

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

INDONESIA

EXECUTIVE SUMMARY¹

IIPA recommends that Indonesia remain on the Priority Watch List.

Recent raids run against dozens of enterprises in West Java, Indonesia, reveal an optical media piracy problem, involving CD and other media capable of being read by an optical device such as a laser, that is nothing short of astonishing. Business records seized during the raids carried out in January 2002 reveal the distribution of 280,000 pirate optical discs a week (15 million discs per year).² Those initial raids led to a further raid on an underground optical media plant near the Jakarta airport, at which two optical disc production lines, recently used to produce pirate copies of an album by a local Indonesian singer, were found and dismantled, whereupon the facility was sealed. These recent anecdotes amply demonstrate that Indonesia's huge market remains dominated by piracy, and that massive optical media pirate production has arrived in Indonesia. If the pirate syndicates, fleeing markets like Taiwan, Malaysia, and Thailand, continue to establish their criminal enterprises freely in Indonesia, the country is bound to become a center in Asia for optical media piracy being uprooted elsewhere within the next couple of years.³

Enforcement continues to present unusual challenges in Indonesia, given pervasive civil unrest and political upheavals, heavily fortified loci of pirate production (often including huge concrete walls, and in one instance, even poisonous snakes) and, in one instance in 2001, armed conflict among governmental authorities (i.e., the well-intentioned national police and local military units). The government is quite simply overwhelmed with problems. Notwithstanding these challenges, some raiding occurred in Indonesia, mainly with the assistance of police units, and many cases were brought to the courts by prosecutors. Unfortunately, some major barriers to effective criminal enforcement still exist, including poor investigative techniques and poor handling of evidence by authorities. Even when cases reach the prosecution stage, seemingly straightforward matters such as seeking destruction of equipment used to pirate often fall by the wayside. One positive highlight during 2001 involved several court decisions for a major business software company, resulting in compensation awards (due to damage caused by the loading of pirated software on computers prior to their sale by pirate computer retailers) of over US\$9 million.

Losses to the U.S. copyright industries due to piracy in Indonesia reached US\$174.6 million in 2001.

¹ For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing.

² These actions had to be carried out by extra police units due to riots that broke out during the first round of investigations. Of the 1 million pirate compact discs seized, 80% were international and local music, and 20% were movies. Documentary records covering sales and deliveries revealed that on average the 28 retailers raided sold over 280,000 pirate optical discs per week to East and West Java, Timor, Sulawesi, Kalimantan, Irian Jaya and Lombok.

³ IIPA understands that one pirate syndicate owns a 45-foot ferry from Singapore that transports pirate product.

In 2002, the government of Indonesia needs to take several steps to address growing piracy:

- Promptly pass and implement a comprehensive regulatory and reporting regime for production equipment, raw materials and facilities in the field of optical media.
- Establish a national coordinating body for intellectual property rights enforcement, under high level government leadership (direct authority from the Office of the President), which is made up of various agencies with responsibility for IPR protection and enforcement.⁴
- Crack down on pirate production facilities (especially optical media plants), pirate retail outlets, unauthorized end-users, and book piracy, through sustained raids by enforcement authorities (including surprise inspections), followed up by swift police investigations, efficient handling by prosecutors,⁵ imposition of deterrent penalties, and destruction of all infringing articles as well as materials and implements used in the piratical activities.
- Enhance border enforcement, especially including seizures of imports and exports of pirated VCDs, DVDs, audio CDs and CD-ROMs, and the tracking of machinery and parts (including masters and stampers) used to produce such pirated goods, including optical media production equipment.
- Effectively combat end-user piracy, including unauthorized use of software in a business setting, by the establishment of a requirement to audit software usage, with mandatory fines and penalties for non-compliance, and as appropriate, cooperatively working with industry for all future acquisition of software by government agencies.
- Promulgate sentencing guidelines for the courts that provide deterrent criminal penalties, including the imposition of jail time and deterrent fines,⁶ and eventual establishment of a specialized IPR court with adequate resources to handle civil and criminal IPR cases, putting in place special procedures and a “fast track” so that IPR cases can be decided quickly and efficiently.
- Promptly ratify and implement the WIPO Phonograms and Performers Treaty.
- Reform Indonesia’s copyright law to achieve full compliance with the TRIPS Agreement.

