

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2021 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. Several years ago, the government instituted some positive changes to its copyright law and enforcement system, which have helped rights holders protect their rights in the online environment, and made progress in liberalizing Indonesia’s investment framework. Unfortunately, the government has recently taken some troubling steps backward on market access—shifting back to a less business and investment friendly regulatory environment—and on copyright reform—contemplating changes that would weaken existing protections and upend rights holders’ longstanding commercial arrangements.

Under the revised Copyright Act and Regulations Nos. 14 and 26 of 2015, rights holders have successfully petitioned the Indonesian government to disable access to over 3,200 domains associated with piracy websites. These regulations have led to significant disruptions of piracy in the country, but the Government of Indonesia should improve them by addressing “domain hopping”—a common tactic pirates use to evade government-ordered site blocking. The Government of Indonesia should also do more to improve the efficiency and capacity of law enforcement in handling digital piracy cases. Highlighting the enforcement shortcomings in Indonesia, criminal groups behind sites like *Indoxxi*, *lk21*, and *Nonton*, which are notorious for piracy, continue to operate these sites by routinely “hopping” domains or through hundreds of copycat domains.

IIPA recommends that in 2021 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 considering 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 new exceptions or limitations are confined to the three-step test, consistent with Indonesia’s international obligations, and that copyright ownership in films resides with the producer unless there is an agreement to the contrary, in accordance with 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 the 25-year reversion of rights provision, 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) and rights management information (RMI). The government should also extend the copyright term of protection for all categories of works to the life of the author plus 70 years, and to at least 70 years for sound recordings and all works for which term is calculated from publication, in line with evolving global norms. 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 towards a protectionist path. Indonesia should reverse course and address the many

<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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



market access and investment barriers, and the discriminatory treatment against U.S. copyright materials that make it difficult for the U.S. copyright industries to do business and compete in the country. The broadcasting and radio sectors remain closed and the government in late 2020 enacted Implementing Regulation for Government Regulation No. 71 of 2019 on the Implementation of Electronic Systems and Transactions (GR-71) regulating the over-the-top (OTT) sector. While GR-71 included some improvements over the earlier draft, there remain onerous localization and registration requirements, a content review mechanism with mandatory takedown requirements, and disproportionate penalties for non-compliance. Indonesia's government doubled down on the harmful 2009 Film Law, which continues to cause significant uncertainty for all rights holders and local exhibitors, issuing regulations in 2019 that affirmed many of the most harmful aspects of that law. Moreover, IIPA remains concerned that the Government of Indonesia may not agree to further extensions of the WTO e-commerce moratorium and may seek to charge duties on electronic transmissions, because 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 collective management organization (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 should join the WTO Information Technology Agreement (ITA) Expansion Agreement.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement:**

- Continue enforcement of the Copyright Law and Regulations Nos. 14 and 26 of 2015 to disable access to piracy sites/domains, including establishing and implementing dynamic, site-specific blocking to cover variants, new primary domains, redirects, mirrors, and proxy domains/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.
- Monitor the marketplace and take enforcement actions to combat the proliferation of Piracy Devices (including set-top boxes) and piracy apps.

### **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:
  - Repeal Articles 18 and 30 of the Copyright Law, which provide that the rights in literary and musical works and performers' rights revert back to the author or performer 25 years after their assignment.
  - Repeal the broad copyright exception related to Internet uses (Copyright Law Article 43(d)).
  - Clarify the rights of making available and communication to the public in line with Indonesia's treaty commitments and international best practices.
  - Narrow the scope of the broad 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 under the WTO TRIPS Agreement (TRIPS) Article 13, the Berne Convention, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).
  - Maintain copyright ownership of audiovisual works in the producer who arranged for the work to be made and is best positioned to exploit the work commercially, consistent with international best practices.

- Provide clear guidelines explaining that live-streaming and camcording in cinemas is illegal and violates exclusive rights.
- Extend the copyright protection term to the life of the author plus 70 years for all categories of works, including cinematographic works and video games, and to at least 70 years from publication for sound recordings and all works for which term is calculated from publication, in line with international best practices and to avoid discrimination against local creators and artists.
- Strengthen the protection of RMI and TPMs consistent with Indonesia’s international treaty obligations and international best practices, including by ensuring the protection of access controls.
- Amend the definition of “piracy” to encompass acts of online copyright infringement and to remove the requirement of financial gain.
- Implement GR-71, but with additional provisions to increase the transparency and accountability of those online service providers to combat online copyright infringement.

