



## **TPP (TRANS-PACIFIC PARTNERSHIP) AND DIGITAL COPYRIGHT INFRINGEMENT (CONFLICT INTEREST BETWEEN JAPAN, USA AND INDONESIA)**

**Bayu Sujadmiko**

Kanazawa University, Japan

email: bayu.sujadmiko@fh.unila.ac.id

### **Abstract**

Japan and the United States are sample countries, which have effectively control to reduce the number of illegal file sharing. They attempt to create a healthy Internet environment by promoting Trans-Pacific Partnership (TPP). However, not all the members and its domestic parliaments agreed with the whole provisions, specifically on Intellectual Property Chapter. Though, they keep strain to invite other nations to join the treaty. Basically, Indonesia agreed with the virtuous purposes of TPP, but it is too fast for Indonesia to ratified into domestic regulation. Indonesia is not ready yet to face the global market with low-potency. The article will show what is the interest of both countries behind the TPP agreement. It also describes how domestic copyright regulation touches the illegal file sharing practices.

Keywords: *TPP, illegal file sharing, enforcement*

### **A. Introduction**

Nowadays, it just few countries have productively control to decrease illegal file sharing through network. They are creating a synchronization and harmonization between law enforcement, technology measure and health Internet environment. However, frequently technology could be utilized to support illegal file sharing performance. The net would be easily transferred of huge digital copyrighted works. Additionally, the smartphones and devices are more sophisticated to distribute and share the content with large storage.

Japan and United States of America are taken as a comparison in this paper, which commit to create health Internet environment. Japanese Copyright Law has amended to make downloading for private use illegal was a big step for digital copyright enforcement. Even United States and Indonesia are not ready yet to take that step. Japanese copyright stakeholders, copyright association and Japanese cyber police have increasing the strategies to reach the infringer, track the pirate and illegal file sharer. Consequently, National Police Agency arrested the numbers of illegal digital copyright infringer. Recording Industry Association of America and other movies and copyright associations were taking legal action by sued randomly to illegal file sharer. They also socialized and educated society to stop the illegal download and upload. Unfortunately, the number of illegal file sharer rise in some years. Instead, Indonesia faced serious problem of digital piracy and physical piracy. Indonesia already harmonized the international copyright regulations (WIPO Copyright Treaty and WIPO Performance Phonograms Treaty) into national provision. The amendment of Copyright Law on 2014 took place as a step to adjust the present situation. Though, the progress significant of regulation is not following with the copyright practices and market condition. The massive number of illegal web and link, which provide free and illegal content, still exist in the Internet, deteriorated by physical piracy market in some areas.

The newest international agreement related to digital copyright enforcement is Trans Pacific Partnership Agreement (TPP). Twelve countries throughout Asia-Pacific region have participated in TPP's meeting.<sup>1</sup> The TPP negotiation has been running nearly five years and over twenty chapters under discussion although several issues remain unresolved. Copyright and the Internet are one of the challenging issues on TPP. Like ACTA, TPP involves each participating nations to guarantee the criminal liability for encouraging and promoting exists under its law.<sup>2</sup>

TPP's Intellectual Property chapter protects trade secrets, trademarks, industrial designs, copyrights, patents, geographical indications, other forms of intellectual property, and enforcement of intellectual property rights and areas in which parties agree to collaborate. The provisions establish standards based on the TRIPS Agreement and international best practices.<sup>3</sup>

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<sup>1</sup> Cheong, Inkyo. (2013). "Negotiation for the Trans-Pacific Partnership Agreement: Evaluation and Implications for East Asian Regionalism", *428 ADBI Working Paper Series*. July 2013, pp. 4-5.

<sup>2</sup> *Trans-Pacific Partnership Agreement (TPP): Intellectual Property Right Chapter*, Draft Feb. 2011, Art. 15 (4), available at <http://keepthewebopen.com/tpp> (accessed March 16, 2015).