⁴ The recording industry has lobbied for the revival of a special dedicated IPR enforcement unit (previously called *Tim Kepres 34*), and although high-level Indonesian officials have signaled commitment to this proposal, this has not resulted in concrete progress on this front.

⁵ The national coordinating body should ensure more effective seizure and safeguarding of evidence collected from raids so it can be used in legal proceedings against pirates, by requiring police and prosecutors to preserve and provide evidence for prosecutors, the courts and right holders. The courts should supervise prosecutors and police to ensure that evidence is preserved, and that cases are properly prepared and passed to prosecutors by the police.

⁶ Sentencing guidelines should set out a system for evaluating the seriousness of the crime, depending on factors such as: the quantity of pirated goods found in the defendant’s possession, their value, any evidence of past infringement (such as documents), a presumption that past profit has been made in the case of those caught in possession of pirated goods. In the most serious cases, including repeat offenders, participants in organized criminal piracy enterprises, etc., jail sentences are necessary to provide deterrence.

INDONESIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	27.5	90%	25.0	90%	25.0	90%	25.0	90%	19.0	85%	19.0	85%
Sound Recordings / Musical Compositions ⁷	67.9	87%	21.6	56%	3.0	20%	3.0	12%	9.0	12%	12.0	15%
Business Software Applications ⁸	49.2	87%	55.7	89%	33.2	85%	47.3	92%	139.6	93%	170.3	98%
Entertainment Software ⁹	NA	NA	NA	99%	80.4	92%	81.7	95%	87.2	89%	86.0	82%
Books ¹⁰	30.0	NA	32.0	NA	32.0	NA	30.0	NA	47.0	NA	47.0	NA
TOTALS¹¹	174.6		134.3		173.6		187.0		301.8		334.3	

COPYRIGHT PIRACY IN INDONESIA

Optical Media Piracy Runs Rampant in Indonesia, Including Mass Domestic Production

Indonesia remains awash in copyright piracy, with reported piracy levels for nearly all sectors among the highest of any major market in the world. Today, that market is dominated almost completely by pirate optical media products: audio CDs, video CDs (VCDs), DVDs, and CD-ROMs containing business software applications and/or entertainment software. Piracy of audiovisual works offers an instructive example. The pirate video compact disc (VCD) and digital versatile disc (DVD) are now firmly entrenched in Indonesia, and over nine-tenths of the market consists of pirate product. Last year the recording industry noted the emergence of very high-quality counterfeits, sold at the same price as legitimate albums, indicating that pirates are becoming increasingly sophisticated and well-funded. At the same time, price competition among pirates has driven prices down some 20-30% from the very low levels reported in early 2000. By

⁷ 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. Estimated displaced sales in 2001 are \$410.5 million. The piracy loss and level numbers for 2000 were adjusted to \$21.6 million and 87%, respectively, in May 2001.

⁸ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 figures of US\$32.9 million in losses and an 87% piracy level were also reported as preliminary. These figures were finalized in mid-2001, and are reflected above.

⁹ IDSA estimates for 2001 were not available at the time of this report. IDSA loss figures for 2000 remain unavailable. However, losses due to piracy of entertainment software in 2000 were comparable to those for 1999.

¹⁰ A 20% loss in value of the currency in Indonesia leads to a slightly lower estimate of trade losses to U.S. publishers due to piracy of published materials, even though the sheer amount of pirated product increased in 2001.

¹¹ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Indonesia were \$109.5 million. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 8), and the adjustment upward in the losses due to sound recording piracy, estimated total losses to the U.S. copyright-based industries in Indonesia in 2000 are increased to \$134.3 million (not including losses due to piracy of entertainment software, which remain unavailable).