### **Market Access:**

- 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.
- Ensure that 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, including by not imposing content review or classification requirements on Subscription-based Video-on-Demand (SVOD) providers and avoiding localization requirements.
- Improve the collecting society regulations by ensuring that the management of the LMKN is well represented by music rights holders, and eventually eliminate the LMKN, which is an unnecessary extra layer to the CMO system.
- Join the expanded WTO Information Technology Agreement (ITA), and eliminate the tariff on physical imported 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 and music industries continues to be online piracy, which consists of various types of websites, including linking, streaming, torrent sites, and stream-ripping sites, among others. Indonesia is also a major market for cyberlockers operating from outside the territory. Homegrown piracy sites and “brands” such as *Ik21*, *Nonton*, and *Dunia21* are harming the already fragile creative industry ecosystem.<sup>2</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 and copycat sites. The government should address this issue of domain hopping by swiftly issuing orders related to the “hopped” domains and copycat sites/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 and apps, which have emerged as a significant means through which pirated motion picture and television content is accessed.

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<sup>2</sup>Sites like these employ gambling advertising and sometimes pornography to lure users.

**Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law:** Increasing access to the Internet, including through mobile devices, in Indonesia 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 direct download sites with pirated content continue to harm the market in Indonesia, inhibiting legal distribution channels from reaching their full potential.

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 3,200 pirate domains since the process began in 2016. Many of the domains that have been the subject of these actions are related to notorious pirate sites like “Indo Twenty One” (i.e., *indoxxi*, *indoxx1*), *Nonton*, *Layarkaca (lk21)*, or *Dunia21*. In late December 2019, the operators of *Indoxxi* announced plans to cease operations voluntarily, but numerous piracy domains believed to be associated with the same syndicate have continued to proliferate.<sup>3</sup> In addition, dozens of copycat piracy sites have sprung up. 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, although most well-known piracy sites employ domain hopping to circumvent the results of site-blocking efforts.<sup>4</sup> 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. 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 *Savefrom.net*, *ytmp3.cc*, *y2mate.com*, and *mp3juices.cc*.<sup>5</sup> Cyberlockers, most notably *Zippyshare.com*, which receives the highest traffic from Indonesia, *Uptobox.com*, *Racaty.net*, and *Solidfiles.com*, also remain very popular.<sup>6</sup>

**Unauthorized Camcording/Live-Streaming of Movies:** Unfortunately, there was an increase in camcording incidents in 2019. 13 video captures and two audio captures of MPA member motion pictures were forensically matched to Indonesia in 2019, up from five in 2018.<sup>7</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, including expressly outlawing these activities, and take the initiative to reduce instances of these illegal activities as a priority.

**Piracy Devices and Apps:** Piracy Devices include media boxes, set-top boxes, or other devices that allow users, through 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

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<sup>3</sup>“Indo 21” and related brands remain popular for piracy in Bahasa language throughout Indonesia and Malaysia. Notwithstanding *Indoxxi*’s announcement that it is shutting down, the *Indoxxi* group has continued to operate via a network of websites, which are constantly being redirected, including to nameless IP addresses, altered, and modified to evade tracking and extensive site blocking efforts. It is estimated that the “indo 21” brand comprises approximately 45-50 domains, and hundreds of other domains use related piracy “brands” to attract traffic, such as “*nonton*” and “*dunia21*.” For example, the most popular site of 2019, “*indoxx1.center*,” has been redirected to “*idtube.me*,” and had 360,856 visits in August 2020. These sites use a U.S.-based reverse proxy service to mask the location of the websites’ servers. Currently, the most popular of the Indo 21 domains is “*layarkacaxxi.org*,” with 1,029,382 visits in August 2020. At last available update, the site was hosted by India-based Host Palace. Many domains associated with this syndicate have been blocked in Indonesia, Malaysia, and Australia.

<sup>4</sup>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. But *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).