<sup>3</sup> Beside copyright, TPP rules; Paten and trademarks provides protections of brand names and other marks of those businesses and individuals, which used to differentiate their products in the marketplace. The protection of geographical indication also covered by certain

In the Copyright chapter,<sup>4</sup> the agreement establishes commitment to protect the works, performances, phonograms (songs, movies, books, and software) and technological protection measures and rights management information. The chapter covers an obligation for members to continuously pursue to create balance in copyright schemes through exceptions, limitations for legitimate purposes, and health digital environment. It requires parties to set up and maintain a copyright safe arrangement for Internet Service Provider (ISPs). These regulations are not allowing the parties to make such safe harbors contingent on ISPs to monitoring their system for infringing activities.

Conclusively, TPP members agreed to provide strong enforcement systems by preparing and establishing provisional measures, civil procedures, criminal procedures, border measures and penalties for commercial-scale trademark counterfeiting and copyright or related rights piracy. They will provide the legal means to avoid the misappropriation from cyber theft and cam cording. The nations should provide criminal penalties for willful copyright infringement on a commercial scale: includes significant willful copyright or IP infringement, which have no direct or indirect reason of financial gain.<sup>5</sup> Financial gain can be described as the receipt or expectation of anything of value. This could be including the file sharing of single copyrighted content.<sup>6</sup>

Due to the TPP implementation, twelve countries including Japan and USA agreed to create strong enforcement on digital copyright infringement including penalties procedures and provisional measures. While, TPP focused on promoting economic expansion, getting adequate agreement for farmers and workers and reducing barriers to trade market. Twelve countries expect this understanding will construct digital freedoms, civil liberties and copyright law.

Regardless of TPP's closed negotiation, the text has been classified and the members prepared the document supervision to be implemented.

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transparency and safeguard process including through international, regional agreement and understanding on the relationship between trademarks and other commonly used terms. Additionally, the chapter rules pharmaceutical related facilitate innovation, generic medicine, public health and new pharmaceutical or agriculture chemical products, *see also* Lewis, Meredith Kolsky. (2011). *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*. 34 B.C. Int'l & Comp. L. Rev. 27.

<sup>4</sup> Chapter 18 sections H, Trans-Pacific Partnership Agreement. 2015.

<sup>5</sup> *id.*, at Art 15 (1), *see also* Michael A. Carrier, *supra note 36*, at 25.

<sup>6</sup> *Ibid.*, *see also* Press Release, Congressman Darrell Issa, Issa Releases the Trans Pacific Partnership Intellectual Property Rights Chapter on KeepTheWebOPEN.com (May 15, 2012) <http://issa.house.gov/press-releases/2012/05/issa-releases-the-trans-pacific-partnership-intellectual-property-rights-chapter-on-keepthewebopencom/> (accessed March 16, 2015)

One of the controversial chapters of the agreement is the intellectual property chapter. It contains the draft to intensify the patents term, medical patents, aggressive measure to prevent digital copyright contents, criminal procedures and penalties for trade secret theft, including by means of cyber theft and for cam cording. Reacting of TPP itself, generally there are two points of view that we can evaluates. Most of the government of the parties supports the agreement, it following by copyright holders, security companies (DRM technology businesses) and Internet Service Provider (ISPs) companies. Conversely, commercial web companies, bloggers, illegal website owner and user are worries about the TPP implementation due to TPP is the first Free Trade Agreement which clarify that IPR enforcement ought to digital enforcement physical piracy.

## B. U.S. Proposal and TPP contradiction

Addressing TPP, United States of America stated that it would help the Americans take advantage individually and widely in promoting trade and innovation together with scientific, technological and artistic exchange throughout the region.<sup>7</sup> The provisions could be combine and consistent with existing U.S. law to create and balance protection.<sup>8</sup> TPP will promote high standards of protection, safeguard of States' exports and customers against IP counterfeiting, physical piracy and trademark infringement. It also covers commitments to prevent digital trade secret theft, digital piracy, and illegal file sharing of creative and commercial contents. Collaborating with ISPs companies, the agreement strongly recommends to the government for establishing safe harbor. It allows legitimate ISPs to expand their business and address the digital copyright infringement effectively. Safe harbors have to contribute to support the Internet, e-commerce industries, entertainment and information to the world. TPP and safe harbors do not require any obligations ISPs to monitor content on their networks or systems, but provides for safeguards against abuse of such safe harbor regimes.<sup>9</sup>

On the other side, many parties have certain thought that TPP is not new model of trade agreement, but more exactly about expansion of NAFTA model plus additional chapter likes; financial service, e commerce, technology and intellectual property.<sup>10</sup> Thus, it more likes "binding

<sup>7</sup> USTR. IP chapter summary of TPP. available at <https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf#.41bgjvfkf> (accessed December 3, 2015)

<sup>8</sup> *Ibid.*

<sup>9</sup> TPP Agreement, Chapter 18, Annex 18 E & F.

