

January 17, 2020

VIA REGULATIONS.GOV, DOCKET NUMBER: USTR-2013-0011

Mr. Erland Herfindahl
Deputy Assistant U.S. Trade Representative
for the Generalized System of Preferences
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20508

Re: **INDONESIA Country Practice Review; Intellectual Property Rights and Market Access Practices; Notice of Intent to Testify and Written Comments of the International Intellectual Property Alliance, in response to the *Generalized System of Preferences (GSP): Notice Regarding a Hearing for Country Practice Reviews of Azerbaijan, Ecuador, Georgia, Indonesia, Kazakhstan, Thailand, South Africa and Uzbekistan, and for the Country Designation Review of Laos, 84 FR 63955 (November 19, 2019)***

Dear Mr. Herfindahl and Members of the GSP Subcommittee:

The International Intellectual Property Alliance (IIPA) submits these written comments in response to USTR's "Generalized System of Preferences (GSP): Notice Regarding a Hearing for Country Practice Reviews of Azerbaijan, Ecuador, Georgia, Indonesia, Kazakhstan, Thailand, South Africa and Uzbekistan, and for the Country Designation Review of Laos." As you know, IIPA was the original petitioner of the GSP review of Indonesia's intellectual property rights and market access country practices petition in the 2011 Annual GSP Review process, and IIPA counsel has testified at subsequent GSP hearings on that petition.

Sincerely,

/Kevin M. Rosenbaum/

Kevin M. Rosenbaum, Counsel
International Intellectual Property Alliance

Written Comments
of the International Intellectual Property Alliance in the
2019 GSP Annual Review
of the Intellectual Property Rights and Market Access Practices of
Indonesia

Submitted to the GSP Subcommittee
Docket No. USTR-2013-0011, Indonesia

January 17, 2020

I. Introduction

In December 2011, the International Intellectual Property Alliance (IIPA)¹ submitted a petition to have the GSP status of Indonesia reviewed with respect to eligibility criteria listed in subsections 502(b) or 502(c) of the 1974 Act (19 U.S.C. § 2462(b) and (c)). See 64 FR 20047. In particular, among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC § 2462(c)(4) and (5).

IIPA originally submitted our petition because we believed that, in spite of the benefits Indonesia receives from the GSP Program,² the Government of Indonesia was not meeting the eligibility criteria due to: 1) lack of adequate and effective intellectual property rights protection and enforcement, which has resulted in high, in some cases extremely high, levels of physical and online piracy; and 2) lack of equitable and reasonable access to the Indonesian market, through many statutory or, in some cases, in-practice barriers.

While the Indonesian government has made past progress addressing these concerns, this progress has recently stalled and even regressed in some respects. If, at the conclusion of the

¹IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com). Collectively, IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

²In 2017, Indonesia benefited from over \$1.96 million in unilateral duty-free GSP benefits in the U.S. market (a 9.3% increase from \$1.79 million in 2016).

review, the Government of Indonesia has not made adequate progress remedying the deficiencies identified below (as well as those identified in IIPA's previous submissions³), IIPA requests that the Committee suspend or withdraw Indonesia's GSP benefits, in whole or in part.

II. Indonesia should build on past progress towards “providing adequate and effective protection” of United States copyrights

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. Following implementation of Regulations Nos. 14 and 26 of 2015, and working with the motion picture and music industries (including local associations, APROFI, and ASIRI), the government has taken effective action by disabling access to 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*),⁴ *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 a strategy of domain hopping—redirecting domains to circumvent the results of site-blocking efforts. For example, *Planetlagu* constantly changes its domain name, 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. A positive step was the launch of an Infringing Website List, which encourages advertisers and marketers not to support piracy websites with advertising revenue.