<sup>5</sup>*Savefrom.net* is currently the most popular stream-ripping site in Indonesia with over 15 million visits from the country, around 8% of its total traffic, during the third quarter of 2020, according to SimilarWeb. *Ytmp3.cc* had over 6 million visits, *y2mate.com* had over 4.5 million visits, and *mp3juices.cc* had over 1 million visits based on SimilarWeb data from the third quarter of 2020.

<sup>6</sup>*Zippyshare.com* received over 13 million visits from Indonesia during the third quarter of 2020, according to SimilarWeb. *Uptobox.com* received over 3 million visits, *Racaty.net* received over 1.7 million visits, and *Solidfiles.com* received over 1.4 million visits, based on SimilarWeb data for the third quarter of 2020.

<sup>7</sup>There were also three audio matches of MPA member titles.

by vendors upon import and prior to sale as an “after sale” service, or loaded by the users themselves. Piracy Devices 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 pre-load the devices with apps that facilitate infringement, and take action against key distribution points for devices that are being used illegally.

## **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 to address this significant problem. 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 criminally investigate operators of major online piracy services, such as *Indoxxi*, and issue penalties strong enough to serve as a deterrent to others. In addition, 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 2021, 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 noted above, implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015 continued to be successful in 2020. Upon stakeholders’ applications, the Indonesian government has issued numerous administrative orders to disable access to over 3,200 piracy domains that resolved to sites that primarily infringed or facilitated infringement of copyright. These actions are the strongest form of self-help available to copyright owners in Indonesia. Emerging issues in 2021 include the ability to disable access to hopped domains, copycat sites, 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 enable “dynamic injunctions” to prevent domain hopping by allowing variants, new primary domains, redirects, mirrors, and proxy sites to be added to the blocking list quickly and easily.

**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 implement judicial reforms. IIPA has outlined recommended steps for such comprehensive enforcement reform and judicial reform in prior filings.<sup>8</sup>

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright law in Indonesia is governed by the Law Concerning Copyright (Number 28 of 2014), which entered into force in 2014, replacing 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, the WCT, and the WPPT.<sup>9</sup>

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<sup>8</sup>See e.g., IIPA 2019 at 151.

<sup>9</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

DGIPR is currently considering 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. In the next phase, 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 or limitations (including mandatory collective management of rights or statutory licenses) must be confined to the three-step test, consistent with Indonesia's international obligations (e.g., TRIPS Article 13). Imposing collective management and/or statutory licenses regarding uses of exclusive rights currently individually licensed would clearly not be consistent with the three-step test. 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 exploit the film commercially, 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 provisions discussed below.

**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, if interpreted incorrectly, would severely undermine legitimate business models built on the 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 and 30 (and the transitional provision in Article 122) of the Law provide that rights in literary and musical works and performers' rights that are transferred shall revert to authors/performers after 25 years. This reversion rule frustrates the freedom to contract and is an unlawful deprivation of property rights, which are protected by the Indonesian Constitution. It is also unclear how these provisions operate in practice, which has created substantial legal uncertainty. One apparent result of this legal uncertainty is that large catalogues of recordings are not available on digital music services in Indonesia, to the detriment of producers, performers, authors, publishers, and the Indonesian public. 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. This is inconsistent with Articles 23 and 24, which provide exclusive rights for performers and producers to make available their sound recordings in accordance with Article 14 of the WPPT. The definitions in the Copyright Law should be amended to remove this inconsistency and ensure the law does not contravene Indonesia's obligations under the WPPT.

**Criminal Case Structure and Penalties Weakened:** For criminal cases, the Law took steps backward from the 2002 law by making criminal cases complaint-based, rather than prosecuted on an *ex officio* basis; removing minimum mandatory statutory criminal penalties; and providing for non-deterrent fines, including for landlord criminal liability. In addition, Article 95 of the Law is highly unusual in that it 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.

**RMI Violations and TPMs 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. 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. In that respect, Indonesian law does not meet the standards of the TRIPS Agreement (i.e., Articles 41 and 50), which require that countries must make available “fair and equitable” civil remedies and procedures to stop and prevent infringements, including provisional measures granted *inaudita altera parte*.