the end of 2001, pirate VCDs were selling for as little as Rp10,000, or approximately US\$0.96 (cf. Rp50,000 for legitimate VCDs). Pirate DVDs entered the market in mid-2001, with initial prices beginning at Rp100,000 (approximately US\$9.60), whereas by the end of 2001, competition had seen pirate DVD prices drop as low as Rp25,000, or approximately US\$2.40 (cf. Rp199,000 for legitimate DVDs). Wholesalers of pirate CDs openly advertise them in newspapers for prices as low as Rp5,000 (approximately US\$0.48) apiece; even with a generous markup, the retail price of Rp7000-12,500 (US\$0.67-1.20) is a small fraction of the price of a legitimate copy. Worse, pirate VCDs and DVDs appear in Indonesia within days of the theatrical release of the film in the U.S., and long before those titles are available in Indonesian theaters; the more savvy pirates will re-release these titles to coincide with theatrical release in Indonesia and thus maximize sales. VCD and DVD piracy thus cripples the theatrical as well as the home video market. The considerable market access barriers faced by U.S. film studios in Indonesia (see discussion below) add costs that pirates evade, and cause delays in legitimate release in both the theatrical and home video markets, thus widening the window of opportunity for pirates. The situation is similarly bleak for other copyright industries.

Worse yet, while until several years ago, the vast majority of pirate optical media product in Indonesia was imported or smuggled into the country from elsewhere, there is now clear evidence of widespread domestic production of pirate optical media products. Factories from Malaysia have begun to relocate to Indonesia, and current estimated optical media production capacity far exceeds the possible legitimate demands. The infiltration of organized criminal enterprises engaging in massive optical media production in Indonesia demands a swift response: Indonesia must promptly pass and implement a comprehensive regulatory and reporting regime for optical production, including controls on production equipment, raw materials and facilities.

Other Piracy Problems in Indonesia

Other piracy problems abound. One of the most serious involves widespread and worsening book piracy, especially of English-language textbooks, reference books, and computer-related volumes. Commercial pirates operate throughout the country, including some who produce and market 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 authorities rule out enforcement because they fear antagonizing student militant groups. Systematic or proactive enforcement against book piracy has never been attempted in Indonesia, and should now be given higher priority.

Although Internet piracy levels remain low due to low Internet penetration rates, the few infringing sites identified to date give rise to great concern. Of the nine cease and desist letters sent by the recording industry to Indonesian sites hosting infringing MP3 files in 2001, the response rate was poor or non-existent. Of note is the fact that infringing MP3 song files are being hosted on servers linked to one educational institution in particular that had received at least three warning letters from the recording industry in 2001.

COPYRIGHT ENFORCEMENT IN INDONESIA

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	SOUND RECORDINGS
Number of Raids conducted	54
Number of cases commenced	208
Number of defendants convicted (including guilty pleas)	208
Acquittals and Dismissals	
Number of Cases Pending	206
Total number of cases resulting in jail time	2
Suspended Prison Terms	1
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Suspended Prison Terms	1
Prison Terms Served (not suspended)	1
Maximum 6 months	
Over 6 months	
Over 1 year	1
Total Prison Terms Served (not suspended)	1
Number of cases resulting in criminal fines	1
Up to \$1,000	
\$1,000 to \$5,000	1
Over \$5,000	
Total amount of fines levied	US\$2,000

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES	SOUND RECORDINGS
Number of Raids conducted	19	10
Number of cases commenced	6	25
Number of defendants convicted (including guilty pleas)	1	25
Acquittals and Dismissals		
Number of Cases Pending	5	
Total number of cases resulting in jail time	0	2
Suspended Prison Terms	4	0
Maximum 6 months	4	
Over 6 months	0	
Over 1 year	0	
Total Suspended Prison Terms	4	
Prison Terms Served (not suspended)	0	2
Maximum 6 months	0	
Over 6 months	0	
Over 1 year	0	2
Total Prison Terms Served (not suspended)	0	2
Number of cases resulting in criminal fines	1	0
Up to \$1,000	1	
\$1,000 to \$5,000	0	
Over \$5,000	0	
Total amount of fines levied	Rp10,000,000 (US\$960)	0

Some Enforcement Raids Continue, But Without Needed Coordination

Indonesia's efforts to enforce its copyright law against pirates during 2001 were laudable at times, but mostly sporadic. Several raids against optical media plants achieved results, including seizures of production lines, sealing or closure of the plants, and some arrests (leading to indictments and convictions). However, these raids were spotty and uncoordinated, making increasingly profitable and organized criminal activities attractive and hardly risky. Because of overall lack of coordination, IIPA recommends the establishment of a national coordinating body for intellectual property rights enforcement, under high level government leadership (direct authority from the Office of the President), and made up of various agencies with responsibility for IPR protection and enforcement.

