

Client Update: Indonesia 29 January 2021

Constitutional Court's Decision Defines Broadcasting in the Digital Age



In a recent case, the Constitutional Court took a stand and rejected a judicial review petition filed by several TV giants that internet-based broadcasting (also known as over-the-top (“OTT”) broadcasting) should fall within the scope of the Broadcasting Law (Law No. 32 of 2002). The Court’s rejection means that the government may enact a new regulation specifically to regulate OTT broadcasting.

The petition was filed by the first private free-to-air network in Indonesia, PT Rajawali Citra Televisi Indonesia (RCTI), and its affiliate, PT Visi Citra Mitra Mulia (iNews TV) and they argued that the definition of “broadcasting” under the Broadcasting Law should be interpreted to include internet-based broadcasting by OTT platforms and service providers. Their argument is based on a circular letter issued by the Minister of Communication and Informatics in 2016, which obliged OTT content and service providers to comply with the law in the broadcasting sector. The petitioners also argue that by having OTT content and service providers under the Broadcasting Law, it will ensure an equal playing field for traditional broadcasting media and up-and-coming media providers.

Below we discuss several key elements of the decision.

Broadcasting According to the Court

In rejecting the petition, the Court elaborated and reaffirmed the definition and boundaries of what constitutes broadcasting under the Broadcasting Law. The Court stated that there are three components of broadcasting under the law, namely: (1) a transmission activity (*pemancarluasan*); (2) utilisation of radio frequency through air, cable, and/or other media; and (3) the simultaneous receipt by the public through a receiving device (which are restricted to those that are explicitly mentioned in the Broadcasting Law, namely TV and radio). These three components are inseparable and consequently, an activity can only be deemed as broadcasting if it fulfils all three components.

The Court declares that the words “other media” in the second component does not refer to the transmission or distribution of broadcasting via the Internet, but rather refers to satellite communication.

Client Update: Indonesia

29 January 2021

Further, the Court emphasises the “simultaneous receipt” aspect, in that the schedule of a broadcasting is determined by the broadcaster and the public has no say in determining the schedule or content of what is being broadcasted. In that sense, broadcasting is a “push” service to audience in every direction, simultaneously, and at the same time. This is unlike OTT services, which can be accessed whenever according to the user’s will.

Why is Video Streaming not Broadcasting?

Besides reinforcing the boundaries of broadcasting, the Court elucidated why OTT services should not be considered as broadcasting. First, the Court determines that OTT services are a “pull” service because any computer connected to the Internet can transmit, send, and/or receive or essentially “pull” the content at any time. In addition, an individual who uses the services of an OTT services provider can choose the content that he wants to watch, determines when he wants to watch it and for how long, and even repeatedly access the same content.

The Court also referred to the Electronic Transaction and Information Law (Law No. 11 of 2008, as amended by Law No. 19 of 2016) that explicitly states OTT services as part of the cyberspace, meaning that its distribution is not restricted by territories. OTT services are provided over the telecommunication network and using internet protocol. Contents distributed via OTT services can be accessed anywhere as long as the users are connected to the Internet and their devices met certain technical standards. Further, OTT services often provide other features besides audio and video content, such as comment and chat, financial transactions, and games.

Lastly, the Court focused on the exclusivity of OTT services. These services are only accessible to its users, who may have to pay a subscription fee, on top of the fee that they pay for internet subscription.

As a result, the Court was of the view that the petitioners’ request to expand the definition of broadcasting would fundamentally alter the meaning of broadcasting and the substance of the Broadcasting Law, and potentially creates confusion and legal uncertainty.

Discrimination towards Traditional Media?

As alluded above, the petitioners argued that excluding OTT services from broadcasting discriminates the traditional media as they are subject to more stringent requirements under the Broadcasting Law. Here, the Court pointed at the stark differences in the characteristics mentioned above of traditional media versus OTT services. Further, the Court’s finding reaffirmed the widely held view of OTT services stakeholders that OTT services are not subject to, among others, the broadcasting licensing regime, guidelines on broadcasting material and language, broadcasting code of conduct, and supervision by the Indonesian Broadcasting Commission (*Komisi Penyiaran Indonesia* or KPI), including censorship and subtitle requirements.

Although unsurprising, this Constitutional Court’s decision, is a relief, to say the least. OTT services stakeholders can now be certain that individuals and business entities engaging in OTT services will not

Client Update: Indonesia

29 January 2021

be required to obtain a broadcasting license from the government. Also, the public no longer has to fear that the freedom to use broadcasting or streaming feature on social media would be restricted.

Looking Ahead

Based on our examination of the decision, we note that experts from the government's side disclosed the government's plan to issue a definitive regulation to specifically govern OTT services. This is not a new plan as the 2016 circular letter itself was issued to provide understanding to OTT service providers and telecommunication operators so that they can internally prepare themselves to comply with the regulation governing OTT services, which is being prepared by the Ministry of Communication and Informatics.

While the government remains committed to issuing a specific OTT services regulation, it is still in the process of determining the most appropriate type of regulation. It is yet to be seen how this decision will influence the government's stance in preparing the OTT services regulation, but we are hopeful that the government will maintain its consistency on the matter and will urgently address the gap in the regulation.

