

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

INDONESIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Indonesia remain on the Priority Watch List.

Overview of key problems/achievements: Piracy in Indonesia remains serious, as piracy levels in Indonesia are among the highest in the world (rivaling countries like China and Vietnam). Investment in illegal optical disc plants increased in 2003, as plants continued to migrate from places like Malaysia, establishing distribution, retail, and, increasingly, export channels. In addition, the huge Indonesian market remains dominated by retail piracy of all copyrighted materials, including optical disc piracy (CDs, VCDs, CD-ROMs, and increasingly DVDs). Several positive legislative developments occurred in Indonesia, as the new copyright law went into effect in July 2003, optical disc regulations were close to being signed into law as of February 2004, and other important regulations had been drafted and were under review. The copyright law failed, however, to modernize legal rights of record producers and to extend terms of protection for all works. By virtue of publicizing the copyright law, and by running a few calculated raids, the Indonesian government was able to halt a major portion of retail piracy activity in August 2003. However, piracy levels soon bounced back as enforcement efforts were not sustained. Efforts in 2003 by the Copyright Office to become more proactive (including raids against piracy) did not have the desired effect of reducing piracy levels, and a new IPR enforcement "Task Force" has similarly been unable to create deterrence in the market. Raids under the copyright law rarely lead to effective prosecutions, and almost never result in convictions of pirates or imposition of deterrent sentences; the court system remains ineffective. The audiovisual sector encounters significant barriers to market access, which exacerbate the piracy problem.

Actions to be taken in 2004

- Sign into law and begin enforcing the optical media regulations.
- Strengthen the new enforcement Task Force by providing the resources and political will necessary to defeat piracy.
- Carry out sustained enforcement activities against pirate production facilities (including optical disc facilities/commercial photocopy shops), distribution channels, and retail outlets.
- Effectively enforce the new criminal provisions against corporate end-user piracy of business software and introduce software asset management in government and business.
- Improve training and performance of prosecutors and judges in IPR cases, while issuing sentencing guidelines that call for deterrent sentences.
- Allow foreign audiovisual producers to participate directly in importation and distribution of their product, and relax bans on foreign investment in media businesses.
- Ratify and implement the 1996 WIPO Performances and Phonograms Treaty and give record producers the exclusive right to control online dissemination of their products.
- Extend duration of copyright protection to follow international trends.
- Implement the 2002 copyright law with detailed provisions on technological protection measures that satisfy the WCT and WPPT and adequately safeguard copyrighted materials.

For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing.¹ Please also see previous years' reports.²

INDONESIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	29.0	92%	28.0	90%	27.5	90%	25.0	90%	25.0	90%
Records & Music ⁴	44.5	87%	92.3	89%	67.9	87%	21.6	56%	3.0	20%
Business Software ⁵	NA	NA	109.6	89%	63.1	88%	55.7	89%	33.2	85%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	99%	80.4	92%
Books	30.0	NA	30.0	NA	30.0	NA	32.0	NA	32.0	NA
TOTALS	NA		259.9		188.5		134.3		173.6	

COPYRIGHT PIRACY IN INDONESIA

There are two chief elements to the piracy problem in Indonesia: massive overproduction for domestic consumption and export of pirate optical discs, and massive distribution or use of pirated product (optical discs sold at retail, end-user piracy of business software, book piracy, audiocassette piracy) domestically, which destroys any legitimate market for copyrighted materials in Indonesia. Disturbingly, there is evidence of the infiltration of organized criminal enterprises engaging in piracy in Indonesia, demanding a swift and sustained response.

There are at least 27 plants (and possibly as many as 33 plants when underground plants are included) mass-producing "finished" optical discs (excluding blank CD-R) in Indonesia, with at least 31 lines (excluding CD-R) producing VCDs, DVDs, CDs, and CD-ROMs of all kinds of copyrighted materials; total disc capacity in 2003 (excluding CD-R) was at least 108.5 million discs.⁶ Indications suggest that in 2003, VCD factories continued to relocate from Malaysia to Indonesia, mainly in the Jakarta area, but also in Surabaya and Batam; in addition, there are some plants which have emerged simply due to increased domestic activity in optical disc piracy. In addition, it now appears that there are at least six plants in Indonesia with "stamper" manufacturing facilities (stampers are a key production part needed to mass-produce optical discs, and themselves contain the infringing content, and therefore must be covered in laws, optical disc regulations, and be subject to seizure, etc.). Indonesia is now believed to have

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ Losses to copyright owners in U.S. sound recordings are represented by pirate sales value, i.e., pirate units multiplied by the pirate unit price.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ Estimated production capacity of finished optical discs is ascertained by multiplying the number of production lines (excluding blank CD-R) times 3.5 million; this is by all accounts considered a conservative estimate.

emerged as a base for export of pirate VCDs. It is also believed that up to four pirate facilities have begun producing DVDs (DVD region 5).

