

ANALYSIS OF THE FAILURE OF THE
IMPLEMENTATION OF INTELLECTUAL
PROPERTY LAWS IN INDONESIA

by

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ABSTRACT

For the past two decades, intellectual property law has been the fastest growing and most dynamic field of law in Indonesia. But, despite impressive and extensive legal reform conducted by the Indonesian government in the area, intellectual property laws remain very difficult to enforce. Ignorance of intellectual property law is widespread within the country and protection of intellectual property rights is both practically and legally weak.

This dissertation aims: (i) to analyse the reasons for the apparent failure of intellectual property laws to be culturally and legally accepted in Indonesia, (ii) to understand the problems underlying the implementation of intellectual property laws in Indonesia and (iii) to seek some possible solutions for the problems. To test and sustain the hypothesis, this dissertation will employ both legal and cultural, socio-economic forms of analysis. It will be argued that the failure to enforce intellectual property laws in Indonesia flows from the fundamental fact that these laws are not consonant with Indonesian culture or with Indonesia's contemporary stage of economic and technological development and that the laws are accordingly unable to benefit and fulfil the interests of the Indonesian people.

With respect to patent law, this dissertation finds that the law does not, on balance, benefit Indonesia, largely because the country has not yet reached a stage of development where it has the potential to develop internationally important innovations with competitive value in the world market. In fact, patent law has a detrimental effect on Indonesia's technological and economic development, as the law increases the local cost of important technological products and further inhibits local technological development. Patent law is also ignored in so far as it is perceived to be contrary to Indonesia's communal political and social culture, which has historically emphasised the protection of the public interest rather than individual, private interests. With respect to trademark law, this dissertation finds that this is the only form of intellectual property law in Indonesia which has been relatively well established and which could easily be culturally and economically accepted

by Indonesians. This appears to be because the *Trademark Act 1961* was in fact essentially coherent with the communal culture of Indonesia in its emphasis on the need to serve the public interest by protecting consumers from misleading counterfeit goods, rather than protecting particular individual owners of trademarks. With respect to copyright law, this dissertation finds once again that the law does not easily fit Indonesian culture and level of development and is not consonant with the interest of Indonesians. Copyright law has become a neglected area of law in Indonesia, because the country is still unable to produce significant intellectual works which are worthy of international copyright protection. Further, most Indonesians have a relatively low economic standard of living and accordingly do not have economic capabilities to buy authorised but expensive works.

This dissertation makes frequent analytical references to the TRIPs Agreement and finds that that agreement has failed to be implemented in Indonesia, because of its profound incompatibility with Indonesia's social, economic and cultural situations. The dissertation finds that the TRIPS Agreement is a real burden for the development of Indonesian economy, especially after the economic and political crisis of 1997.

Based upon these findings, this dissertation recommends that intellectual property laws be drafted according to the needs of Indonesian culture, including the traditional customary laws of the *Adat*, that the intellectual property laws be in coherence with Indonesia's stage of development, and that the laws be able to fulfil the interests of the Indonesian people. Otherwise, the laws will inevitably continue to be ignored by the Indonesian people. Indonesia needs understanding and education in intellectual property rights enforcement from other developed countries, not trade sanctions. But at the same time, Western developed countries should let the Indonesian people determine by themselves through their government, how and what kind of intellectual property laws are appropriate for the nation, based on the social and economic realities and cultural values of Indonesian society.

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LIST OF ABBREVIATIONS

ABRI	Indonesian Army
ACP Group	African, Caribbean and Pacific Group of States
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
Asirevi	Association of Indonesian Sound Recording Industry
ASIRI	Association of Indonesian Recording Industry
B.I.R.P.I.	United International Bureaux for the Protection of Intellectual Property
BSA	Business Software Alliance
CBU	Completely build up
CKD	Completely knocked down
DPRD	Regional Legislative Assembly
EC	European Community
FDI	Foreign direct investment
GATT	General Agreement on Tariff and Trade
GDP	Gross Domestic Product
GSP	Generalised System of Preferences
IFPI	International Federation of Phonogram and Videogram Producers
IIPA	International Intellectual Property Alliance
IKAPI	Indonesian Book Publishers Association
IMF	International Monetary Fund
LIPI	Indonesian Academy of Sciences
LPHN	National Institute of Legal Development
MFA	Multi-fiber Agreement

MPEAA	Motion Picture Export Association of America
NGO	Non-governmental organisations
OECD	Organisation of Economic Cooperation and Development
OPEC	Organisation of Petroleum Exporter Countries
OPI	Organisation of Indonesian Authors
PCT	Patent Cooperation Treaty
PDI	Indonesian Democratic Party
PKI	Indonesian Communist Party
PMA	Foreign investment companies
PMDN	Domestic investment companies
PPUD	Entry Notification for Usage
REPELITA	Five Year Development Plans
TRIMs	Trade Related Investment Measures
TRIPs	Trade Related Aspects of Intellectual Property Rights
UMR	Regional minimum wage
UN	United Nation
UNCTAD	United Nations Conference on Trade and Development
USITC	United States International Trade Commission
USPTO	United States Patent & Trademarks Office
USTR	United States Trade Representative
VCD	Video compact disc
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
YLBHI	Indonesian Legal Aid Foundation
YLKI	Indonesian Consumer Foundation

INTRODUCTION

A. Background to Dissertation

Although intellectual property law had been a relatively quiet and neglected area within the Indonesian legal order in the decades following Indonesian independence in 1945, that situation changed abruptly towards the end of 1980s. There was at that time a sudden interest in the protection of intellectual property rights in Indonesia and a corresponding flurry of political and legislative activity.¹ The change was largely brought about by the economic policies of the Suharto government in the 1980s which aimed to attract foreign investment and increase Indonesian exports by providing laws which met the demands of foreign investors in Western countries, the major markets for Indonesian exports.² Those demands included the provision of a strong legislative regime for the recognition and enforcement of intellectual property rights.

Since that time, intellectual property law has become the fastest growing field of law in Indonesia and the Indonesian government has launched massive legislative reforms in the area. The government introduced the *Copyright Act* in 1987 to amend the *Copyright Act* 1982. A *Patent Act* followed in 1989 and in 1992 a new *Trademark Act* replaced the old *Trademark Act* 1961. These developments were accompanied by a large number of government regulations, ministerial decrees, and other administrative decrees to support

¹ Antons, Christoph, "Intellectual Property Law Reform in Indonesia" in Lindsey, Timothy (ed), *Indonesian Law and Society* (Sydney: The Federation Press, 1999) at 304

Antons, Christoph, *Intellectual Property Law Reform in Indonesia*, Paper presented at "Indonesian Law: The First 50 Years" a Conference held at the Asian Law Centre, the University of Melbourne, 28 September 1995, at 1

² Antons, Christoph, "Indonesian Intellectual Property Law in Context" in Taylor, Veronica (ed), *Asian Laws through Australian Eyes* (Sydney: LBC Information Services 1997) at 411-412

the implementation of the new intellectual property laws.³ Around this time, the Indonesian government also made bilateral agreements for the protection of copyright with several Western countries, including the US, the EU countries, Australia, and the UK.⁴ To kick-start and intensify the campaign for the increased protection of intellectual property rights, President Suharto, on 30 July 1986, issued a Presidential Decree to form a task force, “Working Team for the Solution of Problems in the Implementation of Laws on Copyright, Company Brands and Trademarks, and the Drawing Up of a Patent Law”, known as “Tim Keppres 34.”⁵ The government also held seminars on protection of intellectual property rights that were funded by the World Intellectual Property Organisation (WIPO).⁶

These developments culminated in the ratification of the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement, as part of the Agreement Establishing the World Trade Organisation by the Indonesian government in 1994. As a result of the TRIPs Agreement, the Indonesian government once again reformed the country’s intellectual property laws by amending the existing statutes, the *Copyright Act*, *Trademark Act*, and *Patent Act*, by drafting new legislation on industrial designs, integrated circuits and confidential information, and by ratifying several international conventions for the protection of intellectual property rights, namely, the Patent

³ Antons, Christoph, in Lindsey, Timothy (ed), above n1 at 304-305

⁴ See the *Presidential Decree* No. 17/1988 to ratify the agreement between Indonesia and the EC on copyright protection in sound recording; *Presidential Decree* No. 25/1989 to ratify the agreement between the US and Indonesia on copyright protection in books, sound recording, films, computer software and other creative works; *Presidential Decree* No. 38/1993 to ratify the agreement between Indonesia and Australia on copyright protection; 1993 agreement on copyright protection between Indonesia and the United Kingdom.

⁵ See the *Presidential Decree* No. 34/1986

Gielen, Charles, “New Copyright Law of Indonesia - Implications for Foreign Investment” (1988) 4 *European Intellectual Property Review* at 103

Antons, Christoph, above n2 at 413

⁶ “Seminar Internasional dengan WIPO Mengenai Hak Milik Intelektual” [International Seminar on Intellectual Property Rights with WIPO] *KOMPAS* (8 February 1987) at 1

Cooperation Treaty (PCT), the Trademark Law Treaty, the Berne Convention, and the WIPO Copyrights Treaty.⁷

Despite the extensive legislative and administrative reforms in the field of intellectual property law, however, it has become clear that intellectual property laws⁸ remain very difficult to enforce in Indonesia and protection of intellectual property rights is weak. Ignorance of these rights and their legal status is still very widespread and so far, intellectual property laws have had very little impact on economic and technological development in Indonesia.

This dissertation analyses the reasons for the failure of intellectual property laws to be accepted or enforced in Indonesia. Although there has been considerable discussion of intellectual property protection in Indonesia, that discussion has largely left unaddressed the particular cultural and socio-economic issues which have led to the failure of intellectual property laws in Indonesia. Therefore, this dissertation aims to address those issues, analyse the problems underlying the difficulties of the implementation of the laws in Indonesia and seek solutions.

Because the research of this dissertation is restricted by the time allocation given by the AusAID scholarship⁹, the analyses provided in this dissertation only discusses the implementation of intellectual property laws in Indonesia up to October 2000, when the scholarship period must end.

⁷ Gautama, Sudargo, "New Changes in Indonesian Intellectual Property Law" (1997) 2 *Indonesian Law and Administration Review* at 49

⁸ In this dissertation, the term "*intellectual property law*" refers to a field of law that provides protection for intellectual property rights, while the term Indonesian "*intellectual property laws*" refers to Indonesia patent, trademark and copyright Acts and all supporting regulations of the Acts.

⁹ The scholarship is provided by the Australian Agency for International Development that is responsible for the management of the official Australian Government overseas aid programs, especially in developing countries.

B. Hypothesis

This dissertation argues that intellectual property laws have failed to be enforced in Indonesia essentially because the laws do not fit easily within Indonesian culture and are not appropriate to the country's stage of development. The laws are accordingly unable to benefit and fulfil the interests of the Indonesian people.

C. Structure of Dissertation

To sustain the hypothesis, this dissertation will analyse the cultural and socio-economic issues which underlie the failure of intellectual property laws in Indonesia. This analysis is presented in Chapter I to VI.

Chapter I, as a necessary background to an understanding of the contemporary legal order in Indonesia, which is itself a constituent part of Indonesian culture, briefly explains the development of the Indonesian legal system from the pre-colonial era, through the periods of Dutch and Japanese colonialism (from 1848 to 1945), through the Sukarno and Suharto governments (from 1945 to 1998), and after the fall of the Suharto government.

Chapter II traces the development of intellectual property laws (copyright, trademark, and patent laws) in general, from the pre-colonial era until the end of the Suharto government. It is argued in this chapter that there has been a consistent lack of interest among the Indonesian people in the development and protection of intellectual property rights. Historically and culturally, most Indonesians still strongly hold to *Adat* (an extensive system of indigenous customary norms) that does not recognise ownership in

intellectual works or inventions. Furthermore, the origin of the intellectual property regime in Indonesia is not Indonesian, but from economically developed and industrialised Western countries - originally the Dutch colonial government, and more recently, the United States and European Union - that have different economic interests and profoundly different cultural norms from those of Indonesia.

Chapters III, IV and V of this dissertation focus specifically on the enforcement of patent, trademark and copyright laws in Indonesia. The specific discussion elaborates the background of the problems facing the enforcement of these laws, the court decisions on the protection of patent right, trademark right, and copyright, and the public attitude toward the laws. This dissertation deals only with patent, trademark and copyright laws, as these are the only intellectual property laws currently in force in Indonesia during the research of this dissertation. The bills on industrial designs, integrated circuits and confidential information have not yet reached the stage of a parliamentary hearing.

Chapter III specifically reviews the history and development of patent law in Indonesia and analyses whether the patent law can be seen to be consonant with the Indonesian culture and stage of development and able to fulfil the economic needs and objectives of the Indonesian people. This chapter observes that the enactment of the first indigenous *Patent Act 1989* was not to promote innovation and technological development in Indonesia, but to accommodate economic pressure from Western countries. Since the *Patent Act 1989* came into force, patent ownership is shown to be very predominantly foreign-based and technology transfer into the country is negligible. Moreover, the *Patent Act 1989* was not coherent with under-funded patent enforcement agencies.

Chapter IV reviews the history and development of trademark law in Indonesia. The discussion in this chapter finds that trademark law is the only intellectual property law which is relatively well established in Indonesia and accepted by the Indonesian people even since the Dutch colonial era. After independence, the Indonesian government adopted the Dutch trademark law into Indonesia's first indigenous *Trademark Act* in 1961 and Indonesian courts have developed much well-known and widely accepted case law in trademark cases. The acceptance of the *Trademark Act* 1961 lies in the fact that, unlike other areas of intellectual property, trade mark law is appropriate to the nature of commercial life in Indonesia and consonant with Indonesian culture and, in particular, *Adat*, which is based on the principle of protection of communal public interest, in this case, consumer interest. This situation changed, however, when the government replaced the *Trademark Act* 1961 with the *Trademark Act* 1992. The latter Act was relatively unenforceable and not widely accepted by the Indonesian people. Unlike the previous Act, the *Trademark Act* 1992 mostly served the interest of foreign owners of well-known trademarks, and no longer emphasised the protection of consumer interest.

Chapter V discusses the history and development of copyright law in Indonesia and analyses why the Indonesian copyright law is difficult to enforce in Indonesia. The discussion in this chapter finds that Indonesian *Copyright Act* 1982, as amended by the *Copyright Act* 1987 was incompatible with Indonesian culture, and economic and scientific development. There have also been no sufficient copyright administration and law enforcement mechanisms to support the copyright law. The Indonesian *Copyright Act* 1987 has not in fact had any significant or discernible effect on improving creativity, or research and development in Indonesia. In fact, many Indonesian works have been decimated in the market by big budget and powerful products of the culture industry in the United States and other

Western developed countries that are the main beneficiaries of the Indonesian copyright law.

Chapter VI will focus on the discussion of the implementation of the TRIPs in Indonesia. This chapter will review the history of the TRIPs Agreement and the reasons for Indonesia's adherence to the TRIPs Agreement in preparation for a discussion of why the TRIPs Agreement has failed to be fully implemented in Indonesia. It will be argued that the TRIPs Agreement fails to work in Indonesia because it is incoherent with the public interest and with the reality of Indonesia's economic, political and cultural conditions. It will be further argued that the TRIPs Agreement was never genuinely intended by the government to provide better intellectual property protection, but, rather, was intended to be a bargaining chip for the country during the negotiations of the Uruguay Round of Multilateral Trade Negotiations, to obtain fairer rules in international trade.

Finally, chapter VII summarises the main arguments and conclusions of the dissertation and presents a number of recommendations for the appropriate implementation of acceptable intellectual property laws in Indonesia.

One further preliminary matter should be addressed here, namely, the meaning to be attributed to the use of the word 'culture' throughout this thesis. There are of course, many different understandings and formulations of the concept of 'culture.' The particular formulation which I wish to adopt here and throughout this dissertation is as follows:

The totality of usages and adjustments which relate to family, political formation, economy, labor, morality, custom, law, and ways of thought.

These are bound to the life of the social entities in which they are practiced and perish with these; . . . ¹⁰

In addition to that, the references of “the West” and “Western” made throughout this dissertation, needs to be formulated in a definition to give understanding of what this dissertation means of those references. Definitions of “the West” and “Western” which are adopted in this dissertation, refers to the definitions given by some well-known dictionaries. “The West” here means the non-communist countries of the Western Europe, North America, and some other parts of the world. Meanwhile, “Western” means something related to a region conventionally designated West. ¹¹

¹⁰ Thurnwald, R., *Der Mensch geringer Naturbeherrschung: sein Aufstieg zwischen Vernunft und Wah* (Berlin, 1950) at 104 as cited in Kroeber, A. L. and Kluckhohn, Clyde, *Culture: A Critical Review of Concepts and Definitions* (New York: Vintage Books, 1963) at 81.

For other related formulations, see Herbert Marcuse’s observation that “culture expresses the implication of historical process of society. It relates to the totality of social life in a given situation, that includes both “spiritual world” (culture in the narrower sense) and “civilisation”. Marcuse, Herbert, *Negations: Essays in Critical Theory* (Boston: Beacon Press, 1968) at 94. Edward B. Taylor in 1871 gave a definition of culture that became the most classic one in the field of anthropology and sociology: “Culture, or civilization, . . . is that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society.” Tylor, E.B., *Primitive Culture* (Boston, 1871) at 1 as cited in Kroeber, A. L. and Kluckhohn, Clyde, *Culture: A Critical Review of Concepts and Definitions* (New York: Vintage Books, 1963) at 81. Herskovits in 1948 explained that “. . . culture is essentially a construct that describes the total body of belief, behaviour, knowledge, sanctions, values, and goals that mark the way of life of any people.” Herskovits, M. J., *Man and His Works* (New York, 1948) at 625 as cited in Kroeber, A. L. and Kluckhohn, Clyde, *Culture: A Critical Review of Concepts and Definitions* (New York: Vintage Books, 1963) at 81.

¹¹ See *Oxford Advanced Learner's Dictionary, Encyclopedic Edition* (Oxford: Oxford University Press, 1992) at 1030

Cambridge International Dictionary of English (Cambridge University Press, 2001) at http://dictionary.cambridge.org/define.asp?key=west*2+0

Cambridge Learner's Dictionary ((Cambridge University Press, 2001) at http://dictionary.cambridge.org/define.asp?key=HW*50008854

Merriam-Webster's Collegiate Dictionary at <http://www.m-w.com/cgi-bin/dictionary>

The American Heritage Dictionary of the English Language: Fourth Edition (Houghton Mifflin Company, 2000) at <http://www.bartleby.com/61/55/W0095500.html>



CHAPTER I

THE DEVELOPMENT OF INDONESIA’S LEGAL SYSTEM

A. Introduction

The legal system in Indonesia, together with Indonesia’s history, social life, spiritual, legal-customary norms, and economic development that forms the Indonesian culture, has strongly influenced the development of intellectual property laws and continues to affect its enforcement in Indonesia today. Therefore, it is useful, before specifically discussing Indonesian intellectual property law, to understand the Indonesian legal system and its development from the pre-colonial period until Indonesia’s independence, and beyond. This chapter will accordingly give a general overview of the Indonesian legal systems that were developed in the pre-colonial era, during Dutch and Japanese colonialism, during the Sukarno and Suharto governments, and after the fall of the Suharto government. All of these have had an influence on the subsequent effectiveness of the intellectual property regime in Indonesia.

B. Discussion

Historically, the development of the Indonesian legal system began in the colonial era under the Dutch colonial government. Before the arrival of the Dutch, there was no unified Indonesia. Instead, there were thousands of islands, each with a separately and individually developed and shaped culture.¹² Hundreds of independent kingdoms governed the Indonesian islands. However, among them there was a series of related regional cultural traditions that were

¹² Hardjowardojo R P, “Basic Cultural Influences” in McKay Elaine (ed), *Studies in Indonesian History* (Australia: Pitman Publishing Pty Ltd, 1976) at 1

developed through trading and sometimes wars between the kingdoms.¹³ Each island and kingdom maintained its own traditions and customs which were based on the social and religious duties of the communities. The customary law of the communities in the archipelago was known as *Adat*.¹⁴

When the Dutch came to colonise the archipelagic islands in the sixteenth century, they called the archipelago the Netherlands East Indies. However, it was only as late as 1910 when the Dutch colonial government successfully conquered the whole of the islands and created a single colony with Batavia (now Jakarta) as the capital city for the colonial government. The boundaries of the present Republic of Indonesia were roughly drawn by the Dutch rulers at a great cost in lives, money, devastation, social cohesion, human dignity and freedom.¹⁵ The Dutch colonial government brought a new system of governmental administration including its legal system to people of the Netherlands East Indies. Many of these Dutch-appointed administrators abolished feudal political systems, traditional ceremonies and customs of “inlanders” (native) and violated historical ways of life and forms of social organisation.¹⁶

¹³ Ricklefs M. C., *A History of Modern Indonesia Since c. 1300* (The Macmillan Press Ltd, 1993) at 50

¹⁴ Spruyt, J and Robertson, J B, *History of Indonesia the Timeless Islands* (Australia: Macmillan, 1973) at 13

Grant, Bruce, *Indonesia* (Australia: Melbourne University Press, 3rd ed, 1996) at 4

¹⁵ Ricklefs M. C., above n13 at 146

¹⁶ The term “Indonesian” to call natives of the Netherlands East Indies was first used in August 1940, when Indonesian members of Volksraad (People’s Council) demanded the Dutch colonial government to use the term “Indonesian” rather than “inlander” in official documents to define an Indies nationality. *Id* at 194

1. The Development of Legal System in Colonial Era

1.1. The Dutch Colonial Legal System

There was no clear legal system established by the Dutch colonial government in the Netherlands East Indies until 1848, although the Dutch traders had engaged in a lot of business that exploited the Indonesian natives (inlanders) in forced labour plantations since the sixteenth century. Only after 1848, in order to give legal security to Dutch trading activities, did the Dutch imperial government in the Netherlands codify the law for the Netherlands East Indies by enacting a *Civil Act (Burgelijk Wetboek)* and a *Commercial Act (Wetboek van Koophandel)* for Europeans in the Netherlands East Indies. After the increasing contacts with the Indonesian natives, following the establishment of tea, coffee, rubber and sugar companies, the Dutch government began to formulate a policy regarding laws for Indonesian natives.¹⁷

When the Dutch government started formulating a system of civil law for Indonesian natives, there were two different opinions from Dutch scholars on how to impose Dutch civil law for Indonesian natives. Nederburgh, supported by the Dutch government, was in favour of one civil law for all citizens in the Netherlands East Indies. Nederburgh argued that Indonesian natives had been ready to conduct many kinds of modern business activities, and this process had to be supported with the same civil law as the Dutch.¹⁸

But other Dutch scholars, Cornelis Van Vollenhoven and Barend ter Haar challenged Nederburgh’s opinion and argued that Indonesian natives

¹⁷ Subekti, *Law in Indonesia* (Jakarta: PT. Gunung Agung, 1973) at 9

already had and believed in their own customs and norms that were different from the Dutch.¹⁹ Unlike the French, who considered that their culture, including their legal system, was superior to the cultures of their colonies, these Dutch scholars considered that all legal systems should be equal.²⁰ They argued against the rapid Westernisation of Indonesia, especially when it came with the introduction of a codified Western legal system.²¹ By 1920, van Vollenhoven, Ter Haar, and their supporters successfully convinced the Dutch government to give up their policy of unifying civil law for all citizens in the Netherlands East Indies.²² The Dutch government allowed Indonesian natives to use their own customs and norms, called *Adat* as their law. *Adat* was basically uniform throughout Indonesia, because it derived from the most ancient layers - the common matrix- of Indonesian life. However, it was also true that *Adat* varied considerably from ethnic group to ethnic group, from *desa* to *desa* (“village”) and from generation to generation. While stable, *Adat* is not immutable.²³ *Adat* is a complex of beliefs and norms, which is capable of adopting new ideas or cultures, as long as the new ideas or cultures are acceptable according to the common matrix of Indonesian life.²⁴