<sup>10</sup> Wallach, Lori. "Washington Joint Legislative Oversight Committee on Trade Policy". *Public Citizen's Global Trade Watch*, November 2012, available at <http://leg.wa.gov/JointCommittees/LOCTP/Documents/2012Nov14/TPP%20Presentation.pdf>. (accessed December 7, 2015).

international governance system”, where the provision merely is changed if all the members agree by conform its domestic policies first. So, TPP could enforce the permanent boundaries on domestic and state policymaking.<sup>11</sup> The establishment of safe harbor for ISPs, TPP is considered as continuation of SOPA and ACTA. IP’s professors and academics scholar in the US also challenged this issue by sending letter protest to President Obama, Congress and USTR Michael Forman.<sup>12</sup> They also thought that TPP negotiation held in secret was inconsistent with the US democratic values. While, since the ISPs could be considered for copyright infringement, they are responsible to monitor their network itself and strive for infringing activity by subscriber service termination and blocking content.<sup>13</sup> TPP also propose that all copyright contents would apply to temporary copies as they pass through the Internet, disk or devices. It means that anyone have to get permission from copyright owners to download or even view any copyright work. More over, it is trying to make the Internet activity like a permission-based system. TPP also specify that the members have to regulate fines, criminal penalties and civil remedies for infringer. US own self pushed criminalization to other members even for private activities. While, they have “fair use” doctrine, which has more flexibility and adaptability defending minor action or non-financially violence. For that reason, US is not too focus in expanding criminal penalties.<sup>14</sup>

### C. TPP Means for Japan

Japan Prime Minister, Shinzo Abe addressed the TPP accomplishment by saying that “TPP was significant achievement not only for Japan, but also

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<sup>11</sup> *Ibid.*

<sup>12</sup> Storm, Darlene. “Secret TPP agreement, SOPA on steroids, may be the end of the Internet as we know it”, *Computer World Web*, November 18, 2013, available at <http://www.computerworld.com/article/2475496/internet/secret-tpp-agreement--sopa-on-steroids--may-be-the-end-of-the-internet-as-we-know-it.html> *see also* <http://infojustice.org/wp-content/uploads/2013/11/Law-Professors-TPP-11142013.pdf>, (accessed December 7, 2015).

<sup>13</sup> Geist, Michael. *The Trans Pacific Partnership IP Chapter Leaks: the Battle Over Internet Service Provider Liability*, November 14, 2013, available at <http://www.michaelgeist.ca/2013/11/tpp-leak-isp-liability/>, (accessed December 7, 2015).

<sup>14</sup> Not all the parties have fair use doctrine in their domestic law. Applying criminal penalties for private activities is complicated issue between law, legal culture, technology and user. TPP member who already use this provision under this law is Japan, *see also* Higgins, David. *File Sharing and Downloading Laws in Japan*, September 16, 2014, available at <http://www.japanupdate.com/2014/09/file-sharing-and-downloading-laws-in-japan/> and BBC news, *Japan Introduces Piracy Penalties for Illegal Downloads*, October 1, 2012, available at <http://www.bbc.com/news/technology-19767970>, (accessed December 8, 2015)

for the future in Asia Pacific Region.”<sup>15</sup> He also appreciated; it was a visionary policy, which distributed the progressive values by creating a free and fair economic region. Japan thought that the agreement would reduce tariffs includes forty percent the economic field. It also brings new standards for other participating nations.<sup>16</sup> Hence, the deal was intent to improve trade between the members and counter China’s economic expansion. Most goods and services will be operated duty-free and tariffs reduction among the countries. Japanese government with the TPP Policy Paper have purpose to become a new export superpower.<sup>17</sup> Japan plans to increase export proactively industrial product including auto industry and agricultural products and foods. The paper also gave written strategy by selling broadcast programming worth ¥20 billion in 2018 fiscal and ¥1 trillion of agricultural exports in 2020.<sup>18</sup>