Retail piracy in Indonesia remains the norm, with reported piracy levels for nearly all copyright sectors among the highest of any major market in the world. The market in Indonesia is dominated almost completely by pirate optical discs: audio CDs, video CDs (VCDs), DVDs, and CD-ROMs containing business or entertainment software. Ratu Plaza, Mangga Dua, and Glodok Market remained the worst hot spots. The vast majority of pirate DVDs found in Indonesia continue to be imported from Malaysia and are of high quality, but an increasing number of pirate DVDs in the Indonesian market in 2003 were produced domestically (although they are of lower quality). “Price wars” have erupted among pirate retailers of DVDs, and in 2003, pirate DVDs could be purchased for as little as IDR 20,000 (US\$2.38). This pricing negatively impacts the legitimate VCD market (new release legitimate VCDs retail at around IDR 50,000 (US\$5.95) while legitimate DVDs retail at around IDR 140,000 to 200,000, or US\$16.65 to \$23). Both VCD and DVD pirates continue to display savvy marketing skills by releasing pirate VCD and DVD copies of movies to coincide with legitimate theatrical and video release dates.

The situation is similarly bleak for other copyright sectors. Book piracy remains widespread, especially English-language textbooks, reference books, and computer-related volumes. Commercial pirates operate throughout the country, including some that produce and market illegal reprints or unauthorized translations of U.S. books. Photocopy shops in and around universities are becoming more aggressive and increasing the volume of their unauthorized copying. The local recording industry association estimates that seven of every eight sound recordings in the market are pirate. They note that monthly sales have plummeted over 70 percent since 1997, and that their businesses are “on the brink of extinction.”⁷ Software piracy in all its forms (business software and entertainment software) remains rampant throughout Indonesia, as pirate product is readily available at retail. Unauthorized copies of business software applications are prevalent in businesses and public institutions throughout the country, due to corporate end-user piracy. Although Internet piracy is not prominent due to low Internet penetration rates, the few infringing sites identified to date give rise to great concern. Indonesian sites (including those linked to educational institutions) that host infringing MP3 files have generally not responded to cease-and-desist letters sent by the recording industry. The audiovisual sector reports a 90% cable piracy rate – one of the highest piracy rates for this form of unauthorized transmission of broadcasts in the world.⁸

COPYRIGHT ENFORCEMENT IN INDONESIA

The most significant development in 2003 with respect to copyright enforcement in Indonesia occurred in July and August. As a result of the government’s effort (with the strong support of industry) to publicize the copyright law on or around the effective date (July 29, 2003), coinciding with some impressive raids,⁹ retail piracy levels dropped significantly (in some cases to the lowest levels in years). Reports indicated that replicating facilities were forced to slow down production due to the decrease in demand, and further reports indicated that sales of pirate DVDs in Australia were also affected by the shut down in Indonesia (reinforcing the

⁷ Indonesia Record Industry Losses of IDR11 Trillion; Recording Industry to Survive Until 2008 Due to Pirating, *Bisnis Indonesia*, May 21, 2003.

⁸ Cable piracy in the form of unauthorized reception and retransmission of broadcasts using illegal decoders from neighboring countries such as Malaysia (Astro DTH service) is common.

⁹ The raids included a highly successful raid against a pirate retailer and distributor in the Mangga Dua Mall.

suspicion that Indonesia has become a base for the export of pirate DVDs). These actions and effects demonstrate that piracy levels in Indonesia will drop if the government expresses its intent to enforce the copyright law publicly and takes effective actions against piracy to back up its stated intent.

Unfortunately, on the whole, the Indonesian government's efforts to enforce the copyright law in 2003 fell well short of what is needed to reduce piracy rates on a sustained basis. The good news is that some factories/sources of production and distributors were raided in 2003, and that industry continues to investigate other serious forms of piratical activity (such as a Jakarta-based producer of pirate DVD "stampers" found and seized in Malaysia).¹⁰ The bad news is that in 2003, as in prior years, nearly all criminal actions had to be instigated by right holders, not by police or authorities acting on their own volition, requiring investment of substantial time and resources.¹¹ On the rare occasion when the government of Indonesia acted on its own, it has often been more of a public relations exercise, usually directed against the production and distribution of pornographic material. The Indonesian authorities will not carry out enforcement against book piracy, for example, because they fear antagonizing student militant groups. For the business software industry, while the new copyright criminalizes end-user piracy of business software, no enforcement actions were taken against suspected pirate business software end-users in 2003.