**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.

**Overly Restrictive Definition of Copyright “Piracy”:** Article 1, Subsection 23 of the Law provides an overly restrictive definition of copyright piracy as “distribution” of unlawfully duplicated “goods” to “obtain economic benefits.” This definition is largely redundant, since all acts of copyright infringement amount to “piracy” (unless permitted under an exception). It is also inconsistent with Article 61 of the TRIPS Agreement because it is limited to goods and requires a showing of financial gain. The definition should be amended to expand the scope to include acts of online copyright infringement, and remove the requirement of financial gain.

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

As noted above, there is currently no efficient 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 allowing variants, new primary domains, redirects, mirrors, proxy sites, and alphanumeric variations to be added to the blocking list quickly and easily.<sup>10</sup> 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, Australia, India, and Singapore).

### **Other Needed Legal Reforms**

**Unauthorized Camcording and Live-Streaming 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>11</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 Government of Indonesia should extend copyright term of protection to the life of the author plus 70 years for all categories of works, including cinematographic works and video games, and to at least 70 years from publication for sound recordings and all works for which term is calculated based on publication, 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, the term of protection of certain categories of works, including books, music, dramas, visual art, and architectural works, are protected for the life of the author plus 70 years. However, the protection for other categories of works, such as cinematographic works and video games, remains at life of the author plus 50 years, and the term of protection for sound recordings and all works owned by a legal entity is just 50 years from publication.<sup>12</sup> There is no justification for such varied treatment, and protection should be extended accordingly.

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<sup>10</sup>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.”

<sup>11</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>12</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.



**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.

### **Online Intermediary Regulations**

**Regulation No. 71 on Electronic Systems and Transactions:** In March 2020, the Indonesian government conducted a public consultation on GR-71, which subsequently issued in November 2020. GR-71 regulates certain activities of online services and online intermediaries. This regulation includes provisions addressing the essential role of online intermediaries in combatting unlawful activities online, which is a positive step towards creating a fair online marketplace. However, the regulation should go further to combat online copyright infringement, including requiring additional measures to improve transparency and accountability of online service providers and intermediaries. For example, the regulation should: (i) require certain intermediaries, including payment providers, domain registrars, and hosting services, to implement a “know your business customer” (KYBC) policy and make sure their resellers do the same; (ii) require a public registry for domain registrants that includes accurate data held by domain registrars, registries, or the Ministry of Communication and Information Technology; and (iii) create a legal basis for rights holders to obtain details from the Ministry regarding certain online service providers known as “private scope Electronic System Administrators (ESAs),” which would allow rights holders to take direct action. The regulation should also include a “duty of care” on all intermediaries that requires them to take reasonable steps to limit, stop, and prevent online copyright infringements, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining copyright infringement. Non-compliance should result in liability and fines.

## **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. The Indonesian government should follow this very positive move by issuing clear guidelines on the implementation process of the decree and removal of market barriers. In addition, many media sectors remain on the NIL, preventing direct foreign investment in other Indonesian media industries.<sup>13</sup>

While the removal of the film industry sectors from the NIL is a positive step, 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. The flexibility to dub imported films into a local language on a title-by-title basis 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

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<sup>13</sup>The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

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 rights of copyright 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:** 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. The government-appointed 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 adequately represented by the rights holders whose rights it purports to represent. 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 ITA to address this issue and to stay consistent with international best practices.

**Customs Duties on Electronic Transmissions:** 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 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.

**OTT Regulations:** The Ministry of Communication and Informatics in November 2020 promulgated regulations through its implementation of GR-71 that require foreign OTT service providers to complete mandatory local registration, and that include localization requirements to prevent processing and storing data offshore and create content review mechanisms requiring mandatory takedowns, without reasonable practical procedural considerations, for OTT content. Such requirements would stifle business development and add a burdensome barrier to market entry. Furthermore, in August 2019, KPI suggested that it would subject SVOD providers to its strict content monitoring, content review, and classification requirements, which would raise another market access barrier for OTT content.

## **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 U.S. 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>14</sup> While the Indonesian government has made past progress towards meeting the GSP criteria, these efforts have recently stalled and regressed in some respects. IIPA urges the Government of Indonesia to make further progress to remedy the deficiencies outlined in this report, to avoid 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, provisions regarding civil and criminal remedies, limited RMI violations provision, definitions of making available and communication to the public, and recordation 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>14</sup>19 U.S.C. §§ 2462(c)(4) and (5).