notice and takedown that includes a requirement for the service provider that has been notified of an infringing work to take steps to ensure that

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<sup>9</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.

<sup>10</sup>Note that the term of protection has limited practical effect for certain works in view the 25-year reversion of rights regarding literary works, performances, and musical works, as discussed above.



all other copies of (or URL links to) that same work are also removed. For content that infringes intellectual property, the period of time required to take action can be up to 14 days, which is excessively slow. The Circular Letter also requires platforms to monitor user activities on UGC trading platforms. Unfortunately, it does not specify any punishments or sanctions for users and/or platforms that fail to comply. The Director General of Kominfo has indicated that further comprehensive regulations for all Internet platforms will follow, and that 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 clarifying safe harbor provisions for platforms, if any.<sup>11</sup>

## **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>12</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:** In 2019, the Indonesian government expressed its intention to amend the 2009 Film Law, but regulations issued in late 2019 affirmed harmful provisions in the existing Film Law, including a 60% screen quota for Indonesian films and a prohibition on dubbing of imported films (with limited exceptions). If implemented, the screen quota would likely lead to lost revenue in local theaters and limited choices for Indonesian consumers, limit local industry's exposure to the expertise and skill of foreign producers, and leave a huge opening for the purveyors of pirated content. Dubbing of imported films into a local language is a commercial decision that should be left to content owners based on business considerations and market forces.

Furthermore, the 2009 Film Law and regulations therein include some ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct, such as restrictions on vertical integration and arbitrary limits on vertical supply between content distributors and theatrical exhibitors. Indonesian authorities should remove these provisions because they could have unintended consequences, such as restricting foreign participation in the market and curbing business efficiency. Indonesia should amend the Film Law 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.

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<sup>11</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>12</sup>The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

**Collective Management Organizations:** A December 2018 amendment to the Regulation for Collective Management Institutions (Regulation No. 36/2018) has not improved collective licensing issues faced by the music industry. Certain CMOs for musical works and sound recordings continue to be placed under the single-window 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. As a result, those rights holders involved have little control over LMKN’s governance and operations, including the setting of tariffs, which are fixed and set extremely low. Even though 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 existence 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 of 2002) includes a requirement that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced. Although regulations issued in 2007 provided a series of exemptions, the Indonesian Broadcasting Commission’s (KPI) 2015 statements regarding implementation raised concerns. If implemented, such a burdensome rule would be harmful to consumers, who would likely absorb the additional associated costs. The timeline for revising the Broadcasting Law 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.

**Customs Duties on Electronic Transmissions:** In 2018, Indonesia amended its tariff schedule via Regulation No. 17/PMK.010/2018 to add new tariff lines that may cover electronic transmissions of music, film, publications, and other digital products. In creating new tariff lines for digital products that are transmitted electronically, which includes a threat of imposing customs duties on those products, Indonesia has set a troubling precedent that raises serious concerns with respect to the WTO e-commerce moratorium on customs duties for electronic transmissions. Heightening this concern, the Government of Indonesia has recently indicated that it may not agree to further extensions of the moratorium. These actions could significantly harm the country’s market for creative digital content and related services, including Subscription-based Video on Demand (SVOD) services.

**Content Review:** In October 2015, KPI notified platform operators regarding pre-release content review 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. In August 2019, KPI indicated it would seek to subject SVOD providers to its strict content review and classification requirements. If implemented, these new standards would likewise reduce consumer choice, raise costs, and disincentivize foreign investment in Indonesia’s OTT sector.

**OTT Regulations:** The Ministry of Communication and Informatics is considering OTT regulations that could require foreign OTT service providers to set up local permanent establishments and use local national payment gateways, in addition to providing content filtering and censorship mechanisms. If implemented, such requirements would stifle business development and add a burdensome barrier to market entry.

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

In January 2020, 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 determining whether a country should continue to be designated as a GSP beneficiary country, “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>13</sup> While the Indonesian Government has made past progress towards meeting the GSP criteria, these efforts have recently stalled and even regressed in some respects. If, at the conclusion of the GSP review, the Government of Indonesia has not made adequate progress remedying the deficiencies outlined in this report, IIPA requests suspension or withdrawal of Indonesia’s GSP benefits, in whole or in part

## **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 recodation requirement appear to be out of compliance with Indonesia’s international obligations. In addition, as set forth in the “Market Access” section, there are areas in which the Government of Indonesia may fail to provide equitable and reasonable market access to foreign rights holders, as set forth in the GSP criteria.

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<sup>13</sup>19 U.S.C. §§ 2462(c)(4) and (5).