The Indonesian court system has long been a weak link in the nation's copyright enforcement chain, and IIPA continues to note the ineffectiveness of the courts in handling copyright cases.¹² Following numerous retail raids in 2002, only three retailers received convictions, which were handed down in mid-2003, and all were on appeal as of February 2004; of the raids carried out in 2003, there were no convictions as of February 2004.

Notwithstanding the disappointing overall results of general enforcement in Indonesia in 2003, the Indonesian government took several steps in 2003 to coordinate the roles of various government agencies to make them more responsible and accountable for bringing about effective copyright enforcement. Early in 2003, an official in the Ministry of Justice and Human Rights announced the establishment of an inter-agency "Task Force" reporting to the Ministry,¹³ and on September 2, 2003, the Minister issued a Decree appointing personnel to the Task Force. The first plenary meeting of the Task Force was held in early October 2003. A major obstacle to the effectiveness of the Task Force is that the Department of Intellectual Property Rights has no funding for the activities of the Task Force. The Task Force has tried but has been unable to successfully conclude memoranda of understanding (MOUs) with related agencies, e.g., Customs, Ministry of Trade and Industry, etc. (there is an MOU with Police).¹⁴ An effort to move responsibility for the Task Force from the Ministry of Justice and Human Rights to the President's office is underway, but since 2004 is an election year, many suspect that the will

¹⁰ In that instance, the pirate was found to have left Indonesia to return to Hong Kong. This is just one indicator of the organized criminal and international nature of the optical disc piracy business as it exists in Indonesia today.

¹¹ For example, the motion picture industry group, MPA, carried out retail and factory raids in 2003, including, by the end of September 2003, 59 new retail raids and 1,554 retail revisits (targets in 25 malls), 44 retail prosecutions, 4 VCD factory raids, 4 VCD factory prosecutions, 13 raids against distributors of DVDs and 1 prosecution against a distributor of pirate DVDs.

¹² For more detail on the shortcomings of the court system in Indonesia, please see IIPA's 2003 Special 301 report, at <http://www.iipa.com/rbc/2003/2003SPEC301INDONESIA.pdf>.

¹³ Membership of the Task Force includes representatives from the Attorney General's Office, the Department of Industry & Trade, the State Secretariat, Customs and the Courts.

¹⁴ In June 2003, Justice Minister Yusril Ihza Mahendra and National Police chief Gen. Da'i Bachtiar signed a Memorandum of Understanding; this development was highly publicized through government and industry press events, and nearly coincided with the effective date of the new copyright law, thus having a short-term deterrent effect on retail piracy. However, the MOU has not translated into deterrent enforcement.

of the government to commit additional resources to anti-piracy enforcement may in fact diminish. This should not be allowed to happen, and the government should take steps to invigorate the Task Force through funding and devoting adequate resources to eradicate retail and production (source) piracy in Indonesia.

The copyright community in Indonesia remained active in 2003 to promote copyright awareness, and where possible, to take advantage of positive developments within the government (such as the aforementioned MOU between the Police and the Ministry of Justice and Human Rights). A banner campaign was rolled out in late 2003, in conjunction with the Copyright Office, to raise copyright awareness and promote anti-piracy activities. In many other activities, copyright industry groups have been actively working with the Indonesian government to increase awareness and promote good enforcement with respect to the new copyright law.¹⁵

MARKET ACCESS BARRIERS

For years, Indonesia has enjoyed the dubious distinction of being one of the markets in the world least open to U.S. copyrighted products. Despite economic reforms and liberalization in other sectors, the overarching market access barrier affecting the copyright industries remains in place: the blanket prohibition on foreign company participation in, or even investment in, importation, distribution, exhibition, or retailing in Indonesia. The audiovisual sector also suffers under a flat ban on foreign investment in all media businesses, including cinema construction or operation, video distribution, or broadcast services.¹⁶ The Megawati government had promised a more enlightened approach to intellectual property rights reform than the previous Wahid administration, and has indicated at least in theory the intent to take steps in that direction following the implementation of copyright law amendments that took effect on July 28, 2003. In October 2003, for example, the Indonesian government announced its intention to liberalize foreign investment restrictions in almost all sectors of the economy. Unfortunately, two new laws go in entirely the wrong direction. A new draft film law, intended to replace Film Law No. 8 of 1992, retains a complete prohibition on investment in the film industry.¹⁷ Also, the new