The following are some anecdotes of raids and results, which demonstrate some government will on the part of the police in Indonesia to take initial raids, but also show how little is being done to follow up on initial raids.¹² Given the hundreds of optical media production lines employed in Indonesia today, and the lack of swift movement to impose deterrent fines or sentences, it is clear that large-scale, increasingly organized, and sometimes even militant, pirates face minimal risks:

- In February 2001, police in conjunction with industry assistance raided an underground optical media plant in Solo, Central Java, guarded by poisonous snakes (and a series of large concrete outer walls). By the time the team obtained entry, they found 10,000 destroyed optical discs, five production lines, and a large quantity of finished pirated optical discs, including infringing international music repertoire. The plant was initially shut down, and industry understood that the machinery would be dismantled and the owner of the factory prosecuted. However, by May 2001, it became clear that the factory was open and operating again, and that there would be no prosecution of the owner.
- In February 2001, police raided a heavily fortified factory containing four optical media production lines, three of which were in the process of manufacturing pirate music discs. Ten pirate stampers bearing music titles were found, while a significant quantity of finished product had already been destroyed prior to the search party's obtaining entry. Despite complaints including to the National Police, the police who undertook the raid refused to prosecute the owner, and the factory was allowed to remain open. The same plant was raided again in late 2001 following a raid (by a different police force than that which raided the plant initially) on a distributor supplied by this factory. The distributor was prosecuted and received a lengthy prison sentence out of this second set of raids.
- In March 2001, the Jakarta Police, with the assistance of industry, raided an optical media factory, discovering four optical media production lines, two printing machines, pirate stampers and silk screens for international music titles, and 32 sacks of polycarbonate (750 kilograms each), together with documentation showing extensive production activities of various music and movie titles. This plant is linked to well-known Malaysian piracy syndicates. The owner of the plant was arrested and the initially the factory sealed. The local video association was

¹² For the recording industry, a total of ten major raids were carried out from July to December 2001, six in Jakarta, two in Bandung, and one each in Padang and Surabaya. The raids resulted in the seizure of almost 600,000 pirate CDs, and in one raid on a pirate manufacturer, three CD production lines were found. In all of the cases, no fines or penalties have yet to be meted out to any of the 24 suspects implicated or apprehended.

reportedly pressing for a prosecution on the basis of their product being pirated, but IIPA has gained no further information regarding action taken against this plant, or whether the factory remains in business.

- In April 2001, the Jakarta police raided an underground optical media plant containing three production lines and up to 100 pirate stampers, many containing major motion pictures. The police were initially unable to proceed with a prosecution in this case, but the factory was raided again in early 2002, and police are now preparing new charges against the factory manager.
- In May 2001, the police, aided by industry, raided two illegal optical disc factories in Jakarta, seizing 23 pirate stampers (including *The Mummy Returns*, *Exit Wounds*, and *Crouching Tiger, Hidden Dragon*) at one plant, and two Discjet Netsal production lines, one graphic photo printer, one polycarbonate feeder and 18 bags of polycarbonate. The factory manager (not the owner) was charged in the offense. However, the police have since refused to accept that the pirate stampers evidenced pirate production, and instead claimed that they would only prosecute the manager for infringing distribution (a more difficult charge to prove, and with a less severe maximum punishment). The case is expected to be heard in early 2002.
- In November 2001, the police, in conjunction with industry representatives, raided a plant in Jakarta, seizing two replication lines, printing machines, silk screens, 6,000 suspected pirated discs of movies, BBC-TV series productions, PlayStation® games, and 20 pirate stampers, as well as production records. As of February 2002, the police were still preparing this case for prosecution.
- In January 2002, recording industry representatives raided the residence of a well-known distributor of infringing product in East Java, seizing a small quantity of infringing music albums. A search of related premises, however, led to the discovery of no fewer than 2.5 million infringing optical discs, comprising both international and Indonesian repertoire.

For other industry sectors, the level of enforcement has declined from the levels observed in 2000. For example, eight raids were carried out against business software pirates in 2000, with none being carried out since.