Based on the Constitution of the colony, according to first article 109 *Regerings Reglement* of 1920, and later article 163 *Indische Staatsregeling* of 1926, citizens in the Netherlands East Indies were divided into three legal groups with different civil laws for each group: Indonesian natives,

¹⁸ Lev, Daniel S., *Hukum dan Politik di Indonesia Kesenambungan dan Perubahan* [Law and Politics in Indonesia, Continuity and Change] (Jakarta: LP3ES 1990) at 79

¹⁹ *Id.*, at 1

²⁰ *Id.*, at 79-80

²¹ Hooker, M. B., *Adat Law in Modern Indonesia* (Kuala Lumpur: Oxford University Press, 1978) at 15

²² Lev, Daniel, above n18 at 2

²³ Sievers, Allen M., *The Mystical World of Indonesia: Culture & Economic Development in Conflict* (Baltimore and London: The Johns Hopkins University Press, 1974) at 20

²⁴ For example, before Islam came to Indonesia, Hinduism was a major religion in Indonesian archipelago (circa A.D. 100). However, Hinduism passed through many changes because of the compromise with

Europeans, and Foreign Orientals (that included Chinese, Indians or Arabs living in the Netherlands East Indies).²⁵ Article 131 *Indische Staatsregeling* confirmed that *Adat* together with native religious rules remained the law applicable to Indonesian natives. For Europeans, the law applicable to them was the Dutch law. Foreign Orientals were partially subjected to the Dutch *Civil* and *Commercial* Acts. By the end of the Dutch rule in the Netherlands East Indies, only very few Indonesian natives had been subjected to Dutch laws. This happened when they made working contracts with Dutch companies or because they took part in the government policy called “deliberate submission” (*vrijwillige onderwerping*) that allowed non- Europeans groups (Indonesian natives and Foreign Orientals) to submit themselves to the Dutch civil law.²⁶

In order to apply the various laws to the segregated population, the Dutch government introduced a segregated court system.²⁷ The court segregation was based on religion. Those who were Christian, with the exception of Christian natives, belonged to the European court system, and the rest belonged to the Indonesian native court system.²⁸

The Dutch colonial government imposed a different policy regarding the criminal legal system. In 1914, the colonial government unified criminal law and enacted a *Criminal Act* (*Wetboek van Strafrecht voor Nederlandsch Indie*) that was applicable to all citizens in the Netherlands East Indies.

the traditional Indonesian belief. It was important not to apply the strict caste system that had developed in India (the birth place of Hinduism), as Indonesia had no strict class-consciousness. *Ibid*

²⁵ Bakri, Muhamad, *Sistim Hukum di Indonesia* [Legal System in Indonesia] (Malang, Indonesia: Faculty of Law, Brawijaya University 1983) at 44-47

²⁶ Antons, Christoph, above n2 at 94, 402, 403

Bakri, Muhamad, above n26 at 40-48, 66-80

Sodiki, Achmad, *Pengantar Tata Hukum Indonesia (Pengetahuan Dasar Tentang Hukum Positif Indonesia)* [The Introduction of the Hierarchy of Indonesian Law (The Basic Knowledge of Indonesian Positive Law)] (Malang, Indonesia: The Faculty of Law, Brawijaya University 1983) at 6-18

²⁷ Reglement of de Rechterlijke Organisatie en het Beleiddan Justitie, S 1847:23 jot S. 1848: 57 and Rechteregelement Buitengewesten S 1927: 277

There was no segregation in the criminal legal system and therefore, no recognition of *Adat* criminal law for Indonesian natives. This policy could be viewed as an effort by the colonial government to control the independence movements which had started to emerge in the Netherlands East Indies. By imposing the Dutch *Criminal Act* on Indonesian natives, the colonial government could use some Dutch criminal provisions regarding hate sowing and offences against the King and the Governor General to suppress the independence movements and jail those who were involved.²⁹

1.2. The Japanese Colonial Legal System

Japan took over, by force, the Netherlands East Indies from the Netherlands in 1942. During its occupation in 1942-1945, the Japanese colonial government planned to reform and simplify the complex Dutch legal system. The Japanese colonial government abolished the dual court system, replacing it with one court system for all.³⁰ However, given that its period of occupation was brief, the Japanese colonial government did not have time to reform the segregated civil law before its surrender to the Allied forces in 1945.

²⁸ Article 6-10 Algemane Bepalingen van Wetgeving 1848

²⁹ See the *Dutch Criminal Act* articles 134, 137(1), 154, 155, 156, 207 and 208.

2. The Development of Legal System after Independence

2.1. The Sukarno Government

Before Japan surrendered to the Allied forces on 11 August 1945, the Japanese Commander of the Southern Area, Field Marshal Terauchi Hisaichi, promised Indonesian leaders, Sukarno, Hatta and Radjiman, independence for the whole of the former Netherlands East Indies.³¹

On 15 August 1945 Japan surrendered unconditionally to the Allied forces, and on 17 August Indonesia proclaimed its independence. As an independent nation, the leaders of the Indonesian people, backed by popular sentiment, wanted to have their own laws, on the basis that the Dutch-derived legal system had excluded and disadvantaged Indonesian natives. However, in the early years of independence (1946-1948), the new Republic had more pressing problems to address than a complete review of the legal system because the Dutch invaded again to reclaim Indonesia as their colony.³² Therefore, during this crucial time, Article II of the Transitional Provisions of the Indonesian Constitution 1945 together with the accompanying Government Decree No. 2 of 10 October 1945 provided that “all existing state institutions and regulations remained effective, as long as the new ones had not yet been provided under this Constitution.”³³ It meant that the Indonesian government retained all colonial regulations and institutions as long as they did not contradict the Indonesian Constitution 1945.³⁴

³⁰ Lev, Daniel S., above n18, at 78

³¹ Ricklefs M. C., above n13 at 210

³² International Commission of Jurists and the Netherlands Institute of Human Rights, *Indonesia and the Rule of Law: Twenty Years of ‘New Order’ Government* edited by Thoolen, Hans (London: Frances Pinter (Publishers) Limited, 1987) at 5

³³ Antons, Christoph, above n2 at 403

³⁴ Gautama, “Legal Developments in Independent Indonesia (1945-1970)”, (December 1970) *Lawasia* at 157-158 cited in Antons, Christoph, above n2 at 403

After the exhausting war with the Dutch that finally ended in 1949, there was little basis for Indonesia’s development. The Dutch left ninety percent of Indonesians illiterate.³⁵ It is clear that, for the Dutch, education could and would bring all sorts of destabilising notions of equality, so it was safer to keep most Indonesian people ignorant.³⁶ Only two million children were attending schools and there was only one university in Jakarta, which had opened in 1941 and produced two-hundred-fifty graduates. The economy was ruined because of occupation and war. Separatist rebels had sprung up in different places.³⁷ The government set aside its plan to codify and unify a national law for Indonesians to deal with these more pressing issues. Instead, for practical purposes, all Dutch laws were kept in force. So as to avoid the complexity of *Adat* laws which were not codified and unified, legal authorities enforced all Dutch private and commercial laws for all Indonesians, with the exception of marriage and family law.³⁸

However, the Sukarno government, which was very nationalistic, still intended to enact national laws which were based on Indonesia’s own values. The “*Eight-Year Overall Development Plan 1959-1960*”,³⁹ emphasized the importance of abolishing colonial laws and developing distinctively Indonesian national laws in order to prevent domination of foreign culture over national culture.⁴⁰

³⁵ International Commission of Jurists, above n32 at 6

³⁶ Spruyt, J. and Robertson, J. B., above n14 at 121

³⁷ International Commission of Jurists, above n32 at 6

³⁸ The exception was Book I of the Dutch Civil Code, as this Book governed marriage and family law which were mostly unacceptable for native Indonesians who had different belief from Dutch.

³⁹ The national development plan which was drafted by the National Development Council and approved by the People’s Consultative Assembly, the highest state institution in Indonesia

⁴⁰ Lev, Daniel S., above n18 at 87

In reality, the plan to reform the legal system failed to be carried out. The government only made legal reforms to agrarian law by enacting the *Agrarian Act 1960*. The other Acts passed by the nationalist government, such as, the *Labour Act 1964* and the *Trademark Act 1961*, did not really reform the laws, as those Acts were only copies of the Dutch Labour and Trademark Acts.

The government, which was dominated by the figure of the President, was more concerned to maintain political stability than to reform the legal system. President Sukarno became more repressive, maintaining his position by weakening the independence of legislative and judicial bodies. Legislative members were appointed by the President and some judges became members of the Cabinet.⁴¹ The independence of the courts was diminished with the enactment of Act No. 19/1964 and Act No. 13/1965, both of which allowed intervention of the President and Minister for Justice in judges’ work.⁴²

2.2. The Suharto Government (New Order Government)

On the night of 30 September 1965, the Indonesian Communist Party (PKI) launched a coup and killed six top army generals, out of fear that the army was planning a purge against the PKI. The army, led by Major-General Suharto, the Chief of the Army Strategic Command, was successful in defending the government and fighting back the

⁴¹ Lev, Daniel S., “Introduction”, at xii-xiii

Lev, Daniel, “Reformasi Hukum Tergantung Reformasi Politik” [Law Reform Depends on the Political Reform] *KOMPAS Cyber Media*, <http://www.kompas.com/kompas-cetak/9904/29/NASIONAL/refo15.htm> (29 April 1999) at 2-3

⁴² Rahardjo, Satjipto, “Hukum dalam Perspektif Sejarah dan Perubahan Sosial” [Law in the Perspective of History and Social Change] in Alkostar, Artidjo and Amin, M. Sholeh (ed), *Pembangunan Hukum*

communists. Major-General Suharto mobilised the army against the leaders of the PKI, all communist organisations, their members, followers and sympathisers. Within a month the army had been able to control the chaos left by the abortive communist coup.⁴³ Although President Sukarno was still in charge following these events, he had been weakened by the army, which had taken effective control of government business.⁴⁴

Sukarno died in 1970, and as the result of the general election in the same year, General Suharto was elected to be the new Indonesian President. President Suharto called his government the “New Order” government to show its ideological reversal of the Sukarno government in both internal and external policy.⁴⁵

The New Order government inherited a bad economic situation and political instability from the Sukarno government. There was only an average 2% annual growth in real Gross Domestic Product (GDP), investment in public and private sectors had declined and the rate of inflation had accelerated, reaching an annual rate of over 600% in 1966.⁴⁶

Many people started demanding the restoration of the rule of law and a constitutional state (*rechtstaat*), both of which had been neglected by the

dalam Politik Hukum Nasional [The Law Development in the Political Perspective of National Law] (Jakarta: CV. Rajawali, 1986) at 67

⁴³ However, it is also argued that the army also caused chaos and committed atrocities by initiating and encouraging anti-communist revenge among local army units, landlords, fanatical Muslim youth groups, and individuals, to slaughter some 500,000 peasants, workers, youth, teachers, accused of being sympathizer of PKI in Java, Bali, Lombok, Sulawesi, and Sumatera.

See Ricklefs M. C., above n13 at 274

Caldwell, Malcolm and Utrecht, Ernst, *Indonesia, An Alternative History* (Australia: Alternative Publishing Co-operative Limited, 1979) at 133

Grant, Bruce, above n14 at 139-140

Spruyt, J and Robertson, J B, above n14 at 195

Sievers, Allen M., above n21 at 182

⁴⁴ International Commission of Jurists, above n32 at 7

⁴⁵ *Ibid*

⁴⁶ *Id.*, at 9

Sukarno government.⁴⁷ However, the New Order government, heavily backed by the Indonesian army (ABRI), preferred to give priority to financial and economic rehabilitation to slow down inflation, to increase export production and to secure an adequate provision of rice, the main staple for Indonesians.⁴⁸ To achieve these objectives, the government needed political stability. The government had learned that although from the late 1950s to the mid-1960s, democratic life had flourished in Indonesia with a proliferation of political parties and active participation by parliamentary members, yet at the same time, Indonesia’s economic situation had badly deteriorated. Polarisation and political conflicts had weakened the country’s ability to develop its economy.⁴⁹

To develop the Indonesian economy, the New Order Government framed the Five Year Development Plans (REPELITA). During the REPELITA III (1978/9 - 1983/4), Indonesia entered an era of heavy dependence on foreign capital to fund Indonesia’s development.⁵⁰ Before the REPELITA III, the Indonesian government was actually able to resist demands for opening Indonesian markets and liberalising the economy, as Indonesia could still rely on its high revenue from the sales of oil and gas by the state company, Pertamina.⁵¹

This protectionist policy was no longer sustainable after the sharp decline in the world oil price in the mid 1980s. From then on, the World Bank and International Monetary Fund (IMF), the two major international institutions responsible for financing economic development in Indonesia, pushed the Indonesian government to change their policy from

⁴⁷ Lev, Daniel S., above n18 at 252

⁴⁸ International Commission of Jurists, above n32 at 9

⁴⁹ “Mampukah Pertumbuhan Ekonomi Memacu Transformasi Politik?” [Can the Economic Development Accelerate Political Transformation?] *KOMPAS* (15 August 1995) 1

⁵⁰ International Commission of Jurists, above n32 at 10

⁵¹ Antons, Christoph, above n2 at 412

development which was based on import substitution to a strategy of export-oriented industrialisation.⁵² Other financial institutions and aid organisations began to tie the granting of credits and loans to the implementation of policies which were conducive to export-oriented industries and foreign investment.⁵³ Being helped by Indonesian technocrats who were mostly educated in the United States, the Indonesian government started implementing the policy of export-led development.⁵⁴ In REPELITA IV, which started in April 1984, the economy grew rapidly with an average growth of 7.8% per year.⁵⁵

Since 1982, Indonesia left its status as a low-income developing country and entered the group of middle-income countries.⁵⁶ In the following fifteen years, the government had been able to accelerate the rate of annual economic growth to a level in excess of 6%, control inflation, transform an economy which was largely dependent upon agricultural and mineral exports to one increasingly based on manufacturing and industry, raise levels of nutrition, health care and education⁵⁷ and reduce the level of absolute poverty from 58% to 17%.⁵⁸

⁵² Robison, Higgott and Hewison, “Crisis in Economic Strategy in the 1980s: The Factors at Work” in Robison, Hewison and Higgott (eds), *Southeast Asia in the 1980s: The Politics of Economic Crisis* (Sydney-London_Boston, Allen and Unwin, 1987) at 6 as cited in *Ibid*

⁵³ *Id.*, at 8-9 as cited in Antons, Christoph, above n2 at 411-412

⁵⁴ Antons, Christoph, “The Development of Intellectual Property Law in Indonesia: From Colonial to National Law” (1991) 22 *International Review of Industrial Property and Copyright Law* at 375

⁵⁵ International Commission of Jurists, above n32 at 11

⁵⁶ International Commission of Jurists, above n32 at 8

Keating, Paul, “Public lecture at the University of New South Wales: The Perilous Moment: Indonesia, Australia and the Asian Crisis” *Australian Financial Review*, <http://www.afr.com.au/content/980326/verbatim/verbatim1.html> (26 March 1998) at 4-5

⁵⁷ Brown, Collin, “Indonesia - Recent History” <http://www.abc.net.au/news/special/page01.htm> (18 May 1998)

KOMPAS (15 August 1995) above n49 at 1

⁵⁸ *The East Asian Miracle: Economic Growth and Public Policy* (New York: Oxford University Press 1993) as cited in “Indonesia, Satu dari Delapan Negara dengan Kejayaan Pertumbuhan Ekonomi” [Indonesia, One of the Eight Countries with Miraculous Economic Growth] *KOMPAS* (18 October 1993) at 1

The World Bank praised the Indonesia’s economic achievement. In studies reported in *The East Asian Miracle: Economic Growth and Public Policy* (New York: Oxford University Press 1993) the World Bank categorised Indonesia, together with Malaysia and Thailand as a “newly industrialising economy” and one of the “high-performing Asian economies”.⁵⁹

Since the World Bank had been the major financial source for Indonesian development⁶⁰, the Indonesian government had to follow the World Bank’s Structural Adjustment Policy, which mainly involved facilitating free market and capital flows to achieve high economic development.⁶¹

To implement the World Bank’s policy, the New Order government accepted conditions which foreign investors usually demanded, such as, the introduction of legislation allowing the favourable transfer of profits and special tax facilities for new foreign capital investments.⁶²

Political stability and economic development were the main priorities for the New Order government,⁶³ while law reform was conducted only to support economic development and political stability,⁶⁴ including among others, the reform of investment laws, intellectual property laws,

⁵⁹ The other high performing Asian economies were Japan, Hongkong, Singapore, Taiwan, South Korea, Thailand, and Malaysia.

⁶⁰ During July 1991 to June 1992, Indonesia was the second biggest debtor of the World Bank, followed by the People’s Republic of China, Mexico, and India. See “Bank Dunia Dalam Dilema” [The World Bank in Dilemma] *KOMPAS* (1 April 1993) at 1

⁶¹ Arief, Sritua and Widyatmadja, P. Josef, “Bank Dunia Digugat” [The World Bank was Disputed] *KOMPAS* (16 November 1994) at 4

⁶² Caldwell, Malcolm and Utrecht, Ernst, above n43 at 146

⁶³ The Suharto government named their strategy of development as “Trilogi Pembangunan” (Trilogy of Development) which consisted of even distribution, development, and political stability.

⁶⁴ Nusantara, Abdul Hakim Garuda, *Politik Hukum Indonesia [Indonesian Legal Policy]* (Jakarta: the Indonesian Legal Aid Foundation (YLBHI), 1988) at 18

company laws, stock market laws, parliament laws, general election law, press law.⁶⁵

The idea, declared after independence, of developing national laws was, in large part, never realised. Indonesia still used many Dutch colonial laws, such as, the *Dutch Civil Act*, *Criminal Act*, *Commercial and Bankruptcy Act*, although many articles in the Acts were no longer suitable for the post-independence situation.

Law enforcement was the main legal problem in Indonesia. Although the government had conducted law reform as demanded by international communities and Indonesian legal scholars, at the same time they ignored the legal system to run their own policy.⁶⁶

Without democracy, which was eliminated by the policy of political stability, the economic benefits of the more than 6% annual economic growth were not evenly distributed. The gap between the rich and poor in Indonesia widened. Despite this, world bodies such as, the IMF and World Bank often cited Indonesia a good model of intelligent macro-economic development.⁶⁷ Industrialised countries and world organisations were more interested in political stability than in

⁶⁵ “Produk dan Lembaga Hukum Masih Seperti Dipasung” [Legal Product and Institutions are Suppressed] *KOMPAS* (12 July 1993) at 1

⁶⁶ Winarta, Frans Hendra, “Keppres Sarana Legitimasi Praktek KKN” [Presidential Decrees Legitimise Corruption, Collusion, and Nepotism (KKN)] *KOMPAS Cyber Media*, <http://kompas.com/kompas-cetak/9810/26/NASIONAL/cata09.htm> (26 October 1998)
“MTI: 79 Keppres Soeharto Menyimpang” [Indonesian Transparency Society (MTI): 79 of Soeharto’s Presidential Decrees are Fraud] *KOMPAS Cyber Media* (17 October 1998)
“Hidup dalam Khayalan Negara Hukum” [Live in the Fantasy of a State of Law] *KOMPAS Cyber Media* (9 November 1998)
“Presiden Dapat Tinjau Keppres Bermasalah” [President can Review Fraud Presidential Decrees] *KOMPAS Cyber Media*, <http://kompas.com/kompas-cetak/9810/27/NASIONAL/pres15.htm> (27 October 1998)

⁶⁷ Brown, Colin, above n57

democratisation in Indonesia because of the interest of developed countries in overseas investment and economic expansion.⁶⁸

Meanwhile, foreign investors in Indonesia were more interested in Indonesia’s natural resources, such as, minerals, oil, wood, fish, than in having the raw materials processed in Indonesia.⁶⁹ The Suharto government, being highly dependent on foreign credit, was reluctant to force these multinational companies to establish processing industries in Indonesia⁷⁰ and transfer their know-how to their Indonesian partners. Most foreign investment in Indonesia consisted of short-term, profit-making schemes that were regarded as “quick-yielding projects”. In fact, most of foreign investment in Indonesia did not bring any improvement in local productivity and consequently, did not benefit the population.⁷¹

The Asian monetary crisis of 1997, created partly by Western currency speculators, made the Indonesian currency, “rupiah”, lose almost 80% of its value. It caused great suffering for many Indonesians who suddenly found the price of goods and services sky-rocketing. Despite the assistance given by the IMF, the government still failed to restore the economy to its previous position.⁷² The inadequacy of the laws and the legal system implementing them also failed to facilitate the restoration of law and order after the crisis. The rioting and mass unrest occurred across Indonesia as a result of the crisis finally forced President Suharto to resign in May 1998, allowing the elevation of his protege, Vice-President DR. BJ Habibie to the presidency. The Habibie government lasted only seventeen

⁶⁸ Hidayat, Dedy N., “Menjelaskan Berakhirnya Rezim Orde Baru” [To Explain the End of the New Order Regime] *KOMPAS Cyber Media*, <http://www.kompas.com/kompas-cetak/9809/10/OPINI/menj04.htm> (10 September 1998) at 4

⁶⁹ Spruyt, J. and Robertson, J. B., above n14 at 200

⁷⁰ Caldwell, Malcolm and Utrecht, Ernst, above n43 at 148

⁷¹ Spruyt, J. and Robertson, J. B., above n14 at 200

⁷² Brown, Colin, above n57

months and was replaced by the democratically elected government under President Abdurrahman Wahid in October 1999.

Unlike its predecessors, the Wahid government is placing greater emphasis on the process of democratisation. It seeks to improve the protection of human rights and the integrity of the political and judicial systems, rather than pursuing economic development and political stability as its main priorities.⁷³ The law reforms of the Wahid government, such as, the enactment of anti-corruption, anti-monopoly, and consumer protection laws, the establishment of a human rights court, could provide better protection of the public interest than that given by previous regimes. The Wahid government has been concerned to restore the rule of law which had been undermined by the previous governments, on the basis that without good laws and a developed, functioning legal system, Indonesia could not recover from the economic crisis quickly, like South Korea, Hong Kong, Thailand, and Malaysia could.⁷⁴ Facing more urgent political, national security and economic problems,⁷⁵ the Wahid government has now deferred what it perceives as non-essential law reforms, including intellectual property law reform,⁷⁶ although such reforms have been demanded by first world countries and organisations, such as the World Trade Organisation.