¹⁵ For example, the Business Software Alliance: held press conferences on copyright awareness with the Director General of Intellectual Property Rights and/or Director of Copyright Junus Emawati in February and June 2003; conducted trainings of PPNS (civil service investigators from DIPR) on gathering of evidence in software infringement cases in March, September and October 2003; held a "Software Asset Management" seminar with DIPR in June 2003; participated in meetings with DIPR and Task Force members regarding enforcement in June 2003; and held a full-day seminar with the heads of all the regional branch offices of DIPR in October 2003. The Motion Picture Association was closely involved in publicizing the new copyright law. The MPA mediated a "Mall Managers Meeting" on July 24, the purpose of which was to explain to malls their potential liability for piracy on their premises. The MPA also assisted in the organization and holding of a press conference on July 29 specifically directed at publicizing the new law. The keynote speaker at this press conference was Pak Yusril, the Minister of Justice & Human Rights.

¹⁶ President Habibie reaffirmed the ban through a Decree in July 1998, and two presidential decrees in July and August 2000 further reaffirmed the ban, prohibiting foreign investment in the broadcast and media sectors, including the film industry (film-making business, film technical service providers, film export and import businesses, film distributors and movie house operators and/or film showing service) as well as providing radio and television broadcasting services, radio and television broadcasting subscription services, and print media information services. Presidential Decree No. 96 of July 2000, later ratified by Decree 118 of August 16, 2000.

¹⁷ Under the draft law, only local Indonesian companies would be permitted to operate a "Film Business" or a "Film Professional Service." No provisions exist for foreign investment. Another provision of the draft law provides that film businesses are "obliged to use national potential to the maximum limit while paying attention to the principles of efficiency, effectiveness and quality" (presumably to discourage or otherwise limit expatriate representatives). The draft law also specifies that only national film companies would be permitted to make film commercials, that imported films are expected to be supplementary to national product and imports should be "in proportion to local production," and although the existing film law permits films approved for all ages to be dubbed into Bahasa Indonesian, the new draft prohibits any form of dubbing except for educational, research, or information purposes, but requires that all films be subtitled in Bahasa Indonesian.

Law of the Republic of Indonesia Number 32 Year 2002 Regarding Broadcasting¹⁸ bans the broadcast of virtually all foreign programming in Indonesia.¹⁹ The investment ban and the barriers to a foreign role in distribution are wholly inconsistent with the steps the regime has taken to reduce barriers to the Indonesian market generally and to respond to calls from the international community for market liberalization. They also violate Indonesia's bilateral pledge to the United States in 1992 that direct distribution of audiovisual product would be permitted as soon as the market was opened to the direct distribution of any other foreign goods.

The Ministry of Information has established an annual import quota for foreign films, set at 160 films. Although the quota has never been imposed due to limited domestic production, its existence in Indonesia sets a negative precedent in the region and could be harmful in the future.

COPYRIGHT LAW AND RELATED ISSUES

Two major developments occurred in 2003: the copyright law went into effect in July 2003, and the implementing regulations related to optical disc piracy were approved by the Ministry of Justice and Human Rights in January and are awaiting signature by the President (the Minister of Industry and Trade Rini Soewandi is reportedly holding the regulations at present). IIPA understands that an all-important implementing decree providing further details in support of the optical disc regulations may have been completed. Immediate implementation of the optical disc controls is crucial to curtail the massive and growing problem of unauthorized production of pirate optical discs (and as noted above stampers which are used to mass-produce discs). IIPA looks forward to having a chance to review the draft and certainly encourages the Indonesian government to give the U.S. government an opportunity to review the draft regulations.

Comments on the Optical Disc Regulation

The Government Regulation of the Republic of Indonesia Regarding High Technology Production Facility for Optical Disc will allow the government of Indonesia to swiftly license optical disc production facilities, and give it the tools needed to inspect plants illegally producing or engaged in piracy. Unfortunately, the Regulation contains some gaps and leaves certain issues to a further Ministerial Decree. It is imperative that the government of Indonesia swiftly implement this Regulation, and close some gaps and resolve some ambiguities, including:

- **Licensing:** The Regulation provides a licensing regime for the manufacture of blank, recordable, and pre-recorded optical discs. License requirements are strict but there are no grounds set out for refusal to license. There is also no express license requirement to produce stampers and masters, which is a glaring deficiency, particularly since Indonesia is

¹⁸ Law No. 32 of 2002 went into effect in February 2003 without the signature of President Megawati, in accordance with the amended constitution that permits a bill to take effect 30 days after its passage regardless of whether it has been signed by the President.