Relating with the TPP and digital copyright infringement, The Cultural Affairs Agency was considering revising the copyright law. The plan revisions under the consideration were made including; investigation of copyright infringement can be done by authorities and bring charges against offenders, even if copyright owner have not filled lawsuit/complaint.<sup>19</sup> If these circumstances are running well, export marketplace for Japanese copyrighted works, contents, and physic or digital like songs, *manga*,<sup>20</sup> video games and movie could be estimate as \$13.8 billion.<sup>21</sup> Industry group especially copyright associations, Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), Association of Copyright for Computer Software (ACCS), Recording Industry Association of Japan (RIAJ) and Anti-Piracy Council to exploit File-sharing Software or

<sup>15</sup> Pollman, Mina. “What the TPP Means for Japan”. *Japan Times Web*. October 8, 2015, available at <http://thediplomat.com/2015/10/what-the-tpp-means-for-japan/>, (accessed December 8, 2015).

<sup>16</sup> *Ibid*, see also wire report update of Shimbun, Asahi. “U.S., and 11 other Pacific Rim Countries Reach Sweeping Trade Deal”. October 6, 2015. available at [http://ajw.asahi.com/article/behind\\_news/politics/AJ201510060012](http://ajw.asahi.com/article/behind_news/politics/AJ201510060012), (accessed December 8, 2015).

<sup>17</sup> Nagata, Kazuaki. (2015). “Japan Government Releases TPP Policy Paper in attempt to Quell Unease”. *Japan Times*. November 25, 2015. available at <http://www.japantimes.co.jp/news/2015/11/25/business/japan-government-releases-tpp-policy-paper-attempt-quell-unease/#.VmZdXBOqqk>, (accessed December 8, 2015).

<sup>18</sup> *Ibid*.

<sup>19</sup> Authorities can bring charges as well as allowing rights holders to seek statutory damages for infringements.

<sup>20</sup> Manga is a Japanese cartoon, usually from the comic characters/actor.

<sup>21</sup> Jiji. “Japan to Strengthen Copyright Protections in Light of TPP”, *Japan Times Web*, November 15, 2015, available at <http://www.japantimes.co.jp/news/2015/11/15/business/japan-strengthen-copyright-protections-light-tpp/#.Vk0zNBOqqk>, (accessed December 9, 2015).

Consortium against Copyright Infringement via File-sharing Software (CCIF) welcome and support the copyright law revision.

Due to the ratifications of TPP, Japan had concluded the pact by legislative session on this November.<sup>22</sup> Next, the draft could be signature and ratified by each members. However, because of U.S. Congress has ninety days reviewing the draft, Japanese Diet does not really have ratification debate until at least January. So, could be concluding that the result of the final acceptance from each member would appear on January 2016. The government stated that the legal revision would be created polished, so it will not seriously impact people's interest.<sup>23</sup>

Previously, Japan was already did what TPP formulated about digital copyright infringement. Japan is one of those members where downloading copyrighted contents are prosecutable. In October 2012, it officially started sue the individual and organization whose pirated music, movie and software. Moreover, twenty-two cases caught by the police under this law throughout 2015.<sup>24</sup> RIAJ stated that there was forty percent decline in peer-to-peer and illegal file sharing practices when the legislative introducing the enforcement act. Digital music sales increased five percent to 43,7 billion yen in 2015 and the subscription market expanded every year.<sup>25</sup> Cooperating with the ISPs industries, government gives inflexible for Internet activities. ISPs now are more aggressive stance towards P2P and illegal file sharing. They have limitation for utilizing the Internet quota (Packet Filtering). Most providers give sharing capacity from 10gb to 30gb a day for PC and commercial Internet industries and 5gb to 10gb a for smartphone users.<sup>26</sup> Providers may monitor the port for seeing the user activities, but this action is depending on how strict their policies. Generally speaking, Providers are proactive with or without instruction the police department to combat the illegal file sharing. They will send the first warning “*keikokujo* 警告状 “ to the user for erasing illegal content and sign a form letter to not do again, moreover they will send your address to the police if they pointed out the infringement was to huge and material loss “*shokanjo* 召喚状”.