Some Impressive Court Judgments in 2001, But Non-Deterrent Results/Sentences Remain the Norm

The Indonesian court system has long been a weak link in the nation's copyright enforcement chain. Weaknesses among the corps of prosecutors compound the problem, as most are unfamiliar with IPR matters, and their assignments are frequently rotated, virtually foreclosing the possibility of improving their base skills. Difficulties abound, including proper securing or presenting of evidence, and judicial orders to destroy seized pirate product or production equipment have often been ignored. Typically, courts either impose extremely light sentences, even on major commercial pirates, or else allow cases to languish.

Thus, the results in 2001, including five copyright cases involving the unauthorized loading of software onto computers prior to their sale ("hard-disk loading"), are particularly surprising and

atypical when compared with results in previous years.¹³ Also, in 2001, a new Supreme Court head was appointed, and there has been talk of dividing the Court into four chambers, so that the four-year bottleneck of intellectual property cases can be resolved. This would be a positive step. Other recent case results, however, are less impressive (and thus more aligned with the norm as the copyright community has known it).¹⁴

One abiding problem involves the strict adherence to the procedural rule that cases must be prosecuted in the *lex locus delicti* (the place of the harm), rather than other venues in which jurisdiction against the defendant lies. This strict adherence to this jurisdictional rule creates delays and added costs for the recording industry, which is forced to send its employees or legal representatives to the relevant city/province to monitor each step of the prosecution from commencement of the trial until the issuance of the verdict. Other court rules prove overly burdensome to right holders, for example, authentication of foreign documents must be done by court officials of the court where the prosecution takes place, rather than the foreign mission or place where the right holder is situated. These rules should be made more flexible to comport with international practice and to ensure that Indonesia's courts provide "effective" judicial recourse against piracy.

Other steps the courts could take immediately would be to appoint specialized teams of prosecutors, dedicated to piracy cases and given the proper training to handle them. Tough sentencing guidelines for IPR cases should be issued to dispel the notion that piracy deserves only nominal punishment.¹⁵ A longer-term solution must look toward the establishment of a specialized IPR court in Indonesia, along the lines of the model that has proven successful in Thailand. The pending copyright legislation, which gives specialized commercial courts jurisdiction over some copyright cases, is a step in the right direction. But it falls far short of a solution, because the commercial courts are only empowered to handle civil litigation (not currently a viable method of enforcement against major piracy in Indonesia), and because no provision has been made for specialized training of the commercial court judges in copyright matters.

MARKET ACCESS BARRIERS FOR U.S. COPYRIGHTED PRODUCTS

For years, Indonesia has enjoyed the dubious distinction as one of the least open markets in the world 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:

¹³ In one of those cases, on September 24, 2001, the software firm Microsoft won a legal battle against a local computer dealer that was engaged in pirate hard-disk loading. The pirate dealer was ordered by the court to pay the plaintiff compensatory damages of US\$4.4 million, a previously unheard of judgment in Indonesia, and was further ordered to pay for a full-page apology in two newspapers and one magazine for one week. "Microsoft Wins Battle Against Software Piracy," Jakarta Post, Sept. 25, 2001.

¹⁴ For example, in May 2000, a pirate VCD factory owner from Batam, producing tens of thousands of VCDs per day, was sentenced to a six-month suspended sentence and a fine of a measly \$4,000. Nicholas Redfearn, *Indonesia's Progress in Enforcement*, Managing Intellectual Property, July/August 2001, at 29-32. Another case in April 2001 involving pirate VCD production resulted in the factory manager in Surabaya receiving a two-month sentence (which was suspended) and a \$960 fine, but most crucially, all the duplicating machines were returned to the factory manager's boss. See *id.*

¹⁵ As noted above, these sentencing guidelines should provide deterrent criminal penalties, including the imposition of jail time and deterrent fines.

the blanket prohibition on foreign company participation in, or even investment in, importation, distribution, exhibition, or retailing in Indonesia. This restriction is particularly onerous in its impact on the audiovisual industry. Although government-sanctioned oligopolies have been dissolved, allowing Indonesian companies to compete freely for film or video import licenses, this privilege has not been extended to foreign entities. It remains the case today, as it has for many years, that only 100% Indonesian-owned companies may either import or distribute films and videos, and no company may perform both functions. Thus, U.S. audiovisual products can reach Indonesian viewers only after passing through two separate, unnecessary bottlenecks.