⁷³ “Menteri Ekuin Makin Enggan Rapat” [Ministers of Economy, Finance and Industry More Rarely Have Meetings] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artickel.preview?cookie=2&inw_id=124352 (8 July 2000)

⁷⁴ “Grasp Opportunity to Recreate RI’s Legal System: Scholar” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/isep_render?menu_name=hitlist_details&id=1611093 (2 June 2000) at 1

⁷⁵ “Permintaan Penundaan Pemberlakuan TRIPs Dinilai Tidak Bijaksana” [The Request to Postpone the TRIPs Enforcement is not Wise] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1999/12/281299/Kesra/ks03/ks03.html> (28 December 1999) at 1

⁷⁶ Holder, Sara, “Significant Developments in Intellectual Property Law in Indonesia - the Past Twelve Months” (1999) *IPProfiles* at 56

C. Conclusion

During the period of Dutch colonialism, the Dutch government respected the *Adat* and allowed Indonesian natives to use their *Adat* as their civil law, instead of the Dutch *Civil Act* (*Burgelijk Wetboek*). Its decision was based on the recognition of the fact that the Indonesian natives already had and believed their own customs and norms, embodied in a legal system called *Adat*, that was different from the Dutch's. The Dutch government considered that all legal systems, including *Adat*, are equal and had to be respected. Therefore, during the period of Dutch colonialism, *Adat* could live side by side with the Dutch *Civil Act* designated for applications to Europeans and Foreign Orientals.

After independence, the Indonesian governments under both President Sukarno and President Suharto, preferred adopting the Dutch civil law (including the *Civil Act* and *Commercial Act*) to developing Indonesia's own national law based on *Adat*. Under pressure from developed Western countries and international organisations, such as, the World Bank and IMF, the Indonesian government, under President Suharto, adopted more Western-style laws, which were useful in encouraging foreign investment and promoting international trade to develop Indonesian economy. Law reforms to develop indigenous law which were based on Indonesia's own values and could protect the public interest were never carried out by the government which was more concerned with economic development based on political stability to maintain their power.

Without an effective legal system and sound laws which reflected the public interest and respected Indonesian values, the benefits of economic growth experienced under the Suharto government were enjoyed by only a small percentage of the population. The gap between the rich and poor widened.

"Indonesia Admits Failure in Implementing WTO Commitments" *The Jakarta Post.com*, http://www.thejakarta.post.com:8890/myrend...article_details&id=656706&category_code=f (22 December 1999) at

Finally, the Asian monetary crisis in 1997 brought Indonesia to severe social and economic crisis that forced President Suharto to resign. The inadequacy of both the laws and legal system of Indonesia materially contributed to the worsening of the crisis.

Learning from previous governments, the Wahid government decides to reform the legal system and develop laws which are consonant with the public and national interests. This has led to the passage of laws relating to human rights, consumer protection, anti-monopolistic practices, and anti corruption measures. Non-essential law reforms, such as intellectual property law reform, have been deferred by the Wahid government despite the demands of first world countries and the WTO. Reform of Indonesia’s intellectual property regime is deemed to be non-essential, as the law is not coherent with the social and economic situation in Indonesia.

Finally, the Indonesian government has realised that Indonesian legislation must be drafted in accordance with Indonesia’s national interest, based on its own national values and needs, otherwise such laws will not bring benefits to the nation. Law reform must respond to and reflect the needs of the Indonesian people, not serve foreign interests.

This brief summary of the development of the Indonesian legal system, in relation to broader political and economic developments within the country, sets the scene for a more detailed analysis of the development and position of intellectual property laws in Indonesian legal system.

CHAPTER II

THE DEVELOPMENT OF INTELLECTUAL PROPERTY LAWS IN INDONESIA

A. Introduction

This chapter will provide an analysis of the development of intellectual property laws in Indonesia from the pre-colonial era until the end of the Suharto government. It will include an analysis of whether the existing intellectual property laws in Indonesia are appropriate to Indonesian culture and the country's stage of economic development, and whether these laws fulfil the interests of the Indonesian people. It is found that there has been and continues to be a wide-spread, entrenched lack of interest among Indonesians towards the creation and enforcement of intellectual property laws. Historically and culturally, most Indonesians still hold to *Adat* norms that do not recognise private-sector, individual ownership in intellectual works or inventions. This factor contributes to the denial of rationales for protection of intellectual property rights, acknowledged in many Western countries. These rationales are classically based on moral considerations that recognise the owner of intellectual property works to have natural right to what they create against "free-rider"⁷⁷ and also based on economic reason that gives commercial value of creative works to those who invest, prepare, and develop it.⁷⁸

⁷⁷ This consideration is also adopted in the United Nations' Universal Declaration of Human Rights, Article 27(2): "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". While Article 27(1) states that: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".

McKeough, Jill and Stewart, Andrew, *Intellectual Property in Australia* (Australia: Butterworths, 2nd ed, 1997) at 16-17

⁷⁸ McKeough, Jill and Andrew, Stewart, above n77, at 17

Also see Drahos, Peter, *A Philosophy of Intellectual Property* (Aldershot: Dartmouth, 1996) at 13

Furthermore, the origins of the existing intellectual property regime in Indonesia lie, not in Indonesian society, but rather in Western countries, dating back to the era of English stationers' monopoly in the fifteenth century and Venetian inventor's monopoly granted in 1200s⁷⁹. They have profoundly different economic interests and cultural values from those of Indonesian society. It is found that the type of regime envisioned by the new global system of intellectual property protection is not in fact socially optimal for Indonesia at this time. These factors contribute greatly to the difficulty of enforcing intellectual property laws in Indonesia.

B. Discussion

Intellectual property laws in Indonesia were not and never have been genuinely developed by Indonesians themselves. Before independence, the Dutch colonial government enacted intellectual property laws which were unenforceable for native Indonesians because of the segregation between the Dutch legal system and native *Adat*, described in Chapter I. After independence, Dutch intellectual property laws were adopted by the Indonesian government because of the transitional provisions of the Indonesian Constitution 1945. The enforcement of intellectual property laws has continued, though in a weak and sporadic way, until the present time, mainly because of economic pressure from Western developed countries and international financial organisations.

⁷⁹ McKeough, Jill and Andrew, Stewart, above n77, at 14, 120, 271
Drahos, Peter, above n78, at 14, 22-28
www.patentsonline.com.au at <http://www.patentsonline.com.au/miscell/dou.html>

1. Before the Dutch Colonial Era

Long before it was discovered by European traders in the sixteenth century, the Indonesian archipelago had developed a diverse and rich amalgam of religions and cultures. It had cities, temples, irrigation systems, orchestras, shipping, art and literature. In fact, the Indonesian archipelago was not at all “underdeveloped” if compared to Europe of that time.⁸⁰

The earliest Indonesians are believed to be Malays from Indochina.⁸¹ They lived in co-operative communities. The people had social and religious (animism) duties which were gradually refined to form a coherent body of behaviour known as *Adat*.⁸² Although it is true that *Adat* varies from ethnic group to ethnic group, from village to village, and from generation to generation⁸³, all *Adat* follows some general principles that could be found throughout the archipelagic islands to promote social stability.⁸⁴ These general principles of *Adat* recognise that the community is more important than the individual, that the richer must help the poorer, that the experienced (normally the older) must guide the beginner (normally the younger), and that although a person may inherit his or her parents’ land, the ownership is controlled by the community.⁸⁵

Although *Adat* recognises individual possession of material goods, it never allows individual rights of possession to override principles of the public interest and the social function of goods. The communal norms of this ancient form of social organisation present a powerful alternative to contemporary

⁸⁰ International Commission of Jurists, above n32 at 5

Grant noted that, “[t]he distinction between being ‘primitive’ and being ‘civilised’ has become blurred as we have become more aware of criteria other than material wealth”. Grant, Bruce, above n14 at 4

⁸¹ International Commission of Jurists, above n32 at 2

⁸² Spruyt, J. and Robertson, J. B., above n14 at 13

Grant, Bruce, above n14 at 4

⁸³ Sievers, Allen M., above n23 at 20

⁸⁴ Grant, Bruce, above n14 at 126

⁸⁵ Spruyt, J. and Robertson, J. B., above n14 at 13

dominant Western political philosophies that regard individuals as the center of law protection, so that the individual's life, property and liberty must be the focus of law protection. In Indonesian society, the focus of law protection is not on individuals, but on communities.⁸⁶ An individual, in the cosmology of Indonesian society, cannot be separated from his or her surrounding environment –the community, nature, and even the supernatural spirit.⁸⁷

There is no monopoly of property according to *Adat*, as an individual together with his or her properties becomes an unseparated part of the surrounding environment.⁸⁸ When certain members of a community act, all will be benefited or injured together.⁸⁹ This means that an individual must be able to justify the use and exploitation of his or her property to the community, to nature, and to the supernatural spirit. This helps explain why, before Dutch colonisation, the concept of a monopoly over intellectual works was unknown in Indonesian society, as intellectual works were important not only for individual owners, but also for the communities to which they belonged.

Many artistic and literary works had been created by Indonesians long before the arrival of Europeans. In apparent contradiction to the tenets of the incentive theory currently used to justify intellectual property rights, creativity flourished in Indonesian archipelago even though there was no intellectual property protection. Indonesian artists and authors created many artistic and literary works without try to retain their works are their own private properties. Traditionally, artists and authors did not put their names

⁸⁶ Soepomo, *Bab-bab tentang Hukum Adat [Chapters of Adat Law]* (Jakarta: Pradnya Paramita, 2nd ed, 1977) at 113

⁸⁷ Afandi, Ali, *Kedudukan dan Pengaruh Hukum Asing Didalam Pembinaan Tata Hukum di Indonesia [The Position and Role of Foreign Law in the Development of Legal System in Indonesia]* (Jogja, Indonesia: University of Gajah Mada, 1971) at 7-8

⁸⁸ Ter Haar defined it as the non-material environment, the external environment and parts of the material world. Haar, B. Ter, *Adat Law in Indonesia*, at 53

or signatures on their works.⁹⁰ Other people could freely use the artists' and authors' works and the works were part of the public domain⁹¹. Indonesia was famous for its folklore that included dances, songs, stories, sculptures, batik, architecture and paintings. Even though Indonesian society could freely use the works, it did not mean that there was a lack of respect for or recognition of the works and their creators. For example, all the Indonesian people recognise that "Negarakertagama" (Guidelines to Govern A Country) was written by Empu Tantular (a Javanese spiritual leader) and "Indonesia Raya" (the Indonesian anthem) was written by W.R. Soepratman. Indonesian teachers keep telling their students of who are the authors of Indonesian famous works.⁹² Because of cosmic and communal culture, Indonesian artists and authors would be happy if their works became part of the public domain and benefited other people.⁹³

Adat would give a form of intellectual property monopoly protection to a work only to preserve the religious value of the work. For example, in West Papua, sculptures made by members of the Asmat tribe would be regarded as sacred and precious, so nobody else would dare to make copy of the sculptures.⁹⁴

⁸⁹ *Ibid*

⁹⁰ Surachman, "Setelah Amandemen Terbaru: UU Hak Cipta" [After the Latest Amendment: Copyright Act] *Suara Pembaruan Online*, <http://www.suarapembaruan.com/News/1997/11/211197/OpEd/opiniO2/opiniO2.html> (27 November 1997)

⁹¹ Jessica Litman defines public domain as "...a true commons, comprising elements of intellectual property that are ineligible for private ownership." Litman, Jessica., "The Public Domain" (1990) 39 *Emory Law Journal* at 975

See also Benkler, Yochai., "Free As The Air To Common Use: First Amendment Constraints On Enclosure Of The Public Domain" (1999) 74 *New York University Law Review* at 354

⁹² Kesowo, Bambang, *The WTO Business Summit Indonesia Inc & Era WTO, Ketentuan-ketentuan GATT yang Berkaitan dengan Hak Milik Intelektual (TRIPs)* [*The WTO Business Summit Indonesia Inc & the WTO Era, the GATT Rules that Relates to the TRIPs*] (Jakarta: Ministry of Trade, 1994) at 9

⁹³ Heliantoro, "Undang-undang Paten Berwawasan Nasional dan Internasional" [Patent Law with National and International Perspective] (1987) 4 *Hukum & Pembangunan* at 372

⁹⁴ *Ibid*

Adat never uses abstract juridical constructions in developing its norms, as Western law does. Western abstract juridical constructions that are developed using postulated (assumed, hypothesised) concepts and processes, such as, movable and immovable goods, tangible and intangible goods, are not known in *Adat*.⁹⁵ On the contrary, *Adat* bases its norms and rules on concrete, real and visible juridical constructions. For examples, a sale agreement in *Adat* takes place only if there has been a real transaction (exchange of goods and money), while a sales agreement according to Dutch law, already takes place when the buyer and seller have reached a consensus.⁹⁶ In *Adat*, goods are always tangible and real to be traded.⁹⁷ A sale agreement is always cash with the exchange ownership of goods.⁹⁸

Therefore, rights in intellectual property are not known in *Adat*, as intellectual property is something intangible, not concrete. *Adat* will only recognise tangible, visible works that have been produced by an individual. Only on a material work (*per se*), can its creators claim ownership and can trade the work. But the creator cannot trade his or her intellectual property, because it is not real, not concrete. For example, in Bali, sculptures of thin girls that symbolise virginity, are widely recognised as the work of a famous Balinese sculptor, Nyana. He can sell his own sculptures, but he cannot prohibit other people to sell copies of his sculptures that they carve by themselves. Therefore, this kind of sculpture is very popular and sold in almost every carving shop in Bali despite the fact that the sculptures are not Nyana's work, but only copies made by other sculptors.⁹⁹

⁹⁵ Mahadi, *Uraian Singkat tentang Hukum Adat Sejak RR Tahun 1854 [A Brief Analysis of Adat Law since RR 1854]* (Bandung, Indonesia: Alumni, 1991) at 71- 73

⁹⁶ *Id.*, at 119

⁹⁷ *Id.*, at 126

⁹⁸ Hadikusumah, Hilman, *Pokok-pokok Pengertian Hukum Adat [Principles of Adat Law]* (Bandung, Indonesia: Alumni, 1980) at 56

⁹⁹ Heliantoro, above n93 at 372

As noted above, a sale agreement in *Adat* is always ‘real’ in the sense of being a complete or cash transaction. A sale agreement can only happen when there is an exchange of goods with a complete payment. The meaning of “sale” in *Adat* is different from that in Western law.¹⁰⁰ Therefore, *Adat* cannot accept the idea of “sale” of intellectual products if buyers or users of the products are obliged to continue paying a royalty of the products to its authors or inventors, after a purchase of the products has been completed. If the buyers or users are under a continuing obligation to pay something (in this case, a royalty) to the authors or inventors of the products, the agreement cannot be treated as a sale agreement, but rather as a loan agreement,¹⁰¹ and it means that the ownership of goods accordingly remains with the authors or inventors. According to *Adat* norms, when buyers or users have made a complete payment for intellectual products, they become the full owners of the goods/products and are entitled to exercise their full rights of ownership in respect of their goods, such as, selling, hiring, renting, copying, performing artistic works contained in the goods.

Adat is so well established that it has survived successive waves of imported religious and social beliefs -Hinduism, Buddhism, Islam and 350 years of Dutch colonialism- and remains today a power in Indonesian culture and a unifying factor for Indonesians.¹⁰² Up to the present day, *Adat* still governs most aspects of the lives and behaviour of most Indonesians.¹⁰³ The survival of *Adat* over thousands of years indicates that it contains cultural norms which reflect and shape the lives of the Indonesian people. The survival of

¹⁰⁰ Soepomo, above n86 at 28

¹⁰¹ Hadikusumah, Hilman, above n98 at 56

According to Hadikusumah, if the buyer has received the good, but the payment has not yet completed, the transaction is called loan agreement, not sales agreement.

¹⁰² Grant, Bruce, above n14 at 4, 126

¹⁰³ Spruyt, J. and Robertson, J. B., above n14 at 13

Hooker noted that “...adat was and remains the law primarily applicable to something like 85% of the population, but it is now increasingly subject to pressure for modernization.” Hooker, M. B., above n21 at 25

Adat for such a long period of time is partly attributable to the fact that *Adat* is not immutable, but willing to adopt new ideas as long as those ideas are consonant with the pre-existing complex of beliefs and norms. In short, *Adat* is no less advanced than the norms of the Western culture, which have been imposed on the lives of Indonesians since the sixteenth century.

In summary, given the strong and pervasive influence of *Adat* and that system's lack of recognition of the kinds of values, transactions and capabilities integral to a modern intellectual property system of rights, the introduction of the idea of intellectual property rights among Indonesians will not be an easy task.

2. The Dutch Colonial Era

Intellectual property law was brought for the first time into the Indonesian archipelago by the Dutch colonial government in 1844 when they occupied the archipelago that they called the Netherlands East Indies. The Dutch enacted a "law concerning the conferring of exclusive rights to inventions, introductions and improvements of objects of art and people's diligence (*Reglement op het verlenen van uitsluitende regten op uitvindingen, invoeringen en verbeteringen van voorwerpen van kunst en volkslijt*¹⁰⁴) which had already been introduced in the Netherlands in 1817. The exclusive rights were comprised of privileges granted by the King of the Netherlands. There was, subsequent to that, however, a strong movement against the protection of intellectual property that resulted in the abolition of this law in the Netherlands in 1869 and one year later, the Netherlands East Indies followed the Netherlands' intellectual property policy.¹⁰⁵

¹⁰⁴ Staatsblad van Nederlandsch-Indie (State Gazette of the Netherlands East Indie) 1844 No. 28

¹⁰⁵ Antons, Christoph, above n54 at 361-362

After fifteen years, largely as a result of international pressure, the Netherlands government reintroduced intellectual property laws¹⁰⁶ and so did the colonial government in the Netherlands East Indies. There was a flurry of legislative activity over the next two decades. The first *Trademark Act*¹⁰⁷ was enacted in the Netherlands East Indies in 1885. The Netherlands East Indies became a member country of the *Paris Convention for the Protection of Industrial Property* in 1888¹⁰⁸ and a member country of the *Madrid Convention for the International Registration of Trademarks* in 1893.¹⁰⁹ The *Trademark Act* 1885 was revised to comply with the *Madrid Convention*, and the new *Trademark Act* was enacted in 1894.¹¹⁰ In 1911, the *Patent Act*¹¹¹ was enacted and it was followed with the *Copyright Act* in 1912¹¹². A new *Trademark Act (Reglement Industriele Eigendom*¹¹³) came into force in 1913. In 1914, the Netherlands East Indies joined the *Berne Convention for the Protection of Literary and Artistic Works*.¹¹⁴

In spite of this record of enacting intellectual property laws in the Netherlands East Indies, the laws were not known to or enforced against most Indonesians. This was because of the law segregation policy imposed by the Dutch colonial government, as discussed in Chapter I. Pursuant to the Constitution of the Netherlands East Indies, the civil law applicable to Indonesian natives was *Adat* that did not recognise intellectual property

¹⁰⁶ Twinomukunzi, Charles, “The International Patent System - a Third World Perspective” (1982) 22 *Indian Journal International Law* at 44-45 as cited in Brenner-Beck, Dru, (1992) 11 *UCLA Pacific Basin Law Journal* at 90 footnote 36

¹⁰⁷ Staatsblad van Nederlandsch-Indie 1885 No. 109

¹⁰⁸ Staatsblad van Nederlandsch-Indie 1888 No. 187/188
Antons, Christoph, above n2 at 402

¹⁰⁹ Staatsblad van Nederlandsch-Indie 1893 No. 99/140

¹¹⁰ Antons, Christoph, above n54 at 362-363

¹¹¹ Staatsblad van Nederlandsch-Indie 1911 No. 136

¹¹² Staatsblad van Nederlandsch-Indie 1912 No. 600
Antons, Christoph, above n2 at 402

¹¹³ Staatsblad van Nederlandsch-Indie 1912 No. 545

¹¹⁴ Staatsblad van Nederlandsch-Indie 1914 No. 797
Antons, Christoph, above n2, at 402

rights. Therefore, the *Patent Act* 1911, the *Copyright Act* 1912, and the *Trademark Act* 1913 did not apply to Indonesians.

However, although intellectual property rights were alien to most indigenous Indonesians, there was an understanding and acceptance of the nature and function of trademarks among them. Trademark law for Indonesians was not exclusively or even primarily related to the protection of intellectual property rights, but rather to the protection of the public as consumers from counterfeit goods. There had been several trademark cases that were brought to the *Landraad* (the District/Official Court for Indonesian natives)¹¹⁵ for the purpose of protecting public or customers.¹¹⁶ According to the *Landraad* decisions, there would be a trademark counterfeits if public had been confused or deceived by similarities between the established trademark and the allegedly infringing one.¹¹⁷ Given the fact that the Dutch *Trademark Act* 1913 was not applicable to native Indonesians, the judges in the *Landraad* developed principles of “judge-made law” in trademark cases in order to protect the Indonesian public or customers.¹¹⁸

To protect customers from counterfeit trademark goods, the Dutch colonial government also imposed criminal sanctions, provided by Article 378, 382bis,

¹¹⁵ The *Landraad* is different from the *Adat/Bumiputera Court*. The *Landraad* was organised by the Dutch colonial government and conducted “in the name of the Queen of the Netherlands”, while *Adat Court* was organised by indigenous (Bumiputera) and not conducted “in the name of the Queen of the Netherlands”. See Sodiki, Achmad, above n26 at 25-26

¹¹⁶ For example, the decisions of the *Landraad* in Medan (North Sumatra) on 27 July 1933 and 12 March 1935. There were also many trademark cases that were brought to the *Raad van Justitie* (the court for Europeans, Foreign Orientals, and Indonesian natives who had cases related to the Dutch civil law). See Gautama, Sudargo and Winata, Rizawanto, *Hukum Merek Indonesia [Indonesian Trademark Law]* (Bandung, Indonesia: Citra Aditya Bakti, 1993)

See Lubis, Mulya T., *Hukum dan Ekonomi Beberapa Pilihan Masalah [Law and Economy, Some Problems]* (Jakarta: Pustaka Sinar Harapan, 1987) at 53

¹¹⁷ Gautama, Sudargo and Winata, Rizawanto, above n116 at 95 - 107

¹¹⁸ The appropriate court for Indonesian natives that brought cases under the *Trademark Act* 1913 was the *Raad van Justitie* (the court for Europeans, Foreign Orientals, and Indonesian natives who had cases related to the Dutch civil laws).

Prof. Soepomo, a well-known scholar in *Adat*, said that *Adat* also included judge-made law, besides customary law and non-statutory law. Soepomo, *Kedudukan Hukum Adat Dikemudian Hari [The Position of Adat Law in the Future]* (Jakarta: Pustaka Rakyat, 1959) at 29-30

383, 393, of the *Criminal Act (Wetboek van Strafrecht voor Nederlandsch Indie)*. The *Criminal Act* was applicable to all citizens in the Netherlands East Indies, including Indonesians.

Until the end of the Dutch rule in Indonesia, Indonesians never recognised rights of individuals on intellectual property, such as, creative works and inventions. The recognition of trademark, however, was not intended to protect intellectual property rights of individual trademark owner, but aimed to protect public from counterfeit goods.

3. After Independence

3.1. The Sukarno Government

Most Indonesians were introduced to intellectual property laws after Indonesia's independence in 1945. To avoid a vacuum of law in Indonesia after its independence, Article II of the Transitional Provisions of the Indonesian Constitution 1945 provided that "all existing state institutions and regulations remained effective, as long as the new ones had not yet been provided under this Constitution."¹¹⁹ With this constitutional provision, the Indonesian government adopted all Dutch Acts, including Dutch intellectual property Acts, into the Indonesia's legal system and imposed them to all Indonesians. The government also declared that it would retain the Netherlands East Indies' membership in various international conventions of intellectual property rights entered into by the Dutch colonial government. For several years, efforts to develop an indigenous legal system always failed, because of both the continuing struggles against the Dutch and frequent domestic political crises.