While the TPP is liberalizing market across the region, not all the business zones engaged will surplus as well as others. Based on the final

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<sup>22</sup> Mina Pollman, *supra* note 15.

<sup>23</sup> *Ibid.*, see also Nikkei. *With deal's details still a mystery, Japan parliament unlikely to meet*, October 7, 2015, available at <http://asia.nikkei.com/Politics-Economy/Policy-Politics/With-deal-s-details-still-a-mystery-Japan-parliament-unlikely-to-meet>, (accessed December 9, 2015).

<sup>24</sup> ACCS, criminal case report 2014-2015, available at <http://www2.accs.jp.or.jp/fileshare/criminal/index.php>, (accessed December 9, 2015)

<sup>25</sup> RIAJ Year Book 2015. (2015). *Statistic Trend*, p. 1.

<sup>26</sup> <http://isp.oshietekun.net/>, (accessed December 9, 2015)

draft, we can predict which industries will get the big advantages because of tax and tariff deduction/deletion: Automotive industries, like Toyota and Honda. They will get low priced access to bring huge export to U.S. and other members. Japan also could create cheap automotive spare part in Vietnam, and the production cost will be reduced. Next is farm and livestock business. However, the local farmer and business must be careful against the import product and quality. By reduction or elimination of tariffs, the import and the local price will compete. Following point is local job market business, the developing countries, like Vietnam will get some advantages if they employ the foreign workers. They will get lower wages seemly with the local worker or be adapted to strict labor laws. Next advantages will be obtained by drugs maker companies/business. The deal stated pharmaceutical companies have protection up to eight years for new biotech drugs.<sup>27</sup> The activist claim, the prescription will more expensive for society in developing countries.<sup>28</sup> Lastly, the Technology and Information businesses, they have to build green technology (environmental friendly) for decreasing global warming and local infrastructure. Thus, those results could increase competition among tech giants industries.

#### **D. Indonesia; Standing between the two Threats**

For Indonesia, TPP is still debatable issue in legislative. General speaking, there are some aspect that we could summarize from this issue. When President of Indonesia, Joko Widodo, domestically known as Jokowi, declare to Barrack Obama about Indonesia intend to join the TPP,<sup>29</sup> many industries, stakeholders, legal observers, and academics highlight it with pros and cons. In my understanding, when Indonesia wants to join this agreement, first thing that we have to do is make comprehensive analysis about the advantages and disadvantages. In terms of profit, definitely Indonesia has open market with a population more than 250 million; Indonesia has huge consumers and the largest economy in Southeast Asia. Consequently, consumers are those who get the greatest benefit. Product prices are cheaper and there will be many choices with best quality. Producers will get more connection for international production. Raw material and component could be gain easily, low-priced and sold with the

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<sup>27</sup> Chapter 18, TPP agreement (biotech drugs are expensive medicines produced in living cells).

<sup>28</sup> Rajeshi Naidu-Ghelani, *TPP Trade Deal: Who are the Winners and Losers?*, BBC News, October 6, 2015, available at <http://www.bbc.com/news/business-34451423>, (accessed December 10, 2015).

<sup>29</sup> President of Indonesia, Joko Widodo was meeting with the US President, Barrack Obama at White House, available at <http://www.theguardian.com/world/2015/oct/27/indonesia-will-join-trans-pacific-partnership-jokowi-tells-obama>, (accessed December 10, 2015)



favorable price. However, keep in mind, there are some obstacles to be faced. Competition will be stricter; subsequently some of the producers will not be able to compete and forced to turn down.

Next point is, Indonesia has to evaluate the expansion other developing countries like Vietnam rapidly. Regarding with the merging Vietnam into TPP, it will diminish access market product on developed countries like US and Japan. For instance, for five years back, Vietnam can increase 300% of textile export to US and Japan, while Indonesia was just able to add 100% in the similar product. Accompanying various threats arising could be reasonable if President Joko Widodo intend to be apart of the agreement. Next problem is TPP ruled about intellectual property strictly, expansion of investment term and its protection, amazingly, TPP lined up for dispute settlement with ISDS (Investor-State Dispute Settlement). For developing countries, it could be rather detrimental. Medical side and local farmer also received threats over free distribution/circulation of goods. Finally, TPP asked to every member to amendment and make the domestic regulation appropriate with businesses interest, especially for taxes and export-import. Consequently, private companies will have similar special right with National companies in its operation.