Contacts



Zacky Zainal Husein
Partner

D +62 21 2555 9956
F +62 21 2555 7899
zacky.husein@ahp.id



Muhammad Iqsan Sirie
Senior Associate

D +62 21 2555 7805
F +62 21 2555 7899
iqsan.sirie@ahp.id

[Derry Patra Dewa](#) also contributed to this alert.

Our Regional Contacts

RAJAH & TANN | *Singapore*
Rajah & Tann Singapore LLP
T +65 6535 3600
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*
R&T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*
**Rajah & Tann Singapore LLP
Shanghai Representative Office**
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*
Assegaf Hamzah & Partners

Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*
Rajah & Tann (Laos) Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*
Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*
Rajah & Tann Myanmar Company Limited
T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*
Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)
T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Thailand*
R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*
Rajah & Tann LCT Lawyers

Ho Chi Minh City Office
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

Hanoi Office
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

Rajah & Tann Asia is a network of legal practices based in Asia.

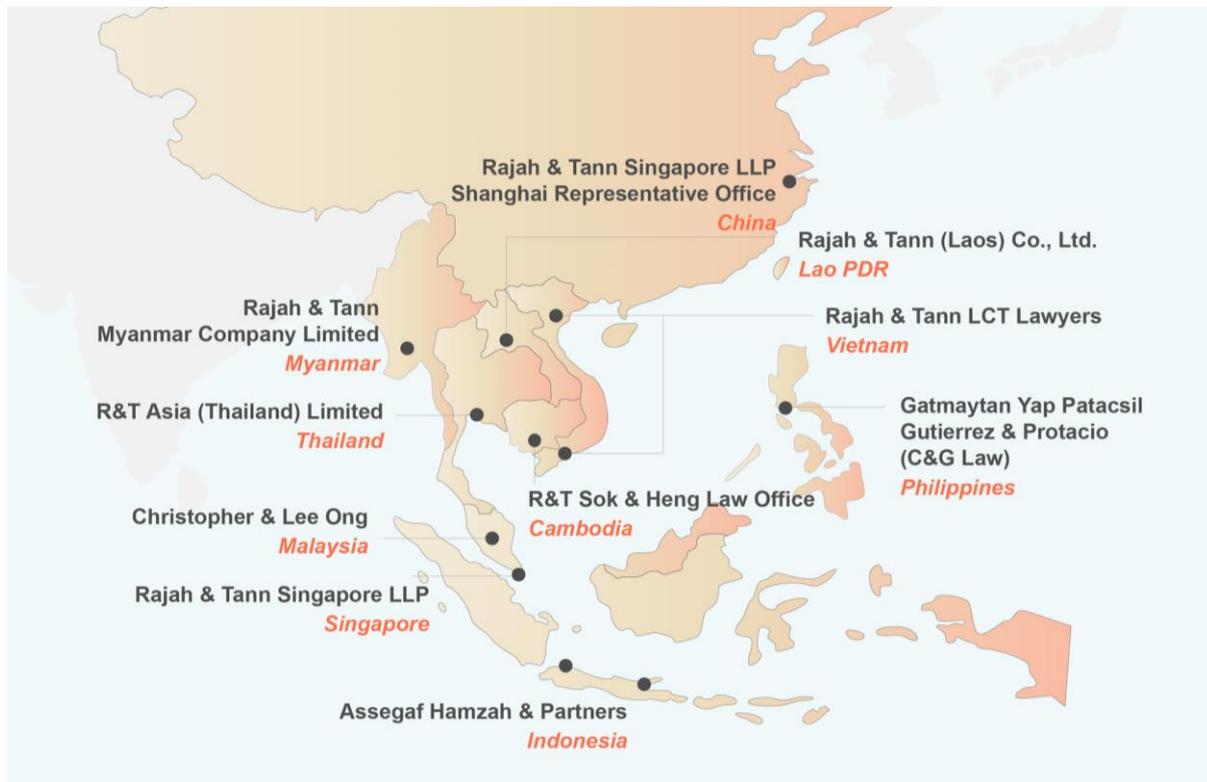
Member firms are independently constituted and regulated in accordance with relevant local legal requirements. Services provided by a member firm are governed by the terms of engagement between the member firm and the client.

This update is solely intended to provide general information and does not provide any advice or create any relationship, whether legally binding or otherwise. Rajah & Tann Asia and its member firms do not accept, and fully disclaim, responsibility for any loss or damage which may result from accessing or relying on this update.

Client Update: Indonesia

29 January 2021

Our Regional Presence



Based in Indonesia, and consistently gaining recognition from independent observers, Assegaf Hamzah & Partners has established itself as a major force locally and regionally and is ranked as a top-tier firm in many practice areas. Founded in 2001, it has a reputation for providing advice of the highest quality to a wide variety of blue-chip corporate clients, high net worth individuals, and government institutions.

Assegaf Hamzah & Partners is part of Rajah & Tann Asia, a network of local law firms in Singapore, Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Thailand and Vietnam. Our Asian network also includes regional desks focused on Brunei, Japan and South Asia.

The contents of this Update are owned by Assegaf Hamzah & Partners and subject to copyright protection under the laws of Indonesia and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Assegaf Hamzah & Partners.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Assegaf Hamzah & Partners.