¹⁹ The law has yet to be enforced, pending the installation of the independent regulatory commission (KPI) and issuance of implementing regulations. However, when it is implemented, the law will require that private broadcasting institutions are to be established initially without any foreign investment. Subsequent foreign investments may be made, but only up to a 20% ownership cap shared by a minimum of two shareholders. Additional restrictions in the draft legislation include: (1) a restriction on foreign managers, (2) cross ownership limitations, (3) a local content quota of 60% on broadcast television and 10% on pay-television, (4) a 30% dubbing quota on foreign programs, (5) advertising limits of 20% of total broadcasting time for private broadcast stations and 15% for public stations, and (6) a total ban against the establishment of foreign broadcast institutions in Indonesia.

a known producer for export of such key production parts. It should be confirmed whether this deficiency will be fixed or added by separate Ministerial Decree.

- **Identification Code Requirement:** The Regulation contains an identification code requirement, which includes “stamper code” and “master code.” It should be confirmed that, in addition to finished discs, stampers and masters may not be manufactured or permitted in Indonesia without the relevant code.
- **No Prohibition on Gouging of Discs:** There is no express prohibition on the unlawful manipulation of identification code (the altering, gouging or scouring of a code on or from a mould, master, stamper, or any disc). It should be confirmed whether these prohibitions will be added by separate Ministerial Decree.
- **Revocation:** The Regulation provides for revocation of the license in case of breaches of the Regulation, but not in case of other violations of the law, such as copyright piracy or trademark counterfeiting. Violations of law should trigger revocation.
- **No Government Record-Keeping:** There is no government record-keeping requirement in the Regulations. The government of Indonesia should agree to maintain and make available for inspection records including production licenses, import/export licenses and identification codes granted, as well as inspection actions.
- **Criminal Penalties:** Article 28 of the Copyright Law requires plants producing optical discs to comply with “license regulations and all production requirements” determined by the “authorized agencies,” and criminal liability attaches (Article 72(9)) for violating Article 28. Article 73(1) appears to provide for a broad authority to seize machinery and other “tools” (“the tools used to conduct the [illegal] actions”). An effective optical disc law must ensure that the following key activities are deemed offenses, subject to fines and imprisonment, with officers (managers, owners, directors, etc.) held liable for corporate acts:
 - manufacturing or duplicating discs, stampers or masters without a license or in breach of the license conditions imposed by the government;
 - exporting discs, or importing/exporting stampers and masters, raw materials, or machinery without a license or in breach of the license;
 - forging license documents;
 - altering, gouging or scouring of a code on or from a mould, master, stamper, or any disc;
 - manufacturing/producing discs at a place other than the licensed premises; and
 - failing to apply the required identification code.
- **Plant Closure Remedy:** Plant closure is not available as a remedy (e.g., for a conviction under the optical disc law or another IP law; continued manufacture in the plant/premises when the license has lapsed or has been revoked; etc.). It should be confirmed whether the Indonesian authorities will have the capability to close a plant.
- **Automatic Licenses for Import/Export of Stampers/Masters, Raw Materials and Equipment:** Article 11(5) of the Regulation indicates that provisions regarding import of stampers and masters, raw materials, and manufacturing equipment will be added by separate Ministerial Decree. It should be confirmed what the timetable for this is, and that an automatic license will be required in order to track movement of and quantity of equipment/raw materials export of optical discs, and the import/export of manufacturing equipment.

Comments on the Copyright Law

IIPA also recognizes and congratulates the Indonesian government for the passage of Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (Copyright Law). This comprehensive revision of the law in Indonesia went into effect on July 29, 2003, remedying many shortcomings of the previous law and bringing Indonesia’s copyright regime

closer to compliance with its obligations under the WTO TRIPS Agreement. The new law imposes maximum criminal penalties on copyright infringers of up to seven years in prison and a fine of up to IDR5 billion (US\$595,000). Officials had also indicated, but appear now to have backtracked from the position, that under the new Law they would seek to prosecute “shopping mall owners if they let their tenants sell pirated products,” so-called ‘landlord liability.’²⁰ The new law also takes into account developments of copyright in the digital age, and attempts to implement some but not all key requirements of the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

There are many improvements in the new Indonesian law.²¹ IIPA points out two main concerns in the new Copyright Law which the Indonesian government must resolve promptly. First, the Copyright Law does not reflect the need to modernize protection in Indonesia for producers of sound recordings and performers to meet evolving global norms. While Indonesia’s prompt ratification of the WCT set an excellent example for its neighbors, the failure to ratify the companion WPPT remains a cause of concern for the copyright industries, although we note with hope the stated intention of the government of Indonesia in communications with the U.S. government to ratify the WPPT soon, based on the new Copyright Law.²² Producers of sound recordings must be granted exclusive rights to control the dissemination of their products over the Internet; these include an exclusive communication to the public right including all forms of wire and wireless transmissions (including broadcast) as well as exclusive distribution and public performance rights. Such rights will enable sound recording producers to effectively fight