<b>Intellectual Property Chapter</b>	<b>Australia</b>	<b>NZ</b>	<b>US</b>	<b>Peru</b>	<b>Chile</b>	<b>Mexico</b>	<b>Canada</b>	<b>Singapore</b>	<b>Bru nei</b>	<b>Malay sia</b>	<b>Viet nam</b>	<b>Japan</b>
Patents: Patentability criteria	A	R	A	A	R	R	R	R	R	R	R	R/P
Patents: Supplementary protection	R	R	A	R	R	R	R	R	R	R	R	R
Patents: Extend Protection to new uses (plants, animals, surgical procedures)	R	R	A	R	R	R	R	A	R	R	R	R/P
Pharmaceuticals: linkage	R	R	A	R	R	R	R	R	R	R	R	R
Pharmaceuticals: Data protection	R	R	A	R	R	R	R	R	R	R	R	R
Copyright: TPM	A	R/P	A	A	R	A	R/P	A	R	R	R	R
Copyright: Term of protection	R	R	A	R	R	R	R	R	R	R	R	R

(US proposal)												
Copyright: Parallel important	R	R	A	R	R	R	R	R	R	R	R	R
Copyright: ISPs (CL proposal)	R	A	R	A	A	A	A	A	A	A	A	R/P
Observations: New elements of Penal System: Establishment of criminal offenses for unintentional infringements of copyright, related rights and trademarks (QQ.H.7.3)	R	R	A	R	R	R	R	R	R	R	R	R
Observations: New elements of criminal code: Obligations to establish criminal penalties and fines for recordings of public works (camcording) (QQ.H.7.5)	A	R	R	R	R	R	A	R	R	A	R	R
Inclusion of agreements that parties should ratify and implement	A	R	A	R	R	R	R	R/P	R	R	R	R
National treatment: maintain TRIPS	R	A	R	A	A	R/P	R/P	A	A	A	A	A
<ul style="list-style-type: none"> <li>• A: Accept, R: Reject, R/P: Reserved Position.</li> <li>• TPP Country Positions (6 November 2013)</li> </ul> <p style="text-align: right;"><b>Source : United States Trade Representative (USTR)</b></p>												

**E. Conclusion**

In the end of 2015, 12 countries agreed to sign the TPP agreement. Chapter 18 ruled about intellectual property, term and its practices.

Regarding with the enforcement of digital copyright, TPP gives new breakthrough. It contains the draft to intensify the patents term, medical patents, aggressive measure to prevent digital copyright contents, criminal procedures and penalties for trade secret theft, including by means of cyber theft and for cam cording. In Japan, on October 2012, it officially started sue the individual and organization whose pirated music, movie and software. Moreover, twenty-two cases caught by the police under this law throughout 2015. U.S. itself pushed criminalization to other members even for private activities. While, they have “fair use” doctrine, which has more flexibility and adaptability defending minor action or non-financially violence. For that reason, US is not too focus in expanding criminal penalties. TPP is still debatable issue in Indonesian legislative. In terms of profit, definitely Indonesia has open market with a population more than 250 million; Indonesia has huge consumers and the largest economy in Southeast Asia. Consequently, consumers are those who get the greatest benefit. However, Competition will be stricter; subsequently some of the producers will not be able to compete and forced to turn down. Many parties afraid that local business/product could not compete with imports additionally, jobless will increase. TPP also intervene the members to legalize criminal penalties for illegal digital copyright infringement and build safe harbor for ISPs to track down the infringer. They also have control to dismiss/block the content if its considered infringe. Based on the economic condition, politic, law and social culture, Indonesia is not ready yet to face the Asian Pacific liberalization. Development of economic facilities, poverty alleviation, education and enforcement of law should be priority in the government agenda. Following the new amendment of Indonesian Copyright Law 2014, government would be able to slowly create good enforcement with proactive give socialization and punishment. Those actions could be build deterrent effect for other infringer and society. Blocking the websites which do copyright infringement are good step for Indonesia to decrease the number of digital piracy. Even in some cases, the website owner and user complain the policy, there is no cases brought to the court.

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