¹¹⁹ Antons, Christoph, above n2 at 403

Although legally, the Dutch intellectual property statutes had become a part of Indonesia's legal system, as a matter of fact, intellectual property laws did not have any practical importance in Indonesia. The only exception to this situation was in the area of trademark law. There had been much trademark litigation during the colonial period, with court decisions reported in the Netherlands East Indies' leading journal, *Indisch Tijdschrift van het Recht*. After independence, these law reports continued to be used as references in trademark cases, while further court decisions also continued to be reported.¹²⁰ The Indonesian government also gave specific attention to the development of trademark law. In 1961, they replaced the colonial *Trademark Act* 1912 with the first *Trademark Act* of the Republic of Indonesia No. 21/1961. In its preamble, it was mentioned that the purpose of enacting the *Trademark Act* 1961 was to protect the public from being injured by counterfeit trademark goods.

Trademark law became fairly well developed in Indonesia mainly because of the "communal" culture of the law that aimed to protect the public (customers) from being confused in the marketplace and injured by counterfeit goods. This made the government and judges more willing to enforce the trademark law. Another reason for the development of trademark law was the strong support from local businesspersons and companies who were always interested in protecting their trademarks before the Courts and had money to pay expensive court costs.

In contrast to the *Trademark Act*, the Dutch *Copyright Act* 1912 was neglected in Indonesian legal practice. In 1958, the Sukarno government became more nationalistic and distant from Western countries,¹²¹ and declared the withdrawal of its membership from the *Berne Convention*.

¹²⁰ Antons, Christoph, above n2 at 404

¹²¹ International Commission of Jurists, above n32 at 7
Lev, Daniel S., above n41 at xi

The official reason put forward by the Government was that at the time Indonesia had not yet had its own indigenous *Copyright Act*. It was argued that in order to perform Indonesia's obligations abroad, it was necessary for Indonesia to have an indigenous copyright law, suitable to its status and needs as an independent nation. This reason was also maintained in the draft *Copyright Act* proposed by the National Institute of Legal Development in 1972.¹²² The government also stated that the withdrawal was necessary to enable Indonesians to copy books freely to improve their education level.¹²³ Other justifications put forward in a 1975 seminar arranged by the Ministry of Justice were that: 1) royalty payments to foreign copyright owners were a heavy burden for Indonesian publishers who generally did not have ready access to foreign currency; and 2) comparing the interests of Indonesian authors for their copyright protection abroad and the interests of foreign copyright owners in Indonesia, it was clear that the latter had a much greater interest in the protection of their copyright in Indonesia than Indonesian authors did abroad.¹²⁴ There was also a strategic and political reason behind Indonesia's withdrawal from the *Berne Convention*, namely, to hit the strong Dutch publishing industry in Indonesia, as a reprisal against the Dutch during the fight for West New Guinea (now West Papua).¹²⁵ In summary, the withdrawal from the *Berne Convention* indicated that the Indonesian government had given little positive reception to copyright protection, although they still maintained the Dutch *Copyright Act* 1912.

¹²² Gautama, Sudargo, above n7 at 52

¹²³ Antons, Christoph, above n2 at 408

¹²⁴ Gautama, Sudargo, above n7 at 52-53

¹²⁵ Antons, Christoph, above n2 at 408
Antons, Christoph, above n54 at 367

Publishers' and authors' efforts to raise copyright awareness achieved little.¹²⁶ New bills were drafted several times: in 1958 co-operatively by the Minister of Education, Instruction and Culture and the Minister for Justice; in 1966 by the Institute for the Development of National Law; in 1972 by the Indonesian Publishers Association. However, none of these bills reached the parliament.¹²⁷ It seemed that, unlike the situation in trademark law, the Indonesian public and the government were not ready for a serious engagement with the idea of copyright law.

The *Patent Act* 1911 was the only Dutch intellectual property legislation that was abolished by the Indonesian government. This Act was regarded as being in direct conflict with Indonesia's sovereignty, as the Act provided that while patents were registered in Jakarta, substantial examination of patents had to be filed in the patent office (Octrooiraad) in the Netherlands.¹²⁸

New legislation to replace the *Patent Act* 1911 was drafted several times, in 1955 and 1965¹²⁹, but the government was unwilling to pass a new Patent Act. Instead of passing a new Patent Act, the government, through the Minister for Justice, issued the *Announcement of Minister for Justice* 12 August 1953 No. J.S. 5/41/4 B.N. 55 to accommodate provisional registration of domestic patents and the *Announcement of Minister for Justice* 29 October 1953 No. J.G. 1/2/17 B.N. 53-91 to accommodate

¹²⁶ The reasons why some Indonesian publishers and authors, the members of the IKAPI and OPI organisations, started demanding copyright protection as early as the 1950s, and thus, departed from the *Adat* values commonly held by many Indonesian artists and authors, is explained in Chapter V below, page 148-149

¹²⁷ Antons, Christoph, above n2 at 405

¹²⁸ Djumhana, Muhamad and Djubaedillah, *Hak Milik Intelektual (Sejarah, Teori dan Prakteknya di Indonesia [Intellectual Property (The History, Theory and Practice in Indonesia)]* (Bandung, Indonesia: PT. Citra Aditya, 1993) at 80

Antons, Christoph, Paper, above n1 at 1

¹²⁹ Saleh, Ismail, *Hukum dan Ekonomi [Law and Economy]* (Jakarta: Gramedia Pustaka Utama, 1990) at 67

provisional registration of foreign patents.¹³⁰ These *Announcements* were intended to be temporary safeguards for patent registration until the Indonesian government enacted a new Patent Act. In fact, the *Announcements* stayed in force for 36 years before the Indonesian government in the Suharto era enacted a new Patent Act in 1989. It means that until 1989, no single patent was ever granted in Indonesia.

In fact, patent law was not particularly needed in Indonesia because Indonesians themselves hardly produced any technological inventions that were valuable enough to be protected under patent.¹³¹ More than 98% of patent applications in Indonesia were registered by foreigners.¹³² This situation made the government unwilling to enact a Patent Act, because in practice, such an Act would not provide any significant benefit for Indonesians.

In summary, after independence, most Indonesians still did not recognise the intellectual property rights that had been introduced by colonial intellectual property Acts. *Adat* norms that did not recognise intellectual property rights certainly influenced on this situation, but other factors, such as, the level of economic, political, technological development within the country, were also important.

¹³⁰ Djumhana, Muhamad and Djubaedillah, above n128 at 80

¹³¹ Heliantoro, above n93 at 373-374

¹³² “Dirjen HCPM: Daftarkan Ciptaan dan Temuan yang Berkaitan dengan Dagang” [Director General of HCPM: Register Works and Invention Related to Trade] *KOMPAS Online*, <http://kompas.com/9709/09/HUKUM/daft.htm> (9 September 1997) at 2

3.2. The Suharto Government

When Suharto took over the government from Sukarno in 1966, he inherited substantial economic and political instability from his predecessor.

Starting from 1967, his government introduced a series of statutes to provide a more favourable investment climate for and to attract foreign investors. For example, the government enacted the *Foreign Investment Act* No. 1/1967 as amended by Act No. 11/1970 that provided a new tax incentive, the *Forestry Act* No. 5/1967 and the *Mining Act* No. 11/1967 that met demands of foreign investors, and the *Government Regulation* No. 16/1970 that liberalised control on foreign exchange.¹³³

The government did not, however, include intellectual property legislation as part of the legislative package to attract foreign investors. Like the previous government, the Suharto government neglected intellectual property law (except for trademark law), because of its little practical importance for Indonesians. In spite of this, foreign investors kept coming to Indonesia because of other attractive conditions, such as, tax incentives, freedom of capital flow, low labour costs, cheap raw materials. The government also offered political stability to attract foreign investment by enacting a series of political laws¹³⁴ and by maintaining Sukarno's anti-subversion laws¹³⁵ that effectively suppressed any political movements. The political stability had encouraged multinational companies to invest their capital in Indonesia.

¹³³ Sumantoro, *MNCs and the Host Country: The Indonesian Case* (Singapore: Institute of Southeast Asian Studies, 1984) at 45

¹³⁴ For example, the mass organisation law, press law, parliament law, political party law, general election law.

¹³⁵ The *Subversion Act* No. 5/1963 and *Presidential Decree* No. 11/1969

However, at the end of 1982, Indonesia's economy was severely hit by the sharp decline in the world oil price that accounted for roughly two-thirds of Indonesia's budget and export earnings since 1974.¹³⁶ From then on, the government was forced to transform its economy that was dependent on exports of agricultural and mineral products to one increasingly based on manufacturing and industrial activities. The World Bank and IMF also pushed the government to change its policy from the policy based on import substitution to a strategy of export-oriented industrialisation.¹³⁷ Supported by cheap labour, vast amounts of raw materials, and substantial investment by domestic and foreign companies, Indonesia was able to produce and sell competitive, cheap manufactured goods in international markets. Later in the 1990s, the World Bank categorised Indonesia, together with Malaysia and Thailand, as a "newly industrialising economy".¹³⁸

However, the flood of cheap products from Southeast Asian countries in international markets raised the US government's concern about US balance of trade. Cheap products from Asia made American products lose their competitiveness in both domestic and international markets. The US government had to face a problem of increasing trade deficits against Asian countries. Moreover, the American government, along with the governments of European countries, became concerned with the fact that the newly industrialising countries in Asia, including Indonesia, were capable of producing high-quality imitations. Many branches of industries in those countries were based on cheap imitations of well-known European trademarks for watches, clothes and leather goods or on pirating computer software and cassettes or compact discs of the Western

¹³⁶ Antons, Christoph, above n1 at 4

¹³⁷ Robison, Higgott and Hewison, above n52 at 8-9 as cited in Antons, Christoph, above n2 at 412

¹³⁸ *KOMPAS* (18 October 1993) above n58 at 1

music industry.¹³⁹ This fact disturbed the US whose 23% to 25% of total 1988 exports contained a high component of intellectual property, such as, pharmaceutical, scientific equipment, movies, books, computer software. A 1988 USITC (the US International Trade Commission) Report estimated that in 1986, the total loss on American industry due to piracy was US\$ 23.8 billion in 1986, or almost 15% of US trade deficit.¹⁴⁰ The report also identified Indonesia as a major producer of pirated goods together with Brazil, China, India, Malaysia, Mexico, Nigeria, the Philippines, the Republic of Korea, Singapore, Taiwan, and Thailand.¹⁴¹ In Indonesia, American copyright holders lost around US\$ 206 million in 1984 because of piracy.¹⁴² Indonesia, together with Singapore, was the main exporter of pirated cassettes to Saudi Arabia and controlled as much as 95% of the Saudi's music market.¹⁴³

In September 1986, the US-based Intellectual Property Alliance, filed a petition against Indonesia with the USTR (the United States Trade Representative) under Section 301 of the *Trade Act* of 1974, as amended, 19 U.S.C. 2411. They demanded that, in retaliation for violation of American patents and copyrights, the US government end its Generalised System of Preferences (GSP)¹⁴⁴ privilege for Indonesia.¹⁴⁵ In the next year, the

¹³⁹ Antons, Christoph, "Intellectual Property Law in ASEAN Countries: A Survey" (1991) 13 *European Intellectual Property Review* at 78

¹⁴⁰ Brenner-Beck, Dru, "Do As I Say, Not As I Did" (1992) 11 *UCLA Pacific Basin Law Journal* at 88
Lepp, Alan W, "Intellectual Property Rights Regimes in Southeast Asia" (1990) 6 *Journal of Southeast Asia Business* at 28

¹⁴¹ Brenner-Beck, Dru, above n140 at 89

¹⁴² Lepp, Alan W, above n140 at 29

¹⁴³ *Music Pirates Run Aground in Saudi Arabia*. Saudi Arabia: Middle East News Network, January 12, 1992

¹⁴⁴ GSP confers duty-free treatment on specific categories of goods exported to the United States by certain developing countries. Section 301 of the *Trade Act* of 1974 (as amended) allows the US government to impose trade sanctions, for example by removing the GSP benefits from a country where US rights are being injured by any act, policy or practice which the US deems "unjustifiable", "unreasonable" or "discriminatory", regardless of whether the act, policy or practice breaches any international obligation.

European Economic Community accepted a similar petition from the Geneva-based International Federation of Phonogram and Videogram Producers (IFPI) against the violation of intellectual property rights on foreign sound recordings.¹⁴⁶

Based on the Intellectual Property Alliance's petition, the US government threatened to remove the Indonesia's GSP privilege if there was no improvement in the field of intellectual property law before March 1987. The GSP privilege had benefited Indonesia's export to US market up to US\$ 28 million in 1985.¹⁴⁷ This deadline was later deferred until 30 September 1987 because of an assurance by the Indonesian government to pass the amendments of the *Copyright Act* 1982. Shortly before the expiration of the deadline, on 19 September 1987, the Indonesian government enacted the *Copyright Act* No. 7/1987 that amended the *Copyright Act* 1982. As a result of the passage of the new copyright law, the USTR recommended that Indonesia's GSP status be maintained.¹⁴⁸

In October 1989, the Indonesian Parliament passed a new patent law, the *Patent Act* No. 6/1989. The Act came into force on 1 August 1991. The passage of the *Patent Act* 1989 came as a response to the threats of trade sanctions launched by the USTR in May 1989 under Special 301¹⁴⁹ of the

MacLeod, Dylan A, "U.S. Trade Pressure and the Developing Intellectual Property Law of Thailand, Malaysia and Indonesia" (1992) 26 *University of British Columbia Law Review* at 354

¹⁴⁵ Lepp, Alan W, above n140 at 30

Gingerich, Duane J. and Hadiputranto, Sri Indrastuti, "Indonesia Amends its Copyright Law" (November 1987) *East Asian Executive Reports* at 7-8

¹⁴⁶ Lepp, Alan W, above n140 at 30

¹⁴⁷ Nio, Threes, "Pertentangan RI-AS Soal Hak Milik Intelektual [Indonesia - US Dispute Over Intellectual Property Rights]" *KOMPAS* (12 February 1987) at iv

¹⁴⁸ Gingerich, Duane J. and Hadiputranto, Sri Indrastuti, above n145 at 8

¹⁴⁹ Special 301 is specifically designed to address the problem of inadequate protection of American intellectual property rights in foreign countries. Special 301 is part of Section 301 procedure that specifically deals with intellectual property matters and provides shorter investigation periods than Section 301 procedure.

Omnibus Trade and Competitiveness Act of 1988.¹⁵⁰ The new *Patent Act 1989* addressed US concerns about insufficient patent protection in Indonesia.¹⁵¹

The new *Trademark Act No. 19/1992* came into force on 1 April 1993 to replace the *Trademark Act 1961*. The *Trademark Act No. 19/1992* came as a response to the economic pressure from Western countries that demanded better protection for trademarks owned by Western companies in Indonesia. The US government had considered that Indonesia's existing trademark law (the *Trademark Act 1961*) outdated and claimed that the Act 1961 could not protect American trademarks in Indonesia.¹⁵²

It can clearly be seen that, having regard to the limited research and development capabilities in Indonesia, very few indigenous inventions, patent and trademark holders, the Suharto government's interest in intellectual property laws during 1980s was largely due to economic pressure from Western countries, the US in particular, rather than a genuine interest in intellectual property protection.¹⁵³

Although intellectual property laws were not in the real interest of most Indonesian people, nobody in Indonesia challenged the reform and enforcement of new intellectual property laws that clearly served the US interest rather than the Indonesian interest. This was because of the nature of one-party state of Indonesia that had very strong central authority.¹⁵⁴ Much of Indonesia's success in reforming its intellectual property laws

¹⁵⁰ MacLeod, Dylan A, above n144 at 367-368
Lepp, Alan W, above n140 at 31

¹⁵¹ MacLeod, Dylan A, above n144 at 368

¹⁵² MacLeod, Dylan A, above n144 at 369

¹⁵³ Antons, Christoph, above n54 at 374

Antons, Christoph, above n1 at 84

¹⁵⁴ Lepp, Alan W, above n140 at 28

could be related to the authoritarian nature of Indonesia's ruling party, namely, the Golkar coalition, led by President Suharto who had ruled Indonesia continuously since 1966. Under this authoritarian, single party regime, the government could control not only the parliament but also the courts to accept almost every government policy, including this new intellectual property policy, irrespective of whether or not it was in the Indonesian people's interest. The new intellectual property law had been enforced in Indonesia with little dissension or opposition.¹⁵⁵

The situation was different in other ASEAN (Association of South East Asian Nations¹⁵⁶) countries, namely, Thailand and Philippines that had relatively weak central authorities.¹⁵⁷ In Thailand, the government faced stiff resistance from diverse groups within Thai society when they planned to amend the intellectual property laws. Even in 1987, an attempt by the Thai government to pass a new copyright law caused resignation of some coalition Cabinet ministers and dissolution of Parliament. Plans to protect pharmaceutical patents in accordance with US requirements had been challenged by strong opposition from students, doctors and public health organisations.¹⁵⁸ Many of the Cabinet ministers who supported the intellectual property legislation were criticised in the Thai press for "selling out" to the US and voted out of office at the next general election.¹⁵⁹ Historically, as the only nation in Southeast Asia that was never colonized by a Western country, Thailand had stronger resistance against foreign interference.¹⁶⁰ In 1989, the US government suspended Thailand's GSP privileges on eight groups of Thai products. Thailand lost

¹⁵⁵ Lepp, Alan W, above n140 at 32

¹⁵⁶ Since it was established in 1967, the ASEAN consists of 10 countries: Indonesia, Malaysia, the Philippines, Singapore, Thailand (also called as the Founding Fathers of ASEAN), Brunei Darussalam, Vietnam, Laos, Myanmar, and the Kingdom of Cambodia.

¹⁵⁷ Lepp, Alan W, above n140 at 28 - 29

¹⁵⁸ MacLeod, Dylan A, above n144 at 372

¹⁵⁹ Lepp, Alan W, above n140 at 33

¹⁶⁰ MacLeod, Dylan A, above n144 at 372

US\$ 170 million worth of its export privileges to US market.¹⁶¹ In Philippines, because of the American political interests and the economic crisis left by the Marcos regime, the US government did not put much pressure on the Aquino government to reform its intellectual property laws, although the USTR kept the Philippines on the 1990 Special 301 secondary “watch list”. National security issues in the Philippines which was the US’ closest ally in Southeast Asia, and Philippines’ fragile economy attracted more attention of the US and Philippines government.¹⁶²

Greater direct American foreign investment in Indonesia than in Thailand was another factor that contributed the Suharto government’s willingness to reform Indonesia’s intellectual property laws to satisfy US demands. The law reform was the government’s effort to attract foreign investment and reduce its dependence on oil and mineral production.¹⁶³

Although *Adat* that does not recognise intellectual property rights, is still influential in the lives of most Indonesians, but in practice, the Suharto government that relied on foreign investment, foreign trade as well as foreign aid to develop Indonesian economy, had set aside *Adat* and replaced it with new legislation in order to accommodate the needs of foreign investors, traders and donors.

Having regard to this background, the enforcement of intellectual property laws in Indonesia would be hampered by the ignorance among most of Indonesians toward intellectual property protection, as the

¹⁶¹ Antons, Christoph, above n139 at 83
Lepp, Alan W, above n140 at 33

¹⁶² Lepp, Alan W, above n140 at 34 - 35

¹⁶³ *Id*, at 31

concept of intellectual property rights was not supported by *Adat* norms. Moreover, the existing intellectual property laws were not derived from Indonesia's interests, but rather from the interests of Western countries, the US particularly. The inefficient and corrupt legal system caused by a lack of democratisation and an extended period of authoritarian rule in Indonesia would also hamper the implementation of intellectual property laws.

3.3. After the Suharto Government

The Suharto government ended in May 1998 after it proved unable to deal with the political and economic crisis that had severely hit Indonesia since December 1997. Now, it becomes a question of how the new government will enforce the intellectual property laws dominated by Western interests in the future.

The economic crisis in addition to the lack of Indonesia's interest in intellectual property protection will become the biggest barrier in enforcing intellectual property laws under the new government. In the past, these intellectual property laws were enacted when Indonesia's economy was booming. Therefore, it was not difficult for the Suharto government to force Indonesians to pay royalties for predominantly Western-owned works. But now, it will be very difficult for the new government to do the same after the political and economic crisis.

The implementation of intellectual property laws may also now take a different direction because the new government with its new development policy may take a different position from the Suharto

government in dealing with Western pressure for greater intellectual property protection.

C. Conclusion

It has been argued that intellectual property laws (copyright and patent law) were difficult to enforce in Indonesia because the laws were not consonant with and did not contribute usefully to Indonesian culture, which was based on *Adat*. The only intellectual property law which was well developed and accepted in Indonesia, was the trademark law, namely, the *Trademark Act* No. 21/1961. This was because the trademark law was in line with *Adat* principles that emphasised the protection of the public interest, in this case the protection of customers.

Unless intellectual property laws are drafted according to Indonesia's own cultural needs and unless they can demonstrably provide significant economic or cultural benefit to Indonesians, the people's indifference to or hostility toward intellectual property laws will continue and the intellectual property laws remain difficult to be enforced in Indonesia.

CHAPTER III

THE ENFORCEMENT OF PATENT LAW IN INDONESIA

A. Introduction

This chapter will briefly review the history and development of patent law in Indonesia and analyse whether that law can be seen to be consonant with Indonesia's culture and stage of development and able to fulfil the economic needs and objectives of the Indonesian people. The conclusion here is largely negative.

The enactment of the first *Patent Act* No. 6/1989, which came into force on 1 August 1991¹⁶⁴, was not primarily designed to promote innovation and technological development in Indonesia, but rather intended to accommodate economic pressure, backed by threats of trade sanctions, from Western countries. The *Patent Act* 1989 which resulted from the demands of Western countries, especially the United States, was not in line either with Indonesia's stage of economic development, namely, a fundamentally resource-based but rapidly industrialising period, or with Indonesian culture, which was, as explained above, still based on a wide social acceptance of cosmic and communal rights, rather than individual rights. Moreover, the *Patent Act* 1989 which was modeled after the patent laws in developed countries was also out of step with the poor judicial infrastructure and the understaffed and under-funded patent enforcement agencies commonly found in developing countries, including Indonesia.

¹⁶⁴ There was almost two year introductory period for the full enforcement of the *Patent Act* 1989, to familiarise the Indonesian people and companies with the new *Patent Act*.

Since the *Patent Act* 1989 came into force, patent ownership has been shown to be very predominantly foreign-based and technology transfer negligible. Of the total patent applications lodged, 95.38% have been lodged by foreigners and only 1.61% by Indonesian applicants.¹⁶⁵ The minimal degree of transfer of technology which has taken place from the patent-owning foreign companies to their Indonesian counter-parts means that the Indonesian people and companies have been and are still strongly dependent on foreign technologies, with the accompanying need to pay high prices to get technological products. So far, the patent regime introduced by the legislation does not appear to have been able to achieve the economic objectives with which it was justified. It has, in short, not been able to serve the interests of the Indonesian people because it has not been appropriate to Indonesia's political economy.

B. Discussion

Patent law in Indonesia began with its imposition by a foreign power, namely, the Dutch colonial government. This continued to the first Indonesian *Patent Act* 1989, which, though technically an Indonesian legislative enactment, was in a substantive sense, a measure again imposed by a foreign power, this time the United States government.