³IIPA has previously provided extensive information regarding Indonesia and its inadequate and ineffective protection for copyrights as well as its lack of equitable and reasonable access to the Indonesian market to members of various U.S. government interagency groups (including the GSP Subcommittee), plus the Special 301 interagency group and the Trade Policy Staff Committee, in the context of USTR's Annual Special 301 review. For IIPA's 2019 Special 301 review of Indonesia related to copyright protection and enforcement, as well as market access issues, please see International Intellectual Property Alliance, *Indonesia*, February, 2019, at <https://iipa.org/files/uploads/2019/02/2019SPEC301INDONESIA.pdf>.

⁴USTR 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.

Indonesia must also improve its efforts to address other forms of piracy, which continue to negatively impact its marketplace for creative content. Illegal live streaming in cinemas through social media apps, and instances of unauthorized camcording of major releases have increased in 2019.⁵ 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. Many extremely popular infringing websites provide stream-ripping services, now the most popular method to obtain unlicensed music content online in Indonesia.⁶ Piracy Devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes.⁷ IIPA encourages the Indonesian Government to take steps to crack down on piracy apps and on device retailers who preload the devices with apps that facilitate infringement, and take action against key distribution points for devices that are being used illegally.

IIPA recommends that in 2020 the Government of Indonesia 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 is consistent 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 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 to the life of the author plus 70 years, or at least 70 years for sound recordings and all works calculated from publication, 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.

III. Indonesia has regressed in assuring the United States “that it will provide equitable and reasonable access to [its] markets”

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

⁵15 video captures of MPA member motion pictures were forensically matched to Indonesia in 2019, up from 5 in 2018.

⁶For example, *Y2mate.com* received over 1 billion visits globally and *Clip2mp3.org* received over 32 million visits globally in 2019.

⁷Piracy Devices are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. The devices may be promoted and/or advertised to enable infringement of copyright or other illegal activities. Chief among these activities are 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 by the users themselves. Piracy Devices are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials.

production, as well as film distribution and exhibition, Indonesia has unfortunately regressed back towards a protectionist path. It is important for Indonesia to reverse course and address the many 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 reduction (and eventual elimination) of such market access impediments is a key component of ongoing efforts to combat piracy in Indonesia. Among the actions we believe would be critical in assuring the United States that Indonesia will provide equitable and reasonable access to its markets for creative materials are the following:

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.⁸

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

⁸The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

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.

Ensure Collective Management Organizations (CMOs) are Efficient, Transparent, and Accountable: 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 entity called LMKN as a “national CMO” that adds an unnecessary extra layer to the collective licensing system. LMKN sets the tariff, collects the remuneration (through agents), and decides how the collections are split among different groups of CMOs; yet, the management of LMKN is not well represented by rights holders, with the majority being government officials, academics, and copyright specialists. 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.

Remove 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.

Address Customs Valuation For Foreign Films: 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.

Address 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.

Ease Content Review Requirements: 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 over-the-top (OTT) sector.

Ensure That OTT Regulations Do Not Create Unnecessary Barriers: 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.

IV. Recommendations and Conclusion

Among the actions IIPA believes would be critical in ensuring that Indonesia provides adequate and effective protection of intellectual property rights and equitable and reasonable access to its markets are the following:

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 Infringing Website List (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., 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 violates 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 National CMO (LMKN) is well represented by music rights holders, and in the long run, eliminate the LMKN, which is an unnecessary extra layer to the CMO system.
- 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.

In seeking to achieve the above, IIPA and its members are willing to work with the Indonesian Government, and encourage the U.S. government to do so as well, to help achieve high levels of intellectual property rights protection and to improve access to Indonesia's market, including, where appropriate, through training, technical assistance, and capacity building.

For the reasons stated in this brief, while the Indonesian Government has made past progress towards meeting the GSP criteria, this progress stalled in 2019, and even regressed in some respects. If, at the conclusion of the review, the Government of Indonesia has not made adequate progress remedying the deficiencies outlined above, IIPA requests that the Committee suspend or withdraw Indonesia's GSP benefits, in whole or in part

Respectfully submitted,

/Kevin M. Rosenbaum/

Kevin M. Rosenbaum, Counsel
International Intellectual Property Alliance