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. President Habibie issued a decree in July 1998 reaffirming the ban, but there was some hope that the previous regime would moderate this approach. These hopes were dashed by issuance of two presidential decrees in July and August 2000,¹⁶ which continued to prohibit 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.

Indonesian officials point to provisions of the Film Law, adopted in 1992, as justification for maintaining the audiovisual sector on the “Negative List.” An amendment to the Film Law that would allow importers to engage in distribution and permit foreign entities to take minority stakes in the film industry has been pending before Parliament since 1999, without any action. Meanwhile, the U.S. audiovisual industries remain largely fenced out of direct participation in this huge market. 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. Today, in a number of sectors, foreign companies have taken advantage of a 1998 presidential decree that allows 100% foreign ownership of distribution entities so long as there is a contractual arrangement (which need not include equity participation) with an Indonesian small or medium-sized business. To say that Indonesia’s bilateral pledge is not yet operative because direct distribution wholly by foreign entities has not yet been formally approved elevates form over substance. The Indonesian government is bound by its predecessor’s promise to the U.S. Now is the time to make good on it.

Onerous import levies also constrict the market for foreign copyrighted materials, and, by unjustifiably increasing their cost to Indonesians, provide an additional incentive for piracy and smuggling. Duties and other tariffs are assessed against videocassettes, VCDs and DVDs at an exorbitant aggregate rate of 57%, and range as high as 100% for some videogame products. The aggregate rate of duties and taxes payable upon import for films imported for theatrical exhibition was 22.5% in 2001, averaging about Rp4 million (approximately US\$392) per print. Other levies and “government royalty” charges, including a “National Film Development” charge, add to this already excessive sum. As a participant in the Information Technology Agreement (ITA), Indonesia was required to eliminate tariffs on a range of products, including most computer software, by

¹⁶ Presidential Decree No. 96 of July 2000, later ratified by Decree 118 of August 16, 2000.

January 1, 2000. This tariff elimination program should be extended to all products embodying copyrighted materials, both for market access liberalization reasons, and to reduce the competitive advantage now enjoyed by pirates, who pay none of these duties.

COPYRIGHT LAW AND RELATED ISSUES

Optical Media Legal Controls Needed

During 2001, the optical media piracy problem in Indonesia reached a critical and troubling tipping point. Indonesia has not only developed enough illegal production capacity within its borders to supply the domestic pirate market, but already has or soon will have enough capacity to export damaging optical media piracy to foreign markets. This unwelcomed development focuses attention on the top anti-piracy priorities for Indonesia: to put in place the legal tools to control and suppress the fast-growing pirate optical media production sector, and to summon the political will to carry out vigorous enforcement efforts against the trade in counterfeit CDs, VCDs, DVDs, and CD-ROMs. Regional conditions contribute to the growth of the problem in Indonesia, as criminal syndicates move plants from Malaysia and elsewhere in Asia to Indonesia.

In the face of this influx of pirate optical media production capacity, Indonesia must swiftly move to enact and implement a comprehensive licensing and reporting regime for the importation and operation of optical media production facilities and the importation and use of optical grade polycarbonate and other raw materials that can be used to manufacture optical media. A draft decree requiring registration of all optical media production facilities was under consideration at the Ministry of Information before it was disbanded in 1999, and the copyright industries continue to call for regulation now. The needed regime should: 1) provide for the licensing of all production facilities (including those producing finished optical media, as well as blank or recordable media, and including those facilities that engage in mastering or otherwise use stampers/masters), subject to spot inspections of their facilities and records, including production orders; 2) cover the importation of equipment and raw materials for the mastering and replication of all optical media products; and 3) require the use of the Source Identification (SID) codes or similar unique markings on all masters and copies of optical media products manufactured in the country. Recent enactments in Hong Kong, Malaysia, and elsewhere are useful precedents. Of course, aggressive implementation of the new regime is the key to success. In the meantime, enforcement efforts based on the Copyright Act should continue and intensify, and must be complemented by the imposition of deterrent punishments against the operators of pirate production facilities.