1. The Dutch Colonial Era

The first intellectual property law was introduced in Indonesia by the Dutch colonial government in 1844 when they enacted a "law concerning the conferring of exclusive rights to inventions, introductions and improvements of objects of art and people's diligence (*Reglement op het verlenen van uitsluitende regten op uitvindingen, invoeringen en verbeteringen van voorwerpen*)

¹⁶⁵ Data from the Directorate of Patents, the Directorate General of Copyright Patent and Trade Marks, the Department of Justice, the Republic of Indonesia, 6 June 1997.

*van kunst en volksvlugt*¹⁶⁶). However, after strong opposition against the protection of intellectual property in the Netherlands itself, the government abolished its intellectual property law in 1869. One year later, the Netherlands East Indies followed its mother-country's intellectual property policy.¹⁶⁷ Largely as a result of international pressure, the Netherlands government reintroduced its intellectual property law in 1884¹⁶⁸ and so did the colonial government in the Netherlands East Indies

In 1910 the Netherlands government enacted a Patent Act, the *Octrooiwet* 1910 S. No. 33 yis. S 11-33, S 22-54, which was then introduced in the Netherlands East Indies in 1911. The Act granted patent protection for a period of fifteen years. Previously, the colonial government had ratified the *Paris Convention for the Protection of Industrial Property* that made the Netherlands East Indies a member country since 1888.¹⁶⁹

The "Patent Council" (*Octrooiraad*), as part of the "Office for Industrial Property" (*Bureau voor den Industrieelen Eigendom*) in The Hague, was authorised to issue patents. A branch of the *Octrooiraad* was established in Batavia (the capital city of the Netherlands East Indies) as part of the "Auxiliary Office for Industrial Property" (*Hulpbureau voor den Industrieelen Eigendom*).¹⁷⁰

¹⁶⁶ Staatsblad van Nederlandsch-Indie (State Gazette of the Netherlands East Indie) 1844 No. 28

¹⁶⁷ Antons, Christoph, above n54 at 361-362

¹⁶⁸ Twinomukunzi, Charles, above n106 at 44-45 as cited in Brenner-Beck, Dru, above n140 at 90 footnote 36

¹⁶⁹ Antons, Christoph, above n2 at 402

¹⁷⁰ Antons, Christoph, above n54 at 363

2. The Sukarno Government

After independence, while the colonial *Trademark Act 1912* and *Copyright Act 1912* remained in force, the *Patent Act (Octrooiwet 1910)* was expressly and specifically abolished by the Indonesian government at the beginning of the 1950s. The *Patent Act 1910* was regarded as being in conflict with Indonesia's sovereignty because it required substantial examination of patents to be conducted in the "Patent Council" (*Octrooiraad*) in the Netherlands. The Act also regarded the Patent Office in Jakarta to be only a branch of the *Octrooiraad* that could not itself issue patents.¹⁷¹

This abolition of an intellectual property law in Indonesia for reasons of national self-interest was of course not unique and a close parallel can be perceived between it and the Dutch abolition of patent law described immediately above. During this time without a domestic patent regime, the Dutch used foreign patents without paying royalties to the holders of patent rights in other countries.¹⁷² This historical precedent vividly demonstrates the principle that the existence of intellectual property laws strongly relates to the internal policy and particular needs of a nation and that nations manipulate their patent regimes in accordance with their individual national economic objectives.

The Indonesian government did not pass new Patent legislation to replace the *Octrooiwet*. Instead, the Minister for Justice passed the *Announcement of Minister for Justice 12 August 1953 No. J.S. 5/41/4 B.N. 55* to accommodate provisional registration of domestic patents and passed the *Announcement of*

¹⁷¹ *Id.*, at 366

Djumhana, Muhamad and Djubaedillah, above n128 at 80

¹⁷² Antons, Christoph, above n54 at 361-362

Twinomukunzi, Charles, above n106 at 44-45 as cited in Brenner-Beck, Dru, above n140 at 90 footnote 36.

Minister for Justice 29 October 1953 No. J.G. 1/2/17 B.N. 53-91 to accommodate provisional registration for foreign patents.¹⁷³ Those Announcements were intended to be temporary safeguards for patent registration until the Indonesian government enacted a new patent law. In fact, the Announcements stayed in force for 36 years, until the Indonesian government enacted a new patent law in 1989. It means that until 1989, there no single patent was ever granted in Indonesia.

Even though the Indonesian government abolished the Dutch *Patent Act*, it maintained Indonesia's membership to the *Paris Convention for the Protection of Industrial Property*. Based on Article II of the Transitional Provisions of the Indonesian Constitution 1945, the Indonesian government and Supreme Court declared that Indonesia was bound by the London Revision of *Paris Convention* of 1934. On 24 November 1950, the Swiss Federal Council issued a circular letter which contained a declaration of the Indonesian Foreign Department that considered Indonesia was bound by the London Revision of the *Paris Convention* and the *Hague Agreement* concerning industrial designs and by the *Agreement of Neuchatel* concerning the restoration of rights to industrial property after the Second World War.¹⁷⁴

3. The Suharto Government

3.1. Before the Patent Act No. 6/1989

Indonesia's membership of the *Paris Convention* continued under the Suharto government when in 1979 Indonesia ratified the *Stockholm Revision* of the *Paris Convention* by the *Presidential Decree* No. 24/1979.

¹⁷³ Djumhana, Muhamad and Djubaedillah, above n128 at 80

¹⁷⁴ "Circulaire du Conseil federal suisse (Departement politique federa) concernant la situation de la Republique des Etats-Unis d'Indonesie a l'egard de certains actes de l'Union", (1950) 66 *La Propriete Industrielle* at 222 as cited in Antons, Christoph, above n54 at 367

However, the *Presidential Decree* made reservations on all substantive articles (articles 1 - 12 of the Paris Convention) and on article 28 (1) regarding dispute settlement. The reason for the reservations was Indonesia's failure to enact patent legislation.¹⁷⁵

The reservations on all substantive articles of the *Paris Convention* indicates Indonesia's reluctance to have a Patent law. Like other newly independent and low-income countries, much economic activity in Indonesia until the beginning of 1980's was in subsistence agriculture, oil and gas production. Indonesia's economic development was based on import substitution that produced low-technology products, such as, textiles, foodstuffs. There was not much demand for advanced technology, and if the demand existed, it would be met by imports. There was little research and development (R&D) activity of either an innovative or imitative type and such activity as there was normally occurred in governmental institutions. So, with little capacity for either innovation or imitation, patent law would have no real application in Indonesia.¹⁷⁶

Most R&D activities in Indonesia were conducted by public sector institutions, such as, state universities and state-funded research centers. This made technologies that came from public sector institutions became part of the public domain, as the state would use the technologies to meet public needs. Culturally, knowledge, both in the abstract and as embedded in technological advances, in Indonesia was regarded as public proper¹⁷⁷, because it related to the public benefit and interest as taught in

¹⁷⁵ Kesowo, Bambang, above n92 at 8

¹⁷⁶ Compare with Konan, Denise Eby, et al., "Intellectual Property Rights in the Asian-Pacific Region: problems, patterns, and policy" (1995) 9 *Asian-Pacific Economic Literature* at 25

¹⁷⁷ See Chapter II above at 31-32

Adat and Islamic laws.¹⁷⁸ Considerable knowledge about medicine, traditional herbs and cultivation technologies was passed from generation to generation in Indonesia.¹⁷⁹ Knowledge was an intangible good and therefore, according to *Adat* that based its norms on real and visible juridical construction, there was no ownership in knowledge.¹⁸⁰ Knowledge is, in economists' terms, a public good; that is, it has a zero marginal social cost.¹⁸¹ Knowledge is not a scarce resource and limited like land, for example. It can be used by all without decreasing its amount and value. The more it is used, the more, on one way of looking at it, valuable knowledge is.¹⁸² As was the case in many other countries, both historically and even in the modern era, knowledge in Indonesia was regarded as the common heritage of mankind that should be freely available to all.¹⁸³ Knowledge was considered to be collective and had to be shared with other people, within communities and even with other nations.¹⁸⁴ As part of the cosmic and communal culture, Indonesians did not rely on intellectual property protection to foster innovation. Instead, they relied on rapid dissemination of knowledge to the society.¹⁸⁵ There is and has been considerable doubt as to whether creating private property in knowledge would be the best way to develop and disseminate knowledge.¹⁸⁶ With this cultural background, many Indonesian scientists

¹⁷⁸Thalib, Sajuti, *Politik Hukum Baru : Mengenai Kedudukan dan Peranan Hukum Adat dan Hukum Islam dalam Pembinaan Hukum Nasional [New Legal Policy: Concerning the Position and Role of Adat Law and Islamic Law]* (Bandung: Binacipta, 1987) at 17

¹⁷⁹“Soal HAKI, Indonesia Terburuk di Asia” [In IPRs, Indonesia is the Worst in Asia] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0003/09/ekonomi/soal14.htm> (9 March 2000) at 2

¹⁸⁰Mahadi, above n95 at 119, 126

¹⁸¹Loughlan, Patricia, “Patents: Breaking Into the Loop” (1998) 20 *The Sydney Law Review* at 563

¹⁸²Vaver, David, “Some Agnostic Observations on Intellectual Property” (1991) 6 *Intellectual Property Journal* at 151

¹⁸³See Brenner-Beck, Dru, above n140 at 87

¹⁸⁴Fernandez, Irene, “Intellectual Property Rights, Patents and Indigenous Knowledge Piracy - Implications for the South and for Women” (1995) 4 *Pesticide Monitor* at 3

¹⁸⁵Braga, Carlos A.P. and Fink, Carsten, “Reforming Intellectual Property Regimes: Challenges for Developing Countries” (1998) 1(4) *Journal of International Economic Law* at 538

¹⁸⁶Konan, Denise Eby, et al., above n176 at 32

and researchers believed that their knowledge should be made available for and benefit their community.¹⁸⁷

Because of the sharp decline in the world oil price in the mid-1980s, the government could no longer rely on its revenue from oil and gas sales. The World Bank and IMF pushed the Indonesian government to change its policy from development, which was based on agriculture and import substitution, to a strategy of export-oriented industrialisation.¹⁸⁸ This recasting of economic objectives meant that the government needed a large amount of capital to achieve this goals, so during the REPELITA III, the government opened the Indonesian market and liberalised the Indonesian economy to attract greater investments by multinational companies in Indonesia.¹⁸⁹

The fact that there was no patent law in Indonesia until 1991 did not prevent foreign investors from coming to and establishing joint-venture companies in Indonesia. They were attracted by government policies that provided a favourable investment climate, with features such as, new tax incentives and freedom of capital flow. Japanese multinational companies, the biggest investors in Indonesia, came to Indonesia because of the skilled labor that suited their needs, the quality of the available infrastructures which could support their businesses, and the uncomplicated procedures used to establish their business.¹⁹⁰ In addition, other factors, such as, low labour cost, cheap raw materials, political stability, a large domestic market, played important roles in attracting foreign investors and multinational companies to invest in Indonesia.¹⁹¹

¹⁸⁷ “Ignorance Blamed for Piracy of Intellectual Property” *The Jakarta Post* (22 March 1997)

¹⁸⁸ Robison, Higgott and Hewison, above n52 at 6 as cited in Antons, Christoph, above n2 at 412

¹⁸⁹ See Chapter I above at 20-21

¹⁹⁰ “Investor Jepang Umumnya Perlambat Alih Teknologi” [In general, Japanese Investors Delay Transfer of Technology] *KOMPAS* (8 April 1991) at 2

¹⁹¹ See Chapter II above at 43-44

As in other developing countries, the government believed that there were other considerations other than the level of intellectual property protection that influenced the decisions of multinational companies to invest in a country or transfer their technology. Mr. Dru Brenner-Beck identified these other factors as: “1)the likelihood of expropriation, 2)political stability, 3)exchange rate regulations and currency stability, 4)labor training and cost, 5)political and labor unrest, 6)the size of the domestic market.”¹⁹²

A study conducted under the United Nations auspices found that there was an absence of correlation between a high level of intellectual property protection and the level of foreign investment in developing countries. The developing countries that received the highest level of foreign direct investment (FDI) over the past decade were the same countries that appeared on the USTR’s list of the worst violators of intellectual property rights, like Argentina, Brazil, the People’s Republic of China (PRC) and Thailand. Conversely, other developing countries that granted a high level of intellectual property protection, but without strong economic attraction, like Nigeria, failed to attract a higher level of FDI.¹⁹³ FDI flew to China, Brazil and other high developing economies, instead of flowing to sub-Saharan African and Eastern European countries, because the former countries had better productivity, education, skills, infrastructures, more open market, bigger market size, and were getting richer than the latter ones.¹⁹⁴

¹⁹² Brenner-Beck, Dru, above n140 at 98-99

Also see Anand, Pravin, “Licensing of Technology and Intellectual Property Rights to Developing Countries” (September 1983) *International Business Lawyer* at 9

¹⁹³ UN Transnational Corps. & Management Div., Dep’t of Econs. & Soc. Dev., *Intellectual Property Rights and Foreign Direct Investment*, ST/CTC/SER.A/24 (1993) as cited in Abbott, Frederick M., below n752 at 390

¹⁹⁴ Maskus, Keith E., “The Role Of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer” (1998) 9 *Duke Journal of Comparative and International Law* at 124 - 129, 138-146

The high level of foreign investment in Indonesia, made Indonesian companies more interested in transferring technology from their foreign partners, than promoting their own innovation. This was somehow caused by the lack of scientific capability and financial infrastructure necessary to create patent-induced innovations.¹⁹⁵ To regulate the transfer of technology in the absence of a patent law, the government issued regulations and created schemes to enable the transfer of technology from foreign companies to Indonesian domestic companies. Article 12 of the *Foreign Investment Act* No. 1/1967 and Article 20 of the *Domestic Investment Act* No. 6/1968 obliged foreign investment companies and domestic investment companies (locally known as “PMA” and “PMDN” companies) to conduct and/or to provide facilities for instruction and training for their Indonesian employees, whether in Indonesia or abroad. In addition, the *Minister of Manpower Decree* No. 143A/MEN/1991 on Educational and Training Obligatory Payments provided that the non-performance of this obligation rendered employers employing foreign worker(s) liable to pay a compulsory educational and training contribution. These contributions were then used to fund the government’s manpower education and training program.¹⁹⁶ Another scheme of technology transfer was conducted through licensing agreement that was governed under the *Civil Act (Burgelijk Wetboek)*.¹⁹⁷

With the benefit of cheap, skilled labour, a vast amount of raw materials, and a large domestic market, many Indonesian companies started taking

¹⁹⁵ Gutterman, Alan S., “The North-South Debate Regarding the Protection of Intellectual Property Rights”(1993) 28 *Wake Forest Law Review* at 121

¹⁹⁶ Kardono, A. Supriyani and Johnson, Darrell R., “Indonesia” in Gutterman, Alan S. and Brown, Robert (ed.), *Intellectual Property Laws of East Asia*, (Hong Kong - Singapore: Sweet & Maxwell Asia, 1997) at 174

¹⁹⁷ “Paten Tak Hanya Soal Hukum, tetapi Juga Kemauan Politik” [Patent Is Not Only a Legal Matter, But Also a Political Will] *KOMPAS* (27 January 1987) at 12

advantage of the technology transfer which was taking place between them and their foreign partners. Although they still did not have innovative capabilities, they increased their imitative capabilities to produce high-quality imitations of goods, such as, clothing, watches, electronics, which were competitively cheap. Together with other Southeast Asian countries, Indonesia reached the status as a “newly industrialising country”¹⁹⁸ and flooded the international market with cheap, good-quality products.

3.2. After the Enactment of the Patent Act No. 6/1989

a. Background of the Patent Act No. 6/1989

The end of the Cold War in the beginning of the 1980s had changed the focus of industrial development in Western countries from military to civil industry. Before the 1980s, during the cold war, many R&D activities in Western countries were directed toward the development of military technologies or industries that could provide between 40% and 60% of their total national income. They did not give too much concern on intellectual property issues of their technologies.¹⁹⁹ If there was protection on their technologies, it was for security reason, and not for intellectual property protection.

With the change of industrial development to civil industries after the end of the Cold War, Western countries started recognising the importance of intellectual property laws to protect their civil technologies from imitation by companies in newly industrialising countries. They did not want to

¹⁹⁸ See Chapter I above at 21 and Chapter II above at 44

¹⁹⁹ Kesowo, Bambang, above n92 at 1

lose their considerable competitive advantage in international market to newly industrialising countries that were able to produce cheap and good-quality products as a result of their imitative capability.

Industries in Western countries complained of the loss of significant revenue due to piracy and counterfeiting by the newly industrialising countries. American companies particularly, lost tens of billions of dollars in sales in both foreign and US domestic markets as a result of piracy and counterfeiting.²⁰⁰ For example, in 1984 the US Automotive Parts and Accessories Association estimated that its industry lost US\$ 12 billion in revenue from counterfeit automotive parts; an agricultural chemical company claimed to have lost between US\$ 30 to 35 million invested in R&D due to counterfeit chemicals; and in 1983 the apparel industry lost an estimated US\$ 450 million.²⁰¹

The American domestic industries demanded the US government improve the protection of their intellectual property rights abroad. As a result of this pressure, the US government authorised the USTR to impose a trade sanction based on the Special 301 of the *Omnibus Trade and Competitiveness Act* of 1988, against countries that denied adequate protection or market access for American intellectual property rights.²⁰²

²⁰⁰ Ross, Julie C., and Wasserman, Jessica, “Trade Related Aspects of Intellectual Property Rights” in Stewart, Terence P. (ed.), *The GATT Uruguay Round, A Negotiating History (1986-1992) Volume II: Commentary* (Boston: Kluwer, 1993) at 2253-2254

²⁰¹ *Unfair Foreign Trade Practices, Stealing American Intellectual Property: Imitation Is Not Flattery*, 98th Cong., 2d Sess. 1-3 (Comm. Print 1984) 46, 43 and *Possible Renewal of the Generalized System of Preferences-Part I: Hearing Before the Subcomm. on Trade of the U.S. House of Rep. Comm. on Ways and Means*, 98th Cong., 1st Sess. 57 (1983) (statement of James L. Bikoff, President, International Anti-Counterfeiting Coalition) as cited in Ross, Julie C., and Wasserman, Jessica, above n200 at 2254

²⁰² Ross, Julie C., and Wasserman, Jessica, above n200 at 2255-2256

In May 1989 Indonesia was placed on the USTR Watch List²⁰³ and as a response to the threats of US trade sanctions, the Indonesian Parliament passed a new patent law, the *Patent Act* No. 6/1989. This new Act addressed the US concerns about the insufficient patent protection in Indonesia. The Act came into force on 1 August 1991.²⁰⁴

Having regard to the limited R&D capabilities and the small number of indigenous inventions and patent holders, the Indonesian government's interest in patent law was largely due to economic pressure from Western countries, the US particularly, rather than a genuine interest in the protection of patent right and the promotion of innovation.²⁰⁵ A member of the Indonesian Parliament, Mr. Aberson Marle Sihalolo, who was involved in drafting the *Patent Act*, said that the Act was urgently needed to accommodate foreign investors' requirements and to give business security to them.²⁰⁶ The Head Deputy of the Indonesian Academy of Sciences (LIPI), Mr. Kayatmo, also admitted in a parliamentary hearing that the *Patent Act* was not needed in Indonesia for the purpose of encouraging innovation, but rather was needed to attract foreign investors who wanted protection for their works.²⁰⁷ Similarly, the Minister for Justice, Mr. Ismail Saleh, said that the new *Patent Act* would encourage foreign investment in Indonesia, as in the past, foreign investors had complained about the lack of patent protection.²⁰⁸ Mr. Bambang Kesowo, from the State Secretariat, argued that the enactment of the *Patent Act* in Indonesia was not concerned with technological development or the

²⁰³ Lepp, Alan W, above n140 at 31

²⁰⁴ MacLeod, Dylan A, above n144 at 368

²⁰⁵ See Antons, Christoph, above n54 at 374

Antons, Christoph, above n139 at 84

²⁰⁶ "UU Paten Bisa Memberi Jaminan Para Investor" [The *Patent Act* can Give Security to Investors] *KOMPAS* (19 June 1989)

²⁰⁷ "Ditinjau dari Segi Inovasi, UU Hak Paten Belum Perlu" [From the Innovation Side, the *Patent Act* is not Necessary] *KOMPAS* (23 June 1989) at 6

²⁰⁸ Lepp, Alan W, above n140 at 31

protection of existing patents, but rather was about the politics of law. The *Patent Act* was not necessarily important for Indonesian economic development because a good patent system did not guarantee the effective, optimal, and substantive transfer of technology. According to him, there were other factors that influenced the transfer of technology, such as, skilled manpower, research and development facilities, negotiation, bargaining position between parties.²⁰⁹ An economic expert, Dr. Sumantoro, said that even in the absence of patent law, the transfer of technology could have been performed under the *Foreign Investment Act* and *Civil Act*.²¹⁰

Although the Indonesian government had enacted a *Patent Act* to comply with US demands, the government was still reluctant to provide full patent protection in accordance with Western countries' standard. The Indonesian patent law represented Indonesian culture and public concerns that were different from the Western society. US patent law was based on the American culture that protected and emphasised on individual rights, values and ideas.²¹¹ However, the US and other Western developed countries had a patent law after they reached a certain level of technological development in which a patent law became a necessity. One has to remember that until 1891, the US did not recognise the rights of foreign authors for their works. Eli Whitney suffered losses from patent infringement of his cotton gin, because of lack of patent protection in the US. This made him forego patenting his later inventions in the US.²¹² The US also obtained the steam engine technology to build their textile industry in the 19th century by violating British laws intended to prevent

²⁰⁹ *KOMPAS* (27 January 1987) above n197 at 12

²¹⁰ *Ibid*

²¹¹ Blatt, Jeffrey J., "Considerations in Representing Western Companies in Technology Transfers to East Asia" (1996) 19 *Hastings International and Comparative Law Review* at 674

²¹² Brenner-Beck, Dru, above n140 at 87

the export of engines, parts, and skilled personnel.²¹³ In the middle of the 19th century the Netherlands abolished their patent law and powerful abolitionist movements against patent protection also developed in England, Prussia and Switzerland.²¹⁴

Indonesia, like many East Asian jurisdictions, did not have the same history of intellectual property protection as the US and other Western countries recently had. The laws of East Asian countries reflected a consensus-building decision process and a greater concern for the common good as well as protection of society, and consequently less protection for individuals. East Asian intellectual property laws required right-holders who were given a legal monopoly on their property rights, to exploit the rights in a manner that benefited society.²¹⁵ With this cultural background and other concerns, the Indonesian government still maintained the reservation on articles 1 - 12 and article 28 of the *Paris Convention*. The *Patent Act* No. 6/1989 did not overrule the *Presidential Decree* No. 24/1979 which imposed the reservation on the *Paris Convention*. The reservation was maintained to avoid many crucial issues in the *Paris Convention* that presumably could hamper economic and technological development in Indonesia.

b. Enactment of the *Patent Act* No. 6/1989

The *Patent Act* No. 6/1989 that came into force on August 1991 ended provisional patent registration made under the *Announcements of Minister for Justice* of 1953 and established the right of priority. Since 1953, around

²¹³ Gutterman, Alan S., above n195 at 137, foot-note 346

²¹⁴ Blakeney, Michael, "Book Reviews: Bankole Sudipo, *Piracy and Counterfeiting, GATT, TRIPs and Developing Countries*", (1998) 20 *European Intellectual Property Review* at 197

²¹⁵ Blatt, Jeffrey J., above n211 at 674

13,000 patents had been registered provisionally and around 12,500 of those were registered by foreigners.²¹⁶ The *Patent Act* Article 131 made clear that only patents that were provisionally registered within 10 years prior to the enactment of the *Patent Act* 1989 (between 1 August 1981 and 1 November 1989²¹⁷) could be re-registered with a new standard of novelty requirement.²¹⁸ This meant that only around 4,500 provisional patents could be re-registered²¹⁹ and 8,500 others fell automatically into public domain.