²⁰ See *Copyright Law Amendments Enacted: Govt to Implement Copyright Law Tuesday*, Indonesia Press, Dow Jones International News, July 25, 2003. Apparently, officials are now insisting that landlord liability would first require a conviction of the stall operator, and subsequent knowledge of such conviction by the mall owner. In an interesting development, we also note that a *fatwa* was issued by the Indonesian Moslem Leader Council (Majelis Ulama Indonesia, MUI) in January 2003, deeming piracy as a crime, and pirated goods as *haram* (forbidden products). See Religious Advice Decision, Religious Advice Commission of Indonesian Council of Religious Scholars, No. 1 of 2003 Concerning Copyright, Jan. 8, 2003 (“Each form of infringement against copyright, in particular piracy, is an unfairness which is forbidden”).

²¹ Improvements include:

- End-user piracy of computer software is clearly defined as a criminal offense under Article 72(3).
- Provisional measures such as *ex parte* seizures are made available under Articles 67-70.
- Criminal penalties are increased in many cases, to levels that could be deterrent if aggressively applied in practice, and minimum penalties (including minimum jail sentences) have been provided for some offenses under Article 72. Seizure provisions (Article 73(1)) in criminal infringements, including violations involving TPMs, RMI, and optical disc production, are improved to include “the tools used to conduct the actions.”
- The Law confirms that temporary reproductions are included in the scope of the definition of “Reproduction.”
- Article 73(1) of the Copyright Law requires confiscation and destruction of the tools used to commit copyright piracy as well as of pirate copies.
- Criminal liability for violations of the neighboring rights of a sound recording producer are more clearly provided for than in the previous law (Article 72(1)).
- Article 27 protects against the circumvention of technological protection measures (TPMs) used to protect copyrighted materials. Criminal liability attaches (Article 72(8)) for violating the Article, although these penalties are far lower than those for copyright infringement, which is a major weakness (maximum penalties are up to 2 years’ imprisonment, with no minimum sentence, and a maximum fine of US\$61,000, with no minimum fine).
- Article 25 protects against the unauthorized omission or change to “rights management information” (RMI). Criminal liability attaches (Article 72(7)) for violating the Article, but as with TPMs, penalties are too low to be adequate and effective.
- Article 28 requires plants producing optical discs to comply with “license regulations and all production requirements” determined by the “authorized agencies”; the Regulations on optical disc production are discussed above. Criminal liability attaches (Article 72(9)) for violating the Article. Article 73(1) appears to provide for a broad authority to seize machinery and other “tools” (“used to conduct the [illegal] actions”).

²² The April 2003 government of Indonesia report to USTR (“April 2003 Report”) includes the statement, “[b]ased on the Law No. 19 of 2002 regarding Copyrights, the GOI has taken the necessary preparation to ratify the *WIPO Performances and Phonograms Treaty*. It is expected that ratification can be completed sooner than later.”

piracy and develop new business models for consumers.²³ Finally, Indonesia should move as quickly as possible to ratify the WPPT.²⁴

Second, it is highly disappointing that Indonesia failed to take the critical opportunity to modernize its law in line with international trends by extending the term of protection for all protected materials beyond the minimum levels required by the Berne Convention and WTO/TRIPS (i.e., life plus 70 years for works, and 95 years from publication for producers of sound recordings, which is the actuarial equivalent of life plus 70). This omission is likely to become more problematic as other countries in its region adopt copyright term extension legislation, or take on bilateral obligations to do so.²⁵

There are several other concerns or ambiguities with the new Copyright Law, including:

- **Retroactivity:** The Copyright Law contains no provision confirming retroactive protection for works as well as for producers of sound recordings and performers.²⁶
- **Right of “Publication”:** It should be confirmed that the right of “publication” satisfies the WCT Article 8 requirement with regard to communications to the public and the “making available” of works.²⁷
- **Overly-Broad Exceptions:** Certain exceptions in the new Copyright Law may be overly broad, which would violate Indonesia’s international obligations.²⁸

²³ In implementing amendments to its law, Indonesia should also take the opportunity to ensure that sound recording producers have exclusive control over the importation and exportation of their recordings.

²⁴ The April 2003 Report did not indicate any issues that would bar Indonesia’s swift ratification of the WPPT. In the past, the government of Indonesia has expressed the desire to join the Rome Convention. It should be noted in this regard that ratifying the WPPT should not be delayed by consideration of the mechanisms for joining the Rome Convention, since Rome adherence is in no way a prerequisite to WPPT ratification.