Draft Copyright Law Amendment Still Violates TRIPS

Since a flurry of activity in May 1997 when Indonesia extensively amended its copyright law, joined the Berne Convention, and became the first nation in the world to ratify the WIPO Copyright Treaty (WCT) copyright law reform in Indonesia has been at a standstill. It is regrettable that the January 1, 2000 deadline for full Indonesian compliance with its TRIPS obligations passed without correction of the significant remaining deficiencies in its copyright law. Most of Indonesia's TRIPS shortcomings relate to enforcement, which the current law deals with only in sketchy terms. Problem areas include:

- The inability of a copyright owner to enforce against a party “not trading in” copyrighted goods could present a major enforcement impediment, especially with regard to end-user piracy of business software. In Indonesia, as in other countries, the most economically damaging form of business software piracy occurs when a company or other institution makes numerous unauthorized copies of a single legitimate copy it has acquired. In order to fulfill its TRIPS Article 61 obligation to provide criminal remedies against all types of copyright piracy on a commercial scale, Indonesia should spell out in its law that the commercial use of unauthorized copies of computer programs is a criminal offense as well. Criminal liability should also be imposed for violations of the neighboring rights of a sound recording producer.
- TRIPS Article 50 requires that provisional measures such as *ex parte* seizures – a crucial enforcement tool in software piracy cases, especially must be available in civil cases; the current Indonesian law does not expressly provide for this.
- The requirement to pay compensation in order to obtain a civil seizure of pirate goods must also be clarified in order to comply with TRIPS Article 46, and should be removed.
- Judicial authority to order payment of fully compensatory damages and the right holder’s expenses, and to dispose of materials and implements predominantly used to make infringing goods, must be spelled out in order to comply with TRIPS Articles 45 and 46.
- Deterrent criminal penalties must be provided, to fulfill TRIPS Articles 41 and 61. This point is particularly significant in light of the historic inability of the Indonesian courts to impose deterrent sentences even in flagrant cases of massive commercial piracy of computer software and books. Not only should maximum penalty levels be reviewed, but minimum penalties should also be enacted for commercially significant cases.

Draft amendments to the Indonesian copyright law were presented to the Parliament in May 2000. An unofficial translation which IIPA reviewed indicated that enactment of the amendment’s enforcement provisions would bring Indonesia much closer to full compliance with its obligations under the TRIPS Agreement. For instance, the draft amendment provides express protection for temporary copies, and more detail on civil enforcement procedures (including interlocutory injunctions); improves remedies for violations of neighboring rights; and gives the courts clear authorization to order the destruction of seized pirate goods. Provisions in the amendment extending the term of copyright protection reflect Indonesia’s efforts to modernize its law in line with international trends. Finally, in several ways the amendment would seek to implement the WIPO Copyright Treaty (WCT), which Indonesia ratified in 1997.

However, the draft amendment falls short in some critical respects in the effort to bring Indonesian law into compliance with TRIPS, to implement the WCT, and to update other aspects of the law. These problems include:

1. Business/Institutional Piracy: To combat commercial piracy of computer programs and other works that take place within the operations of a business, public agency, or other institution, Article 58 of the copyright law should be amended to make it clear that, for instance, a business owner who knowingly uses pirate copies of software in his business operations is an infringer of copyright. Similarly, Article 74 should be amended to make such piracy a criminal offense, as required by TRIPS.

2. Remedies for Infringement: To fulfill Indonesia's TRIPS obligations, Articles 57 and 75 must be amended so that the court may order equipment or raw materials used to produce pirate product (in addition to the product itself) to be seized and destroyed. Article 57 should be amended to ensure that monetary damages that infringers are required to pay will be enough to deter further infringements, as TRIPS requires.

3. Protection of Phonograms: Producers of phonograms should have the legal right to control "publication" of their recordings over the Internet. This would make it much easier for Indonesia to ratify and implement the WIPO Performances and Phonograms Treaty (WPPT). Phonogram producers must also have the right to control rental of their products (TRIPS Article 14), and all their rights should last for at least 70 years.

4. Rights Management Information and Technological Protection Measures: It is commendable that the draft amendment includes provisions to outlaw tampering with information used to identify the owners of rights in a work or phonogram, and to prohibit pirates from breaking through technologies that right holders use to control who may access or copy their products (for example, by stealing passwords or access codes). However, these provisions need to be more detailed and specific in order to comply fully with the requirements of the WCT and WPPT.