Article 1(1) of the *Patent Act* No. 6/1989 defines a patent as “a special right given by the State to an inventor with respect to his technological invention for a certain period of time, whereby he shall exploit his invention or authorise any other person to exploit the invention”. In this Article, the Indonesian government used the word “a special right” (Ind: *hak khusus*), not “an exclusive right” to define a patent, although “an exclusive right” was the internationally adopted language for the patent right.²²⁰ This indicated the Indonesian government’s intention to avoid the monopolistic connotation of “exclusive right” which was not consonant with the communal philosophy of the Indonesian people. Throughout the *Patent Act* 1989, the government tried to maintain the balance between complying with the demands of Western countries and fulfilling the needs of the Indonesian communal society for information and technological products. The government made patent protection subject to the national interest and to the interest of economic development.²²¹ Like other developing countries, in order to minimise the problems of

²¹⁶ Antons, Christoph, above n54 at 374

Antons, Christoph, above n139 at 82

²¹⁷ See the *Government Regulation* No. 34 of 1991, concerning the procedure of patent applications.

²¹⁸ Dermawan, P.D.D., “Patent Implementing Regulations” (4 July 1991) 6 *IP Asia* at 11

²¹⁹ Antons, Christoph, above n54 at 374

Antons, Christoph, above n139 at 82

²²⁰ “Patent Protection System Application” *The Jakarta Post* (1 May 1997) at 4

employing a Western-style patent system, the Indonesian government used some mechanisms, such as, compulsory licenses, a patent working requirement and the exclusion of large subject matter areas from patent protection,²²² such as, pharmaceuticals, agriculture, plant and animal varieties and biotechnology.

The *Patent Act* No. 6/1989 would protect patents for fourteen years from the date of application and petty patents for five years from the issue of its certificates (Articles 9 and 10). However, Article 8 allowed the President to postpone the granting of a patent for reasons of public interest for a maximum of 5 years. The government also had the discretionary power through a Presidential Decree to make use of a patent when it was regarded very important to the defense and security of the state (Article 104). The patent owner would be freed from paying annual patent fees and receive compensation, but would receive no license fees (Articles 105(3) and 106(2)).

The decision to grant patent protection for fourteen years in Article 9 of the *Patent Act* 1989 was reached after a long debate in the Parliament. The legislature considered that a fourteen-year term of protection was sufficient for inventors to get a return on their investment in addition to getting a reasonable profit from exploiting their inventions. They also argued that the term of patent protection should be granted in accordance with each country's conditions, needs and problems.²²³ It had been found that for developing nations, the shorter the period of patent monopoly and therefore monopoly prices, the better for them.²²⁴ A shorter period of

²²¹ Antons, Christoph, above n2 at 423

²²² Brenner-Beck, Dru, above n140 at 101

²²³ Kesowo, Bambang, above n92 at 25

²²⁴ McGrath, Michelle, "The Patent Provisions in TRIPs: Protecting Reasonable Remuneration for Services Rendered – or the Latest Development in Western Colonialism" (1996) 18 *European Intellectual Property Review* at 401

patent protection yielded a more positive welfare effect in the least developed countries than the longer period common in industrialised countries.²²⁵ This was because there would be a welfare loss to the society and less goods produced if information or knowledge was locked in private hands for a longer period of time. Although the increase in intellectual property protection might contribute to more innovation, there was still a doubt whether it would bring a *net* incentive gain, since all intellectual property rights imposed costs.²²⁶ The shorter period of patent protection was also in line with the communal culture of Indonesian society that acknowledged the public interest for dissemination of important knowledge.

Articles 81 - 93 of the *Patent Act* No. 6/1989 governed the granting of compulsory licenses. Article 82 provided that an applicant could obtain a license on a registered patent if the patent was not implemented in Indonesia for three years after the patent was granted. In the absence of any application of the compulsory license and if the non-use of the patent continued until its fourth year, the Patent Office would revoke the patent (Article 94). Article 88 allowed a patent holder to obtain a compulsory license on a registered patent if his or her patent could not be implemented without infringing the first mentioned patent.

The *Patent Act* No. 6/1989 required patent holders to exploit or work their patents in Indonesia. Importation of patented products or of products, which were produced by using patented processes, was not deemed to be an exploitation or a working of the patents (Article 20). This provision was intended to prevent the common situation in developing countries, where multinational companies obtained many patents with no intention

²²⁵ Loughlan, Patricia, above n181 at 562

of domestic production that could bring technology transfer in the developing countries. They took majority of patents in developing countries in order to protect their export markets, including markets of the developing countries.²²⁷ Patent had been used by many multinational companies as a mean of preventing others from making or selling their products in the market²²⁸ and blocking competitive production.²²⁹ In 1974, for example, more than 70% of patent registration in 50 developing countries came from industrialised countries and up to 90% to 95% were used to protect their markets in the developing countries.²³⁰

However, even though a patent holder had worked his or her patent in Indonesia, Article 21 of the *Patent Act* provided that importation of patented products or of products produced by using a patented process by a person other than the patent holder did not constitute an infringement of the patent. The Indonesian government admitted that this Article would have violated Article 5quarter of the *Paris Convention*²³¹, had Indonesia not placed a reservation on Articles 1-12 of the *Paris Convention*.

The background of Article 21 of the *Patent Act* was the need to support the drug pharmaceutical industry in Indonesia. The data from the Directorate of Food and Drug Authority, the Department of Health, showed that 90%

²²⁶ Drahos, Peter, “Global Law Reform and Rent-Seeking: The Case of Intellectual Property” (1996) 7 *Australian Journal of Corporate Law* at 45

²²⁷ Brenner-Beck, Dru, above n140 at 98

²²⁸ Gutterman, Alan S., above n195 at 123

Nguyen, Christian H., “A Unitary ASEAN Patent Law in the Aftermath of TRIPs” (1999) 8 *Pacific Rim Law & Policy Journal* at 480

²²⁹ Brenner-Beck, Dru, above n140 at 98

²³⁰ Antons, Christoph, above n139 at 79

²³¹ Article 5quarter of the *Paris Convention*: “When a product is imported into a country of the Union where there exists a patent protecting a process of manufacture of the said product, the patentee shall have all the rights, with regard to the imported product, that are accorded to him by the legislation of the country of importation, on the basis of the process patent, with respect to products manufactured in that country”.

of medicine required in Indonesia was provided by the domestic pharmaceutical industry.²³² In addition, the industry provided a large number of job opportunities for the Indonesian people. In general, the domestic pharmaceutical industry did more for Indonesian society than the foreign pharmaceutical companies and their subsidiaries operating in Indonesia.²³³ However, no domestic pharmaceutical companies had their own patented products²³⁴ because they based their production on “copy products” (imported materials that infringed the patent rights of others), that were imported from other countries. These copy products were as good as the original patented products and were much cheaper because buyers/users did not have to pay royalties to the patent holders.²³⁵

The Indonesian government adopted the policy of allowing the importation of copy products in order to maintain the availability of generic medicine, which were widely used in public hospitals and government clinics in Indonesia, at a time when the domestic pharmaceutical companies still lacked the efficiency and financial capability to produce patented pharmaceutical products of their own.²³⁶

²³² “Komisi VI Tanyakan Kolusi Obat” [Commission VI Questioned the Collusion on Drugs] *KOMPAS Online*, <http://www.kompas.com/9712/03/IPTEK/komi.htm> (3 December 1997) at 1

²³³ Kesowo, Bambang, above n92 at 28

²³⁴ “Paten Farmasi Indonesia Nol Persen” [Patent of Indonesian Pharmacy is Zero Percent] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/2000/03/26/Nasional/na91/na91.html> (26 March 2000) at 1

Hadiputranto, Hadinoto & Partners, “Revision of Indonesian IP Laws” (January 1998) 1 *Hadiputranto, Hadinoto & Partners Intellectual Property Law Bulletin* at 10

²³⁵ Kesowo, Bambang, above n92 at 29

²³⁶ *Suara Pembaruan Daily* (26 March 2000) above n234 at 1

The lack of efficiency in the domestic pharmaceutical industry was caused by among others: 1) transfer pricing and marking up, in which Indonesian subsidiary pharmaceutical companies were obliged to buy the basic ingredients from their parent companies overseas with higher price than common international price; 2) idle capacity in domestic production caused by too many pharmaceutical companies in a very small domestic market; 3) royalty payment; 4) excessive advertisement; 5) oligopoly practice among pharmaceutical companies. Pane, Amir Hamzah, “Pulbako” dan Transparansi Harga Obat” [“Pulbako” and the Transparency in Drug Pharmaceutical Pricing] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1998/09/100998/OpEd/op06/op06.html> (10 September 1998) Hadiputranto, Hadinoto & Partners, above n234 at 10

With the price of patented medicine in Indonesia 400% higher than that of generic medicine,²³⁷ it was obvious that generic medicine could help more Indonesian patients than patented medicine. Besides that, the prohibition of using copy products could shut down the domestic pharmaceutical industries and consequently, could lead to massive job-losses²³⁸ and a substantial increase in the cost of medicine.²³⁹

However, realising that this policy could jeopardise the patent system, the government later introduced a limitation on the implementation of this policy. On 11 June 1991, the government passed the *Government Regulation* No. 32/1991 to clarify further Article 21 of the *Patent Act* 1989. The *Government Regulation* No. 32/1991 provided that Article 21 of the *Patent Act* applied only to the importation of raw materials or products that had obtained their patents before 1 August 1991. For other products or processes that obtained their patents after 1 August 1991, the government only allowed fifty raw materials or products listed in the Annex of the *Government Regulation* to be imported freely without infringing their patent. Therefore, after the enactment of the *Government Regulation* No. 32/1991, Indonesian drug pharmaceutical companies could no longer freely import raw materials and products that were patented after 1 August 1991, with the exception of the fifty exempted items listed in the Annex of the *Government Regulation*.

“Harga Mahal, Banyak Beredar Obat Palsu di Jakarta” [High Price, Many Fake Drugs in Jakarta] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1999/11/081199/Editor/op040/op040.html> (8 November 1999)

²³⁷ *KOMPAS Online* (3 December 1997) above n232 at 1

²³⁸ Kesowo, Bambang, above n92 at 29

Antons, Christoph, “The Indonesian Patent Act of 1989” (1997) 28 *International Review of Industrial Property and Copyright Law* at 334

²³⁹ Kesowo, Bambang, *Intellectual Property Protection in Indonesia: Establishing Intellectual Property Laws*, Paper presented before The Intellectual Property Law Conference, Adelaide, Australia, 26-29th March 1995, at 5

Indonesia was not alone in excluding pharmaceutical processes and products from patent protection. Many other ASEAN and developing countries, such as, Argentine, Turkey, and India also excluded pharmaceutical products from patent protection in the interests of the social welfare of their population.²⁴⁰ The introduction of patent protection for pharmaceutical products would entail welfare losses for developing countries, from both the increased prices of medicine and loss of profits of domestic pharmaceutical companies, caused by the large royalty payments to foreign pharmaceutical companies.²⁴¹ Even in among industrialised countries, for many years pharmaceutical industry was not protected by patents. It had only been recently that patent protection had been given to pharmaceutical products: France in 1960, Germany in 1968, Japan in 1976, Switzerland in 1977, Italy and Sweden in 1978. Some other industrialised countries, such as, Finland, New Zealand, Spain and Norway, did not grant patent protection to pharmaceuticals until the early 1990s.²⁴²

Article 7 of the *Patent Act* 1989 prohibited the granting of patent protection to five kinds of inventions: 1) products or processes which were in violation of the law, public order or decency; 2) manufacturing process or products of foods and beverages, chemically processed products of foods and beverages for human or animal consumption; 3) new types or varieties of plants and animals, or any process which could be used for the cultivation of plants and animals; 4) methods of examination, care,

²⁴⁰ See Antons, Christoph, above n139 at 79, 82, 83

Brenner-Beck, Dru, above n140 at 101

Weissman, Robert, "A Long, Strange TRIPs: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries" (1996) 17 *University of Pennsylvania Journal of International Economic Law* at 1119

²⁴¹ Konan, Denise Eby, et al., above n176 at 19-20

Weissman, Robert, above n240 at 1116

²⁴² Nogues, Julio, "Patents and Pharmaceutical Drugs: Understanding the Pressures on Developing Countries" (1990) 24 *Journal of World Trade* at 82

treatment and surgery applied for humans and animals (excluding products that were used in the methods); 5) theories and methods in science and mathematics.

For the government, the reason for not granting protection to those five subject matters was because the five subject matters were also not protected in developed countries when they had not yet achieved their present technological development.²⁴³ Even the United International Bureaux for the Protection of Intellectual Property (BIRPI) and the World Intellectual Property Organisation (WIPO) acknowledged this, as is evident from the standard of patent protection for developing countries in the *Model Law for Developing Countries on Inventions* 1965 and 1979 that they established.²⁴⁴ Indonesia was involved in the drafting process of the *Model Law* of both 1965 and 1979. Section 5 of the *Model Law* 1965 excluded from patentability plant or animal varieties or essentially biological processes for the production of plants or animals and any invention the publication or exploitation of which would be contrary to public order or morality. Section 118(1) of the *Model Law* 1979 allowed temporary exclusion by a decree from patent protection on certain inventions for a period not exceeding ten years with the possibility of an extension of the period for a further five years.

However, compared to the *Model Law*, the *Patent Act* 1989 adopted a more advanced approach. The Elucidation of Article 7 of the *Patent Act* 1989 stated that the exclusion from patent protection did not extend to all new

Weissman, Robert, above n240 at 1119, 1123

²⁴³ Kesowo, Bambang, above n92 at 24

²⁴⁴ Verma, S.K., “TRIPs and Plant Variety Protection in Developing Countries” (1995) 17 *European Intellectual Property Review* at 282

Model Law is not law, but a model. In this case, the *Model Law* is a model of a national law. The *Model Law* may be adopted by a country or a regional group, but a certain number of modifications would have to be made to it in order to take into account the country's or region's character.

kinds or varieties of plants and animals, but rather is limited to new kinds or varieties of food-crops and livestock. So, the *Patent Act* 1989 would protect for example, inventions on new kinds or varieties of decorating flowers, or racehorses.²⁴⁵ The public policy underlying this provision was that food-crops, livestock, foods and drinks were essential to the social welfare. The Elucidation of the *Patent Act* recognised that it would be against the public interest, if these kinds of inventions were protected by patent.²⁴⁶ There were also political and historical reasons behind this policy. The Indonesian people could not forget their suffering during the economic and political crisis in the 1960s when they had to queue for long periods of time in order to receive a meager portion of ten kilograms of rice per family. It would be politically risky for the government to grant patent protection to technological inventions relating to rice, the main staple for Indonesians.²⁴⁷ Indonesia was not alone in excluding food-crops and live-stock from patent protection.²⁴⁸ The 1988 WIPO studies found that forty-four countries expressly excluded plant varieties, forty-five countries excluded animal varieties, and forty-two countries excluded biological processes for producing animal or plant varieties from patent protection.²⁴⁹

Article 13(1) of the *Patent Act* 1989 provided that if not agreed otherwise, patent to an invention made under employment belonged to the employer. This provision applied to private and public employment. With most R&D activities in Indonesia were conducted in governmental institutions, this provision enabled the government to own technologies

²⁴⁵ Kesowo, Bambang, above n92 at 24

²⁴⁶ The Elucidation of Article 7 of the *Patent Act* No. 6/1989

²⁴⁷ Kesowo, Bambang, above n239 at 6

²⁴⁸ Footer, Mary, “Intellectual Property Rights” *Trade and Investment Background Briefing No. 6*, <http://www.ids.ac.uk/tradebriefings> or <http://www.dfid.gov.uk> at 3

²⁴⁹ WIPO Doc. HL/CE/IV/INF/1 Rev. 1 in WO/INF/29 of September 1988, at 96-97, as cited in Verma, S.K., above n244 at 281

invented by government employee or those who were hired by the government. This would entitle the government to exploit those technologies for the benefit of the public.

c. Technological Development in Indonesia After The *Patent Act 1989*

Since the *Patent Act 1989* came into force in 1991, there had been 95.38% of patent applications lodged by foreigners and only 1.61% of patent applications lodged by Indonesian applicants.²⁵⁰ The very small number of Indonesian patent applications did not mean that there was no technological development in Indonesia. Unlike in developed countries where most R&D activities were conducted by private entities, in Indonesia and many other developing countries, most R&D activities were undertaken by governmental institutions, such as, state universities and state-funded research centers. They normally did not patent their inventions to make their inventions available to and benefit the Indonesian people.²⁵¹

In addition, given the cultural background, many Indonesian inventors, including researchers, scientists, and farmers were reluctant to claim patents on their inventions. Although Indonesian inventors rarely produced sophisticated inventions, but they frequently invented new kinds of foods, agricultural equipment, cultivation and breeding methods, fertilisers, medical treatments, textiles, and road construction methods that directly related to the everyday needs of the Indonesian people.²⁵²

²⁵⁰ Data 6 June 1997, above n165

²⁵¹ Also see Loughlan, Patricia, above n181 at 568

²⁵² See “Petani Temukan Pengendali Gulma” [A Farmer Invented a Weed Extinguisher] *KOMPAS Online*, <http://www.kompas.com/9804/13/EKONOMI/peta02.htm> (13 April 1998)]; “Dr Endang Purwantini, dari Metanogen ke Bakteri TB” [Dr Endang Purwantini, from Metanogen to Tuberculosis Bactery] *KOMPAS Online*, <http://www.kompas.com/kompas-cetak/9905/09/IPTEK/dren04/htm> (9 May

However, many other domestic inventions were often limited to mere incremental changes to or adaptations of existing technologies in order to tailor those technologies to the specific conditions of a developing country, such as Indonesia. It was difficult for these kinds of inventions to meet the threshold requirement of “novelty”.²⁵³

So far, it was hard to see the real benefit of having patent protection in Indonesia, except to attract foreign investors and avoid trade sanctions from Western countries, the US particularly. The patent protection that had been granted to many multinational companies in Indonesia was intended to persuade them to transfer their technologies to their Indonesian counterparts. However, the multinational companies only transferred kinds of low level technologies that were also commonly exploited in other developing countries. These kinds of technologies only required imitative capability to work in order to produce simple and low-technology products, such as, radios, watches, textiles, cosmetics, foodstuffs. The technologies transferred to Indonesia and other developing countries also tended to be significantly older than the technologies transferred to industrialised countries.²⁵⁴

There were no specific regulations on the transfer of technology in the *Patent Act* 1989. However, provisions on this subject matter, could be located in other sources, for example, the Department of Health required that for drug registration purposes, the information necessary for the licensing of new, innovative and ready-made drugs be filed with the

1999); Soepardi, Goeswono, “Hak Paten Teknologi Siap Terap” [Patent Right for Ready To Use Technology] *KOMPAS* (13 May 1994); Pahan, Iyung, “Bioteknologi dan Hak Paten” [Biotechnology and Patent Right] *KOMPAS* (25 November 1988) 5; “Awing dan Songkok” [Awing and Velvet Cap] *KOMPAS Online*, <http://www.kompas.com/kompas-cetak/9901/10/KELUARGA/awin08.htm> (10 January 1999); “Obat Tradisional Siap Layani Kesehatan” [Traditional Medicine Is Ready to Cure] *KOMPAS Online*, <http://www.kompas.com/9802/23/IPTEK/obat.htm> (23 February 1998)

²⁵³ Brenner-Beck, Dru, above n140 at 99

application.²⁵⁵ The government also required foreign investment pharmaceutical companies to produce the basic materials of their drugs in Indonesia for a period of five years after their establishment in Indonesia.²⁵⁶ However, most foreign investment pharmaceutical companies did not comply with this requirement. Instead, they were obliged by their parent companies to buy the basic materials from their parent companies. This made foreign investment pharmaceutical companies capable only of compounding tablets or capsules²⁵⁷, but always dependent on imported basic materials. The Indonesian government, however, did not impose any sanction against foreign investment pharmaceutical companies that violated this foreign investment regulation.²⁵⁸ The almost absolute dependency on imported pharmaceutical basic materials either for foreign investment or domestic pharmaceutical companies has been very disastrous for many Indonesians since Indonesia was hit by the economic crisis in late 1997. Since the value of the Indonesian currency, the rupiah, drops very low against US dollar, many Indonesians can no longer afford to buy medical drugs that mostly contain imported materials which have to be paid with dollar.