²⁵ The April 2003 Report contained the statement, “[t]he protection of copyright needs no further extension as suggested by IIPA since Article 33 of Law No. 19 of 2002 regarding Copyrights provides copyright protection for good or without time limit.” IIPA would like to point out that Article 33 refers not to extension of term with respect to the economic rights under copyright, but rather, to Article 24(1), which appears to provide the moral right of “attribution” and is indeed perpetual. Given the recent free trade agreement concluded between the United States and Singapore, under which the parties agreed to provide a term of protection of life of the author plus 70 years, or for works authored by a juridical entity, 70 years from publication, Indonesia should take the opportunity to join the international trend and extend term of protection for copyrighted materials.

²⁶ While Article 74 confirms that prior regulations shall remain in effect except where contradictory with the new law, and Article 75 confirms the continued validity of previously issued copyright registrations, provisions should be added in an amendment or regulation to provide Berne/TRIPS-compatible protection for existing works, as well as for producers of sound recordings and performers. (We note that Indonesia is already under a bilateral obligation to provide a TRIPS-compatible term to all pre-existing works of U.S. origin.)

²⁷ The author’s right of “publication” in the Copyright Law explicitly includes an exclusive right of “dissemination of a Work, by utilizing whatever means including the Internet, or by any manner so that such Work is capable of being read, heard or seen by any other person.” It appears that the drafters intended this broad right, as applied to works, to satisfy the requirements of the WCT with respect to “communication to the public.” The phrase “read, heard, or seen by any other person” appears to be an attempt to express the “making available” concept and the government of Indonesia should confirm that this phrase covers the making available of a work so that it can be accessed “from a place and at a time individually chosen or selected” by the user. Also, as noted, it is crucial that the government of Indonesia modernize protection in Indonesia for producers of sound recordings and performers, and as a first step, the government should extend the right of “publication,” amended as necessary, to producers of sound recordings and performers. This would greatly enhance Indonesia’s efforts to implement the WPPT.

²⁸ The language from the Berne three-part test (“provided that they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author or owner of the copyright”) should be added to the chapeau language of Article 15 of the Copyright Law, so that it applies to all of the excepted acts enumerated in that Article. In addition, Article 57 of the Law provides an exemption for non-commercial possession (i.e., would exempt from civil liability anyone who possesses “any work,” as long as the person “obtain[s]” the work “solely for his own need and not using it for any commercial purposes and/or any interests related to commercial activities”), but may amount to an overly broad limitation on liability for copyright infringement, since there does not

- **Compulsory Translation and Reproduction Licenses:** Article 16 of the new Copyright Law contains a compulsory translation and reproduction license which does not meet the requirements of the Berne Convention (and therefore TRIPS Article 9). This Article must be deleted.
- **National Broadcasting Exception for “Interests of the State” Arguably Overbroad:** Article 18(1) provides that the “publication of a work” by the Indonesian government “through a radio, television broadcast and/or other means” is permissible without the authorization of the copyright owner if it is “for the Interests of the State,” provided that “the publication does not prejudice the normal interest of the Copyright Holder” and “a reasonable compensation is given to the Copyright Holder.” It does not appear that “reasonable compensation” means a freely negotiated compensation, which would suggest this Article amounts to a statutory license which goes beyond what is permitted by TRIPS and the Berne Convention. If so, this Article must be deleted.
- **Moral Rights Provisions:** Article 24(2), and associated Article 55(c) and (d), go beyond the moral right of “integrity” as that right is set out in Article 6*bis*(1) of the Berne Convention.²⁹ Article 24 should be amended.
- **Inadequate Border Measures:** Indonesia’s border control measures leave serious gaps that must be filled to ensure that Indonesia provides TRIPS-compatible protection. The 1995 Customs Law established a judicial seizure system and allowed for *ex officio* action, but no implementing regulations ever followed passage of the law. Seizures are occasionally made on basis of an incorrect declaration or under-declaration. Draft regulations went out to industry for comment in early July 2001, but there has been no further progress toward issuance of regulations since then.

Comments on the Draft Regulation on RMI

The Indonesian government has released draft “Regulations on Rights Management Information.” IIPA understands that the intent of the drafters was to issue two separate regulations – one regarding “rights management information” (RMI) (as covered in Article 25 of the Copyright Law) and one regarding technological protection measures (TPMs) (as covered in Article 27 of the Copyright Law).³⁰ Nonetheless, it appears that portions of the RMI draft Regulations concern implementation of Article 27. Given this overlap (intended or not), IIPA encourages the government of Indonesia to make certain minor changes to permit the “RMI” regulations simultaneously to deal with both Articles 25 and 27.³¹

appear to be any limitation on the number of copies of the work, the format (i.e., analog versus digital), the method of obtaining (i.e., by importation, purchase, off the Internet). This Article should be deleted, or if not deleted, significantly curtailed so that it passes the Berne three part test.