5. Compulsory Licenses: Article 16 contains some compulsory licenses that, without significant narrowing by implementing regulations, violate the Berne Convention and TRIPS.¹⁷

6. Impingement on the Exclusive Adaptation Right: The moral right contained in Article 25 impinges on the Berne-required exclusive adaptation right, and this Article 25 violates the Berne Convention and TRIPS, and must be amended.

7. Other Needed Changes: Indonesia should take this opportunity to clarify and correct other aspects of its current law, and some provisions of the draft amendment. These include: 1) providing at least TRIPS-compatible terms of protection for certain works (including computer programs, which under Article 30(1)(a) receive less than TRIPS-compatible terms); 2) definitions of the "publication right" and of "work"; 3) restrictions on licensing (these could be in part remedied through the addition of the phrase "unless otherwise agreed" at the beginning of Article 45(4); 4) point of attachment for protecting foreign phonograms and works; and 5) protection of pre-existing works and phonograms for a full term.

IIPA understands that the copyright amendment bill has been earmarked as a priority item for the Parliament to finalize before the end of 2002, under President Megawati. Apparently, in 2001, the bill underwent a detailed consultation period, with discussions between various government ministers, the Parliamentary commission, several working groups, and senior officials. It is hoped that over the next several months the chair of the relevant Parliamentary commission will deliver a report in the Plenary Session on the results of the consultation process (which will signal that the bill is ready to be approved by the Parliament).¹⁸ Thus, IIPA is pleased to weigh in at

¹⁷ To IIPA's knowledge, Indonesia has not made a declaration pursuant to Article 1 of the Berne Appendix, to avail itself of certain permissible compulsory licenses for developing countries. Even if it had, Article 16 compulsory licenses do not come close to meeting the many requirements of the Berne Convention in this regard.

¹⁸ After Parliamentary approval, in order to become formalized law, the bill will then be promulgated by the President.

this time, and looks forward to further opportunities to provide its advice on any further contemplated changes before Parliamentary approval.

Finally, while Indonesia's prompt ratification of the WIPO Copyright Treaty (WCT) set an excellent example for its neighbors, its failure to ratify the companion WIPO Performances and Phonograms Treaty (WPPT) is cause for concern. Indonesia should move as quickly as possible during 2002 to cure this anomaly by ratifying the WPPT. This action should no longer be delayed by consideration of the mechanisms for joining the Rome Convention, since Rome adherence is in no way a prerequisite to WPPT ratification.

Other Legislation/Regulations

In addition to TRIPS deficiencies in the copyright law, Indonesia's border control measures leave some gaps that must be filled to ensure that Indonesia is providing full TRIPS-compatible protection, and could be further strengthened.¹⁹ 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.

The Department of Posts and Telecommunications is working on a draft "cyber law" on Internet operations (there is currently a bill entitled the "Academic Script Bill on Information Technology," first published in December 2000, which we understand is the first attempt at a cyber law), and has said that the new law is expected to be implemented no later than 2004. As of December 2001, that draft was still in the process of internal consultation.²⁰

Generalized System of Preferences

Indonesia currently participates in the Generalized System of Preferences (GSP) Program, a U.S. trade program that allows duty-free imports of certain products into the U.S. from developing countries. For the first 11 months of 2001, \$1.2 billion of Indonesian goods (or 13.2% of Indonesia's total imports to the U.S.) entered the U.S. duty-free under the GSP Program.²¹ In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that the country meets certain discretionary criteria, including whether it provides "adequate and effective protection for intellectual property rights." Indonesia's failure to address effectively the endemic problem of copyright piracy creates serious questions about whether it meets this criterion for continuing favorable treatment under the GSP program.

¹⁹ For example, Article 55(d) provides for the payment of a "guarantee" in order to suspend the release of suspected infringing goods into the channels of commerce; however, it is not made clear in the Customs Law or regulations (which have yet to be passed) that this amount cannot be so high as to make it burdensome for right holders.

²⁰ Reports in the Jakarta Post in December 2001 indicated the bill was still being worked on.

²¹ In 2000, \$1.4 billion worth of Indonesian goods entered the U.S. duty-free under the GSP Program, accounting for 13.3% of Indonesia's total imports to the U.S.