Another regulation of technology transfer was also found in the *Government Decision* No. 307/1976 which aimed to facilitate the development of the national car industry in Indonesia. The *Government Decision* prohibited the importation of “completely built up” (CBU) cars and only allowed the importation of “completely knocked down” (CKD) cars with a very high tariff. The national car industry comprised

²⁵⁴ Maskus, Keith E., above n194 at 146

²⁵⁵ Kardono, A. Supriyani and Johnson, Darrell R., above n196 at 174

²⁵⁶ “Industri Farmasi Perlu Reformasi” [Pharmaceutical Industry Needs Reform] *KOMPAS Online*, <http://www.kompas.com/9805/08/IPTEK/indubc.htm> (8 May 1998) at 2

²⁵⁷ “Kontroversi Produksi Bahan Baku Obat” [Controversy on the Production of Raw Materials of Drugs] *KOMPAS Online*, <http://www.kompas.com/9805/08/IPTEK/kontbc.htm> (8 May 1998) at 2

²⁵⁸ *KOMPAS Online* (8 May 1998) above n256 at 2

authorised Indonesian dealers of Japanese, European, and American cars, such as, Toyota, Fiat, Ford, etc. These authorised dealers assembled and sold their principals' cars in Indonesia. With the prohibition on CBU cars and a very high tariff imposed on CKD cars, it was expected that the national car industry could gradually produce components and spare parts of their cars by themselves. By this process, the national car industry could improve their status from being car assemblers to car manufacturers, an important step in the creation of an independent, Indonesian-owned car industry. In order to facilitate the development of the national car industry, the government introduced a "deletion program" that forced the national car industry gradually to replace imported car components with local car components in accordance with a schedule promulgated by the government. The more a car company used domestic components, the less the amount of tariff it would have to pay to the government. This "deletion" would last until all car components, including engines, were made in Indonesia.²⁵⁹

However, this "deletion program" could not continue because of the sharp decline in car sales during the period between 1982 and 1986. During this period, the "deletion program" was abandoned and it was never implemented anymore even after car sales in Indonesia returned to healthy levels.²⁶⁰ Indonesian car industry claimed that they were bound to follow the policies of their foreign principals in developing their products and selling cars with their principals' trademark.²⁶¹ Most of the principals' policies, however, were not helpful for the development of national car

²⁵⁹ "Industri Otomotif: Dilema Berkepanjangan" [Automotive Industry: Long Lasting Dilemma] *KOMPAS* (6 February 1999) at 1

²⁶⁰ "Proteksi Industri Otomotif, Masih Adakah Manfaatnya?" [Protection of Automotive Industry, Is Still Useful?] *KOMPAS* (30 January 1995) at 1

²⁶¹ "Industri Otomotif Tetap Rapuh dan Tidak Mampu Lepaskan Ketergantungan Impor" [Automotive Industry Is Always Fragile and Dependent on Import] *KOMPAS* (31 January 1995) at 1
KOMPAS (6 February 1999) above n259 at 1

industry. Foreign principals always limited the extent of technology transfer to the Indonesian car industry by requiring the purchase of car spare parts, including car accessories from the foreign principals. They also did not allow the Indonesian car industry to independently design cars which they were to assemble.²⁶² Therefore, twenty-three years after the *Government Decision* No. 307/1976 was passed, there had been no significant transfer of technology from foreign car companies that could help develop the Indonesian car industry. Instead, for twenty-three years, the legislation had actually made the price of cars in Indonesia the highest in the world, because of the very high tariff imposed on imported components of cars sold in Indonesia.²⁶³

The licensing scheme as a mean to facilitate the transfer of patented technology also did not assist the technological development in Indonesia. It was well known that Japanese multinational companies in Indonesia were reluctant to transfer their technologies to their Indonesian counterparts. They argued that Indonesian companies would be unable to adopt and work with Japanese technologies.²⁶⁴ In some senses, this argument could be correct, because much of patented technologies from first world countries did not suit the conditions of developing countries. For instance, the patented technologies were inappropriate for the distribution of labor and the industrial infrastructures of most developing countries.²⁶⁵ They were designed for labour-saving industries, and not labour-intensive industries which were common in Indonesia with its

²⁶² “Mungkinkah Indonesia Membuat Mobil Sendiri?” [Will Indonesia Be Able to Manufacture Cars?] *KOMPAS* (25 September 1997) at 2

²⁶³ “Mobil Mahal Karena Diproteksi” [Cars are Expensive because of the Protection] *KOMPAS* (28 December 1994) at 12

²⁶⁴ “Pengusaha Jepang Dinilai Remehkan Kemampuan Indonesia” [Japanese Businessmen Underestimate Indonesian Capabilities] *KOMPAS* (27 January 1994) at 2

²⁶⁵ Brenner-Beck, Dru, above n140 at 100

overabundant labour force.²⁶⁶ However, the most significant problems in technology transfer originated from such restrictive conditions contained in many patent licensing agreements that eliminated the benefits expected from the technology transfer.²⁶⁷ The UNCTAD (United Nations Conference on Trade and Development Secretariat) identified fifteen clauses of restrictions commonly included in licensing agreements: 1)Restrictions on field of use, volume, or territory; 2)Restrictions after expiration of industrial property rights or loss of secrecy or secret technical know-how; 3)Restrictions after expiration of arrangements; 4)Duration of arrangements; 5)Challenges to validity; 6)Use of quality controls; 7)Restrictions on research and development; 8)Exclusivity arrangements; 9)Grant-back provisions; 10)Non-competition clauses; 11)Tying; 12)Exclusive sales or representation arrangements; 13)Export restrictions 14)Price fixing; 15)Cartels, patent pool and cross-licensing arrangements.²⁶⁸ All these restrictive practices in the transfer of technology clearly violated the 1974 Resolution of the UN General Assembly about the Establishing of a New International Economic Order which recommended the transfer of technology to promote the development of technology and modern science in developing countries.²⁶⁹

Furthermore, the compulsory license scheme provided by the *Patent Act* 1989 did not promote the transfer of technology, because nobody in

²⁶⁶ Hartono, C.F.G. Sunaryati, *In Search of New Legal Principles* (Bandung: Binacipta,1979) at 83

²⁶⁷ Brenner-Beck, Dru, above n140 at 100

²⁶⁸ UNCTAD Secretariat, *Control of Restrictive Practices in Transfer of Technology Transactions: Selected Principal Regulations, Policy Guidelines and Case Law at the National and Regional Levels* (New York: United Nations, 1982)

Also see Maskus, Keith E., above n194 at 134

²⁶⁹ Yohanes, Triyana, “Perdagangan Hak Milik Industri dan Alih Teknologi” [Trade in Industrial Right Property and Transfer of Technology] *Suara Pembaruan Online*, <http://www.suarapembaruan.com/News/1997/02/270297/OpEd/opd02/opd02.html> (27 February 1997) at 1

Indonesia had applied for a compulsory license.²⁷⁰ There were difficulties to be encountered, even if one had a compulsory license. Much of vital information about an invention, especially how to make the invention work, could not be obtained from the patent documents. Patent documents normally contained inadequate know-how required to produce and work with inventions.²⁷¹ The US Supreme Court found the continuing practice of a “highly developed art of drafting patent claims so that they disclose as little useful information as possible - while broadening the scope of the claim as widely as possible.”²⁷² Almost no domestic companies in Indonesia would be capable of independently using patented technologies without additional technical assistance from patent holders.²⁷³

So far, there was no clear benefit of having patent law to promote innovation and technological development in Indonesia. The *Patent Act* No. 6/1989 also failed to promote the transfer of technology from foreign investors to Indonesians. Like in other developing countries, the actual transfer of technology fostered by patent system was very low.²⁷⁴ In fact, many transfer of technology depends on decisions made by the management of big multinational companies and many other factors which were difficult to be calculated.²⁷⁵ Intellectual property protection had little, if any, effect on the R&D decisions of these big multinational companies.²⁷⁶

²⁷⁰ Fernando, Donny, “Memanfaatkan Paten Melalui Lembaga Lisensi Wajib Paten” [To Benefit Patent by Compulsory License] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?/cookie=2&inw_id=57461 (18 February 1998) at 2

²⁷¹ Loughlan, Patricia, above n181 at 575

Also see Brenner-Beck, Dru, above n140 at 100

²⁷² *Brenner v. Manson*, 383 U.S. 519 at 534 (1966) as cited by Vaver, David, above n182 at 149

²⁷³ Also see Gutterman, Alan S., above n195 at 123

²⁷⁴ Brenner-Beck, Dru, above n140 at 98

²⁷⁵ Antons, Christoph, above n139 at 84

Also see Hartono, C.F.G. Sunaryati, above n266 at 93

²⁷⁶ Brenner-Beck, Dru, above n140 at 97

d. Enforcement of the Patent Act 1989

Until 1995, the Indonesian Patent Office granted 178 patents out of 102,850 patent applications. There were 2,828 applications for substantive examination still pending. With only thirty-seven patent examiners, each examiner was responsible for, on average 76.4 applications for substantive examination. This was an onerous task for examiners who had limited experience and had to comply with the time limit of maximum two year examination period. Doubts were expressed about the quality of their patent examinations.²⁷⁷

This was a common problem in the enforcement arena in developing countries. Their patent enforcement agencies were severely understaffed and under-funded that caused a significant backlog of pending patent applications.²⁷⁸ They could not afford to spend over US\$ 300 million annually like the US patent office did, to employ around 2,200 patent examiners, most of them with the highest academic credentials, and to provide them with an extensive library and search capabilities and opportunities for continuous legal and technical training.²⁷⁹ Brazil, as a developing country, had made an effort to run their patent office with US\$ 30 million annually, but still suffered a significant backlog of pending patent applications.²⁸⁰ In Indonesia, the Office of Intellectual Property Rights (IPR), which included the Patent Office, was not given the revenue derived from the registration fees collected for copyright, patent

²⁷⁷ Kesowo, Bambang, above n239 at 2

²⁷⁸ Konan, Denise Eby, et al., above n176 at 24, 25, 29

Emmert, Frank, “Intellectual Property in the Uruguay Round – Negotiating Strategies of the Western Industrialised Countries” (1990) 11 *Michigan Journal of International Law* at 1359

²⁷⁹ Sherwood, Robert M., “The TRIPs Agreement: Implications for Developing Countries” 37 *IDEA: The Journal of Law and Technology* at 527

Konan, Denise Eby, et al., above n176 at 29

²⁸⁰ Konan, Denise Eby, et al., above n176 at 29
Emmert, Frank, above n278 at 1359

and trademarks. This revenue could reach up to 15 million rupiah (around US\$ 1,764,705) per year. Because of the national budget allocation, the Office of IPR was only given 2 million rupiah (around US\$ 235,294) per year to fund their operations, while the balance of the registration fees was retained by the government as part of the state budget. With only a very limited budget available, it was impossible for the Office of IPR to maintain or acquire more modern equipment and qualified staff.²⁸¹

Another problem faced in Indonesia was the legislative culture which was more concerned with principles than with detailed and strict provisions of laws.²⁸² The Indonesian Government often left important areas in laws, including intellectual property laws, open to further regulation by way of administrative provisions, such as, Presidential Decrees, Government Regulations, Decrees of the Ministry of Justice and Circular Letters.²⁸³ The failure to issue these implementing regulations led to the delays in the registration process for intellectual property rights, including patents.²⁸⁴ For example, Article 79 of the *Patent Act* 1989 required that every licensing agreement be registered in the Patent Office and a government regulation be issued to govern the procedures of such registration, but up to now no government regulation on this matter has been issued.²⁸⁵ This meant that compulsory licensing provided for by Articles 81 - 93 of the *Patent Act* 1989, had simply been unenforceable, because the Government

²⁸¹ “Pengelolaan Anggaran di Ditjen HAKI Idealnya Swadana” [Directorate General of IPRs should be Self-funded] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/2000/03/28/Kesra/ks03/ks03.html> (28 March 2000)

Sherwood, Robert M., above n279 at 523,

²⁸² Hooker, M B, above n21 at 87

²⁸³ Antons, Christoph, above n2 at 416

²⁸⁴ Kardono, A. Supriyani and Johnson, Darrell R., above n196 at 180

²⁸⁵ Holder, Sara, above n76 at 57

Regulation needed to govern compulsory licensing, had yet to be issued.²⁸⁶

There were only quite few cases of patent infringement brought before the Indonesian courts. Only two cases had been reported since the introduction of the *Patent Act* 1989.²⁸⁷ This was possibly because a “patent culture” had not yet developed in Indonesia. Penal provisions of the *Patent Act* 1989 were a maximum penalty of seven year imprisonment and maximum fine of 100 million rupiah (about US\$ 55,000²⁸⁸).

Among Indonesian scientists and inventors, there were several constraints on them to patent their inventions. Besides the cultural factors, the “novelty” requirement in patent law had been identified as the major risk in obtaining patent for them.²⁸⁹ In scientific tradition, the results of any research was usually made public through academic journals or seminar presentations to allow fellow scientists to assess their worth.²⁹⁰ The need to obtain funding for research projects also forced researchers to publicise their results through public presentations of research plans.²⁹¹ These academic norms and ethics inhibited Indonesian scientists from obtaining patents for their inventions. The highly patent application fee, annual fee and other related fees could also discourage Indonesian inventors and small entrepreneurs from applying for patent protection.²⁹² In 1997 (before the economic crisis), the annual fee was equivalent to approximately US\$

²⁸⁶ Gautama, Sudargo, above n7 at 47

²⁸⁷ “Melanggar Hak Paten Dituntut Tiga Tahun” [3 Years for Patent Infringement] *KOMPAS* (5 May 1995) at 10

“Polda DIY Teliti Kasus Pelanggaran Hak Paten” [The Yogyakarta District Police Investigates A Patent Infringement] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1997/10/221097/Hukum/huk01/huk01.html> (22 October 1997)

²⁸⁸ Based on the conversion rate when the *Patent Act* 1989 was enacted.

²⁸⁹ Loughlan, Patricia, above n181 at 573-574

²⁹⁰ *The Jakarta Post* (22 March 1997) above n187

Loughlan, Patricia above n181 at 573-574

²⁹¹ *The Jakarta Post* (22 March 1997) above n187

45 for the first year, increasing to US\$ 700 for the fifteenth year.²⁹³ This was a significant impost when compared to the living standard in Indonesia.

4. Trade Secrets/Confidential Information

Indonesia did not have a specific law to protect trade secrets.²⁹⁴ *Adat* law did not regard trade secrets or confidential information as property, therefore it afforded trade secrets no legal protection. The Dutch *Criminal Act* did not have penal provisions to protect trade secrets. But the Dutch *Civil Act* that had been adopted into Indonesia's legal system would protect trade secrets under its tort provisions. This came from a precedent in the Dutch Supreme Court (*Hoge Raad*) on 31 January 1919 in the case of *Lindebaum v. Cohen*. The Cohen's publisher company had bribed employees of Lindebaum's publisher company to obtain lists of Lindebaum's customer names and customer orders. This caused damage to Lindebaum's company, as Lindebaum lost his customers to Cohen's company. The *Hoge Raad* in the Netherlands decided that Cohen had committed a tort and awarded damages to Lindebaum.²⁹⁵ The *Civil Act* also protected trade secrets, if there was a contract between parties that required the trade secrets be kept confidential.²⁹⁶ So far, there was no case relating to a breach of trade secrets ever brought before the Indonesian courts.

²⁹² Braga, Carlos A.P. and Fink, Carsten, above n185 at 549

²⁹³ Kardono, A. Supriyani and Johnson, Darrell R., above n196 at 163

²⁹⁴ Kaehlig, Carl-Bernd, "Trade Secrets" in Kaehlig, Carl-Bernd, *Indonesian Intellectual Property Law* (Jakarta, Indonesia : Tatanusa, 1993) at 1

²⁹⁵ Djojodirdjo, Moegni M.A., *Perbuatan Melanggar Hukum [Tort]* (Jakarta: Pradnya Paramtia, 1979) at 25-26

Djumhana, Muhamad and Djubaedillah, above n128 at 181-182

²⁹⁶ Kaehlig, Carl-Bernd, "Trademarks Under the 1961 Trademark Law" in Kaehlig, Carl-Bernd, *Indonesian Intellectual Property Law* (Jakarta, Indonesia : Tatanusa, 1993) at 1-2

C. Conclusion

With the very low degree of indigenous patent ownership and technology transfer to Indonesian industries, it can be said that patent protection failed to increase the development of domestic industries.

Historically, the Indonesian patent law, the *Patent Act* No 6/1989, was enacted not to fulfil the economic needs and objectives of the Indonesian people, but to meet the demands of foreign companies and economic pressure of Western countries, the US particularly. Culturally, the *Patent Act* 1989 was at odd with *Adat* norms of the communal ownership of knowledge and technologies. Economically, the *Patent Act* 1989 was not suitable for the existing level of Indonesia's economic development which only in mid 1980s did transform to manufacturing and industrial based economy from agricultural and mining based economy.

A patent law will not benefit Indonesians unless Indonesia has reached a certain stage of development where it has the potential to develop internationally important innovations that have competitive value in the world market. In the early stages of their industrial growth, Indonesia has an interest in very limited patent protection, because they want to be able to freely imitate imported technologies. It has been found that when the rate of imitation declines because of the global strengthening of patent system, the global rate of innovation slows as well.²⁹⁷ As Indonesia develops and patent protection becomes economically advantageous, they will develop their patent system and give protection to other countries' patents even without economic pressures or trade sanctions.²⁹⁸ This situation also occurred in Western developed countries, where they used to

²⁹⁷ Maskus, Keith E., above n194 at 134 - 135

infringe patents and gave patent protection only when they had been able to produce internationally important innovations.²⁹⁹

Until Indonesia reaches that stage of development which is supported by a strong judicial infrastructure, patent law will have a detrimental effect on Indonesia's technological and economic development, as the patent law will cost too much for the Indonesian people to get important technological products and to develop technology in Indonesia. For example, patent protection for foods, plant and animal varieties, and pharmaceuticals might cause welfare losses for the Indonesian people.³⁰⁰ This will make the patent law regarded as in contrary to Indonesia's cosmic and communal philosophy which emphasises the protection of the public interest in preference to the individual interest.

The patent law will also have a detrimental effect on Indonesians when the foreign companies in Indonesia that are benefited by patent law abuse the law to prevent transfer of technology to domestic industries and make them dependent on foreign technology.

With a different cultural background and a different level of economic development from those prevailing in Western countries, Indonesia and other developing countries should be given the freedom to draft their own patent law

²⁹⁸ Also see Henderson, Elizabeth, "TRIPs and the Third World: the Example of Pharmaceutical Patents in India" (1997) 19 *European Intellectual Property Review* at 663

²⁹⁹ See Brenner-Beck, Dru, above n140 at 87;

Gutterman, Alan S., above n195 at 137, foot-note 346;

Antons, Christoph, above n54 at 361-362;

Twinomukunzi, Charles, above n106 at 44-45 as cited in Brenner-Beck, Dru, above n140 at 90 footnote 36.

Blakeney, Michael, above n214 at 197

³⁰⁰ Subramanian observed that increased patent protection for pharmaceuticals in southern countries could result welfare losses to individual countries which outweighs the gains to pharmaceutical producers." Subramanian, R, "Putting Some Numbers on the TRIPS Pharmaceuticals Debate" (1995) 10 *International Journal of Technology Management* at 263.

Also see Section 5 of the B.I.R.P.I. *Model Law for Developing Countries on Inventions* 1965 and Section 118(1) of the WIPO *Model Law for Developing Countries on Inventions* 1979.

that suits their condition and needs. This is the way to make patent law benefit the people.

CHAPTER IV

THE ENFORCEMENT OF TRADEMARK LAW IN INDONESIA

A. Introduction

This chapter will review the history and development of trademark law in Indonesia and analyse why trademark law is the only intellectual property law which is relatively well established and accepted in Indonesia since the independence.

The discussion in this chapter will start with an analysis of the *Trademark Act* No. 21/1961 and case law found in the field of trademark law. It will continue with an analysis of the *Trademark Act* No. 19/1992, which came into force in 1993.

It was found that the *Trademark Act* No. 21/1961 was enacted in line with those aspects of Indonesian culture and *Adat* which were based on the principle of communalism, namely, protection of the public interest over private sector interests, when there was any conflict or tension between the two. According to its Preamble, the enactment of the *Trademark Act* No. 21/1961 was designed to protect the Indonesian public from being misled by counterfeit goods. The Indonesian courts had also implemented this guiding principle by developing case law that aimed to protect Indonesian consumers and trademark owners who acted in good faith. Trademark law became relatively well developed in Indonesia as it accommodated Indonesian culture and fulfilled the interests of the Indonesian people.

However, the *Trademark Act* No. 21/1961 could not satisfy foreign owners of well-known trademarks who argued that the Act failed to provide adequate

protection to their well-known trademarks in Indonesia. As a result of economic pressure and threats of trade sanctions from Western governments, the Indonesian government replaced the *Trademark Act* No. 21/1961 with the *Trademark Act* No. 19/1992. The *Trademark Act* No. 19/1992 differed markedly from its predecessor by failing to take account of Indonesian culture and *Adat* and by shifting its emphasis away from the protection of the public interest, particularly consumer interests. To accommodate the pressure from Western countries, the Preamble to the *Trademark Act* No. 19/1992 emphasised that the Act was enacted to protect trademarks. It meant that the *Trademark Act* No. 19/1992 no longer put the public interest as the overt and underlying reason for trademark protection, but instead emphasised the paramount interest of individual trademark owners.

The enforcement of the *Trademark Act* No. 19/1992 is found to be ineffective. The Indonesian community could not really accept the Act. The police, even the courts have been reluctant to enforce the Act strictly. They were hindered by the culture and the lack of Indonesia's own interest in the *Trademark Act* No. 19/1992. Moreover, the lack of technological, human and financial resources in the Trademark Office to provide effective trademark registration was also another factor that made the enforcement of the *Trademark Act* No. 19/1992 ineffective.

B. Discussion

Trademark law in Indonesia was introduced by the Dutch colonial government. In spite of the law segregation during the colonial era, the Court for Indonesian natives (*Landraad*) often applied the colonial trademark law in reaching their decisions in order to provide protection to the Indonesian native public.

After independence, the Indonesian government quickly adopted the Dutch trademark law into Indonesia's first indigenous intellectual property law, the *Trademark Act* No. 21/1961. After that, trademark law became relatively well developed in Indonesia with case law developed by the Indonesian courts which is still valid today.

The enactment of a new trademark law in 1993, namely, the *Trademark Act* No. 19/1992, was the result of economic pressure from Western countries that demanded better protection for trademarks owned by Western companies. Unlike the previous Act, the *Trademark Act* No. 19/1992 mostly served the interest of foreign owners of well-known trademarks.

1. The Dutch Colonial Era

The first *Trademark Act* (Staatsblad van Nederlandsch-Indie 1885 No. 109) in Indonesia was enacted by the Dutch colonial government in 1885. The Act granted the right to trademark protection for fifteen years, subject to the payment of a deposit and registration at the District Court in Batavia (now Jakarta). The Act was revised when the Netherlands East Indies joined the *Paris Convention* in 1888.³⁰¹

In 1893, three years after the Netherlands ratified the *Madrid Agreement* concerning the International Registration of Trademarks, the Netherlands East-Indies followed to ratify the *Madrid Agreement*. A new *Trademark Act* (Staatsblad van Nederlandsch-Indie 1893 No. 305) was introduced and came into force in 1894. This Act provided that the right to a trademark no longer resulted from first registration, but from first use in the Netherlands, the Netherlands East-Indies, Surinam or Curacao. A registration of the right

³⁰¹ Antons, Christoph, above n54 at 362

would create an assumption of first use in favour of the registrant, until contrary evidence was brought. The term of protection was increased from 15 years to 20 years.³⁰²

In 1912, a new *Trademark Act* called *Reglement Industrieele Eigendom* (Staatsblad van Nederlandsch-Indie 1912 No. 545) was promulgated and came into force in 1913.³⁰³ This new Act adopted most provisions of the previous Act of 1894.

An interesting development in trademark law happened in 1935 when the Dutch government announced the withdrawal of the Netherlands East-Indies from the *Madrid Agreement*. The reason for withdrawal was because in practice, only a small number of trademarks registered in the Netherlands East-Indies were actually used. People in the Netherlands East-Indies required simple, easily remembered trademarks, which were only limited in number.³⁰⁴ This policy evinced an intention by the colonial government to relate the enforcement of trademark law to the factual life of Indonesian natives. Other reasons for withdrawal from the *Madrid Agreement* were the high costs and numerous administrative problems.³⁰⁵

Based on the Constitution of the colony, Article 109 *Regerings Reglement* of 1920 and Article 163 *Indische Staatsregeling* of 1926, which imposed segregation in civil law, the *Trademark Act* 1912 was not applicable to Indonesian natives.³⁰⁶ In spite of this, unlike copyright and patent laws, native Indonesians recognised the idea of trademark law, because it was to protect public (consumers), including native Indonesians from counterfeit

³⁰² *Id.*, at 362-363

³⁰³ *Id.*, at 363

Antons, Christoph, above n2 at 402

³⁰⁴ Antons, Christoph, above n54 at 363-364

³⁰⁵ *Id.*, at 364

³⁰⁶ See Chapter I above at 13-14

goods. There had been several trademark cases that were brought to the Landraad (Court for Indonesian natives³⁰⁷) for the purpose of protecting public or consumers, for example, in the Landraad in Medan (North Sumatra). In their decisions of 24 September 1931, 27 July 1933, 12 March 1935, the Landraad held that there would be a counterfeiting of trademark if the public had been confused or deceived by similarities between an established trademark and the alleged counterfeiting trademark.³⁰⁸

In fact, unlike in other area of intellectual property laws, there had been fairly extensive trademark litigation during colonial period.³⁰⁹ Trademark law was well established. Many court decisions made during colonial period were reported in the leading journal of the Netherlands East Indies, the *Indisch Tijdschrift van het Recht*. Even after Indonesia's independence, these decisions continued to be used by Dutch-trained and Dutch-speaking lawyers.³¹⁰

To protect consumers from counterfeit goods, the Dutch colonial government also imposed criminal sanctions provided by the Article 378, 382bis, 383, 393 of the *Criminal Act (Wetboek van Strafrecht voor Nederlandsch Indie)* against counterfeiters. Unlike civil acts, the *Criminal Act* was applicable to all citizens in the Netherlands East Indies, including native Indonesians.