²⁹ Article 6*bis* of the Berne Convention provides, *inter alia*, the right “to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” Article 24(2) and (3) give the author (and the author’s heirs) the right to refuse to authorize *any* “changes” including any change to the “title” or “subtitle” of a work regardless of whether the copyright in that work has been assigned. This right violates the Berne Convention as it would impinge upon the ability to exercise (and to assign) the exclusive right of adaptation in Article 12 of the Berne Convention.

³⁰ The April 2003 Report indicates that “The Law No. 19 does not provide detailed provisions on the safeguard of technological measures. Rather, such provisions have been accommodated by Law Number 14 of 2001 regarding Patents.” Having perused that law, we are unaware of any articles that deal with TPMs. Article 27 in Law No. 19 of 2002 squarely covers protection of TPMs, providing that “[e]xcept on the consent of the Author, a technological control facility to protect a right of the Author shall not be destroyed, deleted, or made non-functioning.”

³¹ The following changes, among others, to the Draft Regulations on RMI, could ensure that both Article 25 and 27 are implemented:

- adding a definition of “technological protection measure” to the regulations to ensure that measures that control “access” to works as well as measures to control the exercise of any “rights” under copyright are fully covered;

Internet/E-Commerce Legislation and “Cybercrime” Initiative

It appears that the government of Indonesia is taking steps toward enacting some e-commerce-related legislation, namely, legislation on “Electronic Information and Transactions.”³² It is unclear whether there are any aspects of that legislation that deal with intellectual property rights, or with the liability of service providers. IIPA has not seen the draft legislation, but now understands that a final draft was submitted to relevant departments before being considered for passage. IIPA encourages Indonesia to include provisions helpful to achieve adequate and effective copyright enforcement in the various bills, and specifically, to ensure that proper incentives are retained for service providers to cooperate with copyright owners to protect their rights. In February 2003, a “cybercrime task force” was established in Indonesia.³³ It is reported that the Minister for Information and Communications, in cooperation with the Association of Internet Service Providers (APJII) and the Police, decided to form a task force to confront the issue of Internet-based crimes, and was to have begun work in March 2003 to examine ways in which Internet-based crimes can be eliminated. IIPA supports the establishment of this task force, and would encourage the task force to include in its mission ways to combat Internet piracy of copyrighted materials. IIPA also encourages both the drafters of the “cyber” legislation and the task force to look to the Council of Europe Cybercrime Convention for approaches to the issue of combating cybercrime and Internet piracy.

Generalized System of Preferences

Indonesia currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective protection for intellectual property rights.” In 2002, over US\$1.5 billion worth of Indonesian goods (or 15.7% of Indonesia’s total imports to the U.S.) entered the U.S. under the duty-free GSP code. For the first 11 months of 2003, nearly \$1.3 billion worth of Indonesian goods (or over 14.3% of Indonesia’s total imports to the U.S.) entered the U.S. under the duty-free GSP code. Indonesia’s failure to address effectively the endemic problem of copyright piracy creates serious questions about whether it meets the criteria for continuing favorable treatment under the GSP program.

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- amending Article 2(5) so that it is fully consistent with all the treaties’ requirements on the prohibition of TPMs (for example, to ensure that requisite “preparatory acts” with regard to devices or services are covered under the prohibition, and to ensure that the class of devices covered is not defined too narrowly so as to potentially and inadvertently exclude most devices from coverage, etc.);
 - adding a new sub-article to cover the act of circumvention; and
 - making Article 3 of the proposed Regulations expressly applicable only to “rights management information” (not to technological protection measures), or it would run afoul of WIPO treaties’ requirements.

³² Apparently, drafting teams have been assembled at two universities, e.g., the University of Indonesia is apparently drafting an “e-commerce” bill based on instructions from the Ministry of Trade and Industry, while the University of Padjaran is apparently drafting a bill focused on technology based on instructions from the Department of Posts and Telecommunications. These efforts are apparently the next step from a December 2000 “Bill on Information Technology (Cyber Law),” which was prepared by academics. The Ministry of Communications and Information (KOMINFO) has prepared a draft bill on “Electronic Information and Transactions” that is expected to be submitted through the State Secretariat to the Parliament for debate soon. The MPA has made submissions based on available drafts and continues to track the passage of this bill.

³³ *Cybercrime Task Force To Be Established in Indonesia*, Asia in Focus, Feb. 25, 2003.

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