Therefore, unlike copyright and patent law, native Indonesians had recognised trademark law since the Dutch colonial era. However, in keeping with the *Adat* philosophy underlying and shaping commercial life in Indonesia, the recognition of trademark law was not primarily for the

³⁰⁷ Fof further definition of Landraad, see above n115

³⁰⁸ Gautama, Sudargo and Winata, Rizawanto, above n116 at 106-107

³⁰⁹ See Gautama, Sudargo and Winata, Rizawanto, above n116

³¹⁰ Antons, Christoph, above n2 at 404

purpose of protecting the intellectual property rights of trademark owners, but to protect the public from counterfeit goods.

2. The Sukarno Government

After independence, the Indonesian government had to examine the compliance of all colonial Acts with article II of the Transitional Provisions of the 1945 Constitution. The colonial *Trademark Act* 1912 could stay in force, partly because the Act had been widely recognised by Indonesians.³¹¹

The government also maintained Indonesia's membership in the *Paris Convention for the Protection of Industrial Property*. The government and Supreme Court declared that Indonesia was bound by the London Revision of the *Paris Convention* of 1934. On 24 November 1950, the Swiss Federal Council also issued a circular letter which contained a declaration of the Indonesian Foreign Department that considered Indonesia was bound by the London Revision of the *Paris Convention* and the *Hague Agreement* concerning industrial designs and by the *Agreement of Neuchatel* concerning the restoration of rights to industrial property after the Second World War.³¹²

As part of the “*Eight Year Overall Development Plan 1959-1960*” which aimed to abolish colonial laws and develop indigenous law, the Sukarno government started legal reform by enacting several new Acts.³¹³ One of the new Acts was the *Company Mark and Trademark Act* No. 21/1961 (hereinafter called the *Trademark Act* 1961) which came into force on 11 November 1961. The *Trademark Act* 1961 replaced *Reglement Industrieele Eigendom* 1912. The

³¹¹ Antons, Christoph, Paper, above n1 at 1

Antons, Christoph, above n2 at 402

³¹² above n174

³¹³ See Chapter I above at 17

Sukarno government had paid attention to the development of trademark law, as trademark law was in the public interest to give protection to consumers from being injured by counterfeit goods. The development of trademark law was also supported by Indonesian entrepreneurs who often went to the court to protect their trademarks. Clearly, trademark law was the area of intellectual property law with which Indonesian entrepreneurs and lawyers were most familiar.³¹⁴

The purpose of trademark law as the protection of the public interest was clearly stated in the Preamble to the *Trademark Act 1961* which promulgated that the Act was needed to protect the public from counterfeit goods that used trademarks commonly known for good quality products. This aim was implemented by the Supreme Court which held in their decision No. 352 K/Sip/1975, that the *Trademark Act 1961* was to protect both consumers (the public) and the first user of a trademark in Indonesia from trademark imitation, no matter whether he or she had registered the trademark.³¹⁵

Although it was meant to be an indigenous law, the *Trademark Act 1961* adopted almost all provisions of the colonial *Trademark Act 1912* (the *Reglement Industriele Eigendom*). The only reform was the reduction of term of trademark protection from 20 years to 10 years.³¹⁶ With the adoption of the *Reglement Industriele Eigendom* into the *Trademark Act 1961*, colonial case law and literature on trademark were also adopted widely in Indonesian courts.³¹⁷ The colonial case law on trademark could be accepted in the post-

³¹⁴ Antons, Christoph, above n2 at 419

³¹⁵ Kaehlig, Carl-Bernd, above n296 at 51

Also see the decision of the Supreme Court No. 1269/Pdt/1984 of 15 January 1986 in the *Hitachi* case and the decision of the District Court of Central Jakarta No. 681/Pdt/G/1988 of 11 April 1990 in the case of *Arthur Guinness Son & Co (Dublin) Ltd v Darwis Gunawan and Directorate of Trademarks*

³¹⁶ Antons, Christoph, above n54 at 369

³¹⁷ Kaehlig, Carl-Bernd, above n296 at 1

Keyzer, Patrick, "Trade Mark Law and Practice in Indonesia" (1999) 10 *Australian Intellectual Property Journal* at 7

independence era because most of case law dealt with the protection of the public from deceptive, counterfeit trademarks, a value which was in line with the philosophy of Indonesian communal society.

Like the colonial *Trademark Act 1912*, the *Trademark Act 1961* adopted the “first to use” system which granted trademark protection to the first user of the trademark in Indonesia (Article 2(1)). This meant that the first use of a trademark in Indonesia was not necessarily first use internationally.³¹⁸

Registration of a trademark only served as a legal presumption that the person who registered the trademark was the first user of the trademark, and consequently the owner of the trademark in Indonesia until it could be proved contrary (Article 2(2) of the *Trademark Act 1961*).

The Indonesian courts gave strong support to the “first to use” system, although *BIRPI Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition 1967* Article 4, adopted the system of “first to register”. It was argued that the identity of the first user of a trademark in Indonesia could be proved by invoices of sales, bills of lading, delivery orders, advertisements in the printed media and on television, offers and sale of products by reference to the trademark, samples sent to customers, as well as exhibitions held by the trademark users.³¹⁹ Article 2(3) of the *Trademark Act 1961* provided that the registration of a trademark six weeks later after the trademark’s exhibition provided a legal presumption that the exhibitor had used the trademark for the first time on the date of the exhibition.

Also see Gautama, Sudargo and Winata, Rizawanto, above n116

³¹⁸ Kardono, A. Supriyani and Johnson, Darrell R., above n196 at 168

³¹⁹ Gautama, Sudargo and Winata, Rizawanto, above n116 at 30
Kaehlig, Carl-Bernd, above n296 at 9

3. The Suharto Government

3.1. The Trademark Act 1961

a. Protection for the Public Interest and Trademark First Users in Good Faith

Although the Supreme Court upheld the “first to use” system, in 1972 to protect consumers (public), the Supreme Court interpreted the term of “first use” in Article 2(1) of the *Trademark Act 1961* to mean the “first use in good faith not in bad faith”.³²⁰ This interpretation became an established principle of case law in Indonesian trademark law until today since the Supreme Court’s decision in the case of *PT. Tancho Indonesia Co. Ltd. v. Wong A Kiong*³²¹ which held that trademark protection was given only to the first user in Indonesia who acted in good faith.

In the case of *PT. Tancho Indonesia Co. Ltd. v. Wong A Kiong* (hereinafter called the *Tancho* case), an Indonesian entrepreneur, Wong A Kiong, registered the trademark “Tancho” under his company name “Firma Tancho Osaka Company”. Wong A Kiong registered the trademark “Tancho” for his cosmetic products in 1965. In 16 November 1970, PT. Tancho Indonesia Co. Ltd., which was a joint venture between Tancho Kabushiki Kaisa, in Osaka, Japan, and NV. The City Factory, in Jakarta, applied for registration of their trademark “Tancho”. Although they had never registered their trademark in Indonesia, but since 1961 Tancho

³²⁰ Gautama, Sudargo and Winata, Rizawanto, above n116 at 22

Kaehlig, Carl-Bernd, above n296 at 9

Rooseno, A. Mulyono, “Indonesian Trademark Law: Some Practical Problems and Solutions” (1982-3) *2 Lawasia* at 271

³²¹ The Supreme Court decision No. 677 K/Sip/1972, 13 December 1972

Gautama, Sudargo, and Winata, Rizawanto, *The New Indonesian Trademark Law* (Bandung, Indonesia: Alumni, 1993) at 6

Kaehlig, Carl-Bernd, above n296 at 9

Rooseno, A. Mulyono, above n320 at 271

Kabushiki Kaisa, Japan, had been producing cosmetic products bearing the trademark “Tancho” to be marketed in the Philippines, Singapore, Hongkong and Indonesia. However, the Patent Directorate³²² did not accept their application because Wong A Kiong had registered the trademark “Tancho” earlier. When this case was brought to the Supreme Court, the Supreme Court held that the term of “first use” had to be interpreted as “first use in good faith”, because it was in line with the purpose of the *Trademark Act* 1961 which was to protect the public. The Supreme Court held that Wong A Kiong had acted in bad faith for two reasons. Firstly, the two “Tancho” trademarks in question had entire similarity. Secondly, Wong A Kiong deliberately added to his trademark the words “Trade Marks Tokyo Osaka Co”. According to the Supreme Court, this was an obvious sign of bad faith, because Wong A Kiong misled customers into believing that his products were foreign-made, whereas they were actually made in Indonesia.³²³

In most cases, it was not easy to find an obvious sign of bad faith. In cases of foreign trademarks, judges normally would examine whether products with the trademarks had been imported in compliance with Indonesian import regulations. Bad faith was assumed if the products were not imported via legal channels.³²⁴ In the *Tancho* case, the Japanese company, Tancho Kabushiki Kaisa, had marketed their “Tancho” products in the Philippines, Singapore, Hongkong and Indonesia since 1961. Although they had not registered their trademark in Indonesia until 1970, their products had been well known by several Indonesian companies that

³²² Please note that during this time, the trademark office was under the Directorate of Patent and Copyright of the Department of Justice.

³²³ Gautama, Sudargo and Winata, Rizawanto, *Himpunan Keputusan Merek Dagang [The Compilation of Trademark Decisions]* (Bandung, Indonesia: Alumni, 1987) at 1 - 40
Kaehlig, Carl-Bernd, above n296 at 10
Rooseno, A. Mulyono, above n320 at 271

³²⁴ See the *Wood Milne* case, the Supreme Court decision No. 3439 K/Pdt/1983, 7 February 1985 at 6

legally imported the products since 1961. This indicated the good faith of Tancho Kabushiki Kaisa. However, in the *Christian Dior* case³²⁵, the District Court of Central Jakarta decided in favour of the Indonesian trademark owner who had registered the “Christian Dior” trademark. The Court held that the foreign trademark owner of “Christian Dior” had not acted in good faith, as he had failed to prove an active use of the trademark by showing the Entry Notification for Usage (PPUD) of the latest date issued by the Directorate General of Customs and Excise.³²⁶ Another sign of bad faith also took place when the manufactured product was not identical to the officially registered one.³²⁷

In the Tancho case, the Supreme Court found that the Indonesian entrepreneur acted in bad faith because he registered the “Tancho” trademark which had entire similarity to the trademark owned by Tancho Kabushiki Kaisa, Japan, for the same kind of product, namely cosmetics.³²⁸ According to Article 10 of the *Trademark Act* 1961, trademark protection would be granted to goods of the same kind. The Elucidation of the Act did not give further definition to what was meant by “goods of the same kind”. The Supreme Court usually took account of public opinion to determine which were goods of the same kind.³²⁹ The fundamental principle held by the Supreme Court was that the public should not be deceived or confused by trademarks of goods that had a similar nature.³³⁰ This was in line with the purpose of the *Trademark Act*

Kaehlig, Carl-Bernd, above n296 at 10

³²⁵ The decision of the District Court of Central Jakarta No. 48/1982 G, June 1982

³²⁶ Rooseno, A. Mulyono, above n320 at 272

Kaehlig, Carl-Bernd, above n296 at 10s

³²⁷ The decision of the District Court of Central Jakarta No. 21/1974G, 11 December 1974

Kaehlig, Carl-Bernd, above n296 at 12

³²⁸ Gautama, Sudargo and Winata, Rizawanto, above n323 at 20

³²⁹ This was based on a precedent from the decision of the Hoog Gerechtshof (the Supreme Court of the Netherlands East Indies) of 20 October 1927

³³⁰ See the decision of the Hoog Gerechtshof, reported in the journal TR 127 (20 October 1927) at 43
Kaehlig, Carl-Bernd, above n296 at 15

1961 that tried to give protection to public (consumers). In other Supreme Court decisions, goods were also considered as being of the same kind if the goods were produced in the same area of industry or trade³³¹, were traded together by the same trading houses, were sold by the same type of shop, or were produced by the same means of production. Goods were also of the same kind if the public believed that the goods originated from the same place, if the goods had the same characteristics, or the same structure or composition, or served the same purpose of use.³³² Some examples of goods held to be of the same kind by courts include:³³³

- candies and biscuits;³³⁴
- shoes, shoe soles, sandals, wooden sandals;³³⁵
- cigarette paper and cigarettes;³³⁶
- beverages and candies or confectionery;³³⁷
- orange squash, soda water and lime;³³⁸
- containers of accumulators and accumulators;³³⁹
- paint, water colour, and varnish;³⁴⁰
- lubricating oil and fuel oil;³⁴¹
- matress, pillow and blanket;³⁴²
- perfume, pomade, and other cosmetic products;³⁴³

Gautama, Sudargo and Winata, Rizawanto, above n116 at 95

³³¹ For example, in the decision of the Raad van Justitie, Jakarta of 7 April 1937 and the Hoog Gerechtshof of 5 November 1909, candies and biscuits were categorised as goods of the same kind. See Gautama, Sudargo and Winata, Rizawanto, above n116 at 95

³³² See the decisions of the District Court of Central Jakarta No. 73/1982 PDT G of 16 September 1982 at 5; the Supreme Court No. 3043 K/Sip/1981 of 12 April 1982 Kaehlig, Carl-Bernd, above n296 at 15

Gautama, Sudargo and Winata, Rizawanto, above n116 at 96

³³³ Kaehlig, Carl-Bernd, above n296 at 15-16

Gautama, Sudargo and Winata, Rizawanto, above n116 at 96-97

³³⁴ See the decision of the Raad van Justitie Jakarta, reported in the journal TR 147 (7 April 1937) at 775; The decision of the Hoog Gerechtshof, reported in the journal W 8919 (5 November 1909)

³³⁵ See the decision of the Raad van Justitie Jakarta, reported in the journal TR 143 (11 December 1936) at 465

³³⁶ See the decision of the Raad van Justitie Jakarta, reported in the journal TR 143 (11 December 1936) at 465

³³⁷ See the decision of the Indonesian Supreme Court No. 3043 K/Sip/1981 of 12 April 1982 and No. 3027 K/sip/1981 of 29 December 1982

³³⁸ See the decision of the the Hoog Gerechtshof, reported in the journal TR 145 (3 June 1937) at 761

³³⁹ See the decision of the Raad van Justitie Jakarta, reported in the journal TR 148 (19 December 1938) at 963

³⁴⁰ Gautama, Sudargo and Winata, Rizawanto, above n116 at 96

³⁴¹ *Ibid*

³⁴² *Id*, at 97

- flour and noodle.³⁴⁴

There was an assumption that goods in the same class for the purpose of trademark registration were also of the same kind.³⁴⁵ The *Trademark Act 1961* attached a list of goods and services classification that adopted the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*, although Indonesia was not a member of the *Nice Agreement*.

Regarding the similarity of trademarks, the Supreme Court held that the similarity would be found if there was similarity in the shape, or structure, or sound of the trademarks that could deceive or confuse the public.³⁴⁶ According to the Court, consumers would not give attention to details of trademarks, but to the general picture of trademarks. Therefore, to determine trademark similarity, the Court regarded “total impression” of the trademarks on consumers as a decisive factor.³⁴⁷ Furthermore, to protect the public from being deceived by similar trademarks, the Indonesian courts also looked at the kind of people or community who bought the goods bearing the trademarks. Children and uneducated or illiterate people would have more difficulty in differentiating similar trademarks than educated people. It meant that courts would more readily find trademark similarity on goods sold to children and uneducated people than on goods sold to educated people.³⁴⁸

³⁴³ *Ibid*

³⁴⁴ *Ibid*

³⁴⁵ Kaehlig, Carl-Bernd, above n296 at 16

³⁴⁶ See the decision of the Supreme Court No. 217/ K/Sip/1972 of 30 October 1972 in the case of *PT. Kuda Mas Jaya v. Yoshida Kogyo Kabushiki Kaisha* (also known as the YKK case).

Gautama, Sudargo and Winata, Rizawanto, above n323 at 41

³⁴⁷ Gautama, Sudargo, and Winata, Rizawanto, above n321 at 17

For example, the decision of the Raad van Justitie Jakarta of 2 April 1937 in the case of *Phillips v.*

Philco, the decision of the Supreme Court No. 178 K/Sip/1973 of 7 May 1973 in the case of *Kampak v. Raja Kampak*

Gautama, Sudargo and Winata, Rizawanto, above n116 at 102-107

There were some other trademark case law developed by Indonesian courts which retained its relevance even after the enactment of a new Trademark Act in 1993:

- a. An undistinctive trademark which consisted only of numerical figures, lines or alphabetical letters, could obtain its distinctive character and could be protected by trademark law if the trademark had been used continuously for a long period of time, had become well-known to the public, and the public had accepted it as a trademark.³⁴⁹
- b. No time limit shall be fixed for seeking the cancellation of marks registered in bad faith.³⁵⁰ The Court adopted Article 6bis(3) of the *Paris Convention* 1934 (London Revision).³⁵¹

Because the Indonesian government placed a reservation on all substantive Articles of the Stockholm Revision of the *Paris Convention* 1967 (articles 1-12 and 28)³⁵², the reference to substantive Articles of the *Paris Convention* by Indonesian courts in their decisions had to be interpreted as a reference to the London Revision of the *Paris Convention* 1934 and not

³⁴⁸ Gautama, Sudargo and Winata, Rizawanto, above n116 at 107

³⁴⁹ See the decision of the Supreme Court No. 217/K/Sip 1972 of 30 October 1972 in the case of “*PT. Kuda Mas Jaya v. Yoshida Kogyo Kabushiki Kaisha*” (also known as YKK case); The decision of the Supreme Court No. 757/K/Pdt/1989 (also known as AQUA case); The decision of the Central Jakarta District Court No. 904/1970 of 30 January 1971 in the case of “*PT. Limasatu Sankyo Industry Pangan v. PT. Fuji Agung Foods Manufacturing Corp*” (also known as Supermie case). These decisions are reported in Gautama, Sudargo and Winata, Rizawanto, above n323 at 47, 61 and in Gautama, Sudargo, and Winata, Rizawanto, above n321 at 13

³⁵⁰ The decision of the Supreme Court No. 3027 K/Sip/1981 in the case of “*Tjhin Tjen Khian v. The Seven Up Company*”, as reported in Gautama, Sudargo and Winata, Rizawanto, above n323 at 240

³⁵¹ Maulana, Insan Budi, “Indonesian Trademark Law” (1995) 26 *International Review of Industrial Property and Copyright Law* at 386

Antons, Christoph, above n2 at 407-408

Kaehlig, Carl-Bernd, above n296 at 9

³⁵² The reason of the reservation was because at that time, Indonesia did not have any industrial property law, but trademark law. Kesowo, Bambang, *Industrial Property Systems: Past, Present and Future, Indonesia's Profile*, Paper presented at “APEC - IPR Symposium on the Development of Industrial Property Systems Toward the 21st Century” held in Tokyo, 28-29 August 1996, at 2 and Kesowo, Bambang, above n92 at 8

the Stockholm Revision of the *Paris Convention* 1967.³⁵³ The adoption of the London Revision of the *Paris Convention* was also supported by the Indonesian government when they made reference to substantive Articles of the *Paris Convention* in the Elucidation of Article 29 of the *Patent Act* No. 6/1989.³⁵⁴

Because trademark law was regarded as part of private law, the *Trademark Act* 1961 did not have criminal provisions regarding trademark infringement. The *Trademark Act* only provided procedures for trademark annulment³⁵⁵, while criminal penalties for trademark infringement were governed in the *Wetboek van Strafrecht voor Nederlandsch Indie* (hereinafter called the *Criminal Act*), especially Article 393 regarding trademark infringement³⁵⁶. In practice, the case law also adopted other provisions of the *Criminal Act* to punish trademark infringement, namely, Article 378 regarding general falsification³⁵⁷, Article 382bis regarding unfair competition and Article 383 regarding falsification.³⁵⁸

Article 393 of the *Criminal Act* regarding trademark infringement provides that anybody who sells, offers, or gives counterfeited goods with

³⁵³ See the decision of the District Court of Central Jakarta No. 95/75 G of 16 April 1974 in the *Fortuna* case; the decision of the Supreme Court No. 3670K/Sip/1981 of 25 October 1982 in the *Metzler International* case; the decision of the Supreme Court No. 3027 K/Sip/1981 of 29 December 1982 in the *Seven Up* case; the decision of the Supreme Court No. 809K/Sip/1980 of 28 January 1984 in the *Shan Hwu Brand Shears* case; the decision of the District Court of Central Jakarta No. 598/PdtGD/1986/PN JKT PST of 18 May 1987 in the *Revlon* case.

Antons, Christoph, above n2 at 407

³⁵⁴ Kaehlig, Carl-Bernd, above n296 at 65

Antons, Christoph, above n2 at 407

³⁵⁵ Gautama, Sudargo and Winata, Rizawanto, above n323 at 1-2

Kesowo, Bambang, above n92 at 34

³⁵⁶ Soesilo, R., *Kitab Undang-undang Hukum Pidana serta Komentar-komentarnya Lengkap Pasal Demi Pasal [The Criminal Act with Complete Explanations of Its Articles]* (Bogor, Indonesia: Politeia, 1971) 234

³⁵⁷ See the Supreme Court decision No. 677 K/Sip/1972 of 13 December 1972 in the case of “*PT. Tancho Indonesia Co. Ltd. v Wong A Kiong*”, reported in Gautama, Sudargo and Winata, Rizawanto, above n323 at 13

³⁵⁸ Kaehlig, Carl-Bernd, above n296 at 63-64

counterfeit trademarks or company-names may be sentenced to a maximum term of four year imprisonment or fined up to 9,000 rupiah (around US\$ 5.00³⁵⁹). Article 378 that deals with general falsification provides that anybody who is unjustly enriched himself or somebody else by using a false name or a false condition, fraud, lie, may be sentenced to a maximum term of four year imprisonment. Article 383 provides that a seller who misleads a buyer about the condition, nature or amount of the goods may be sentenced to a maximum term of one year and four month imprisonment.

All the criminal provisions adopted by the case law were intended to protect the public from counterfeit goods. The only criminal provision intended to protect the interest of the trademark owner was Article 382bis that prohibited unfair competition practices. According to Article 382bis of the *Criminal Act*, a person engaging in unfair competition practice might be sentenced to a maximum period of one year and four month imprisonment or fined up to 13,500 rupiah (around US\$ 6.75), if:

1. the conduct was deceptive to mislead the public or a person and to enrich the business or company of the wrongdoer, and
2. the deceptive and misleading conduct caused a loss to his or her competitor.

These two elements had to exist to bring a criminal charge under Article 382bis.³⁶⁰

After Indonesia's independence, criminal charges were very rarely brought against trademark infringement.³⁶¹ In most cases of trademark

Gautama, Sudargo, and Winata, Rizawanto, above n321 at 44

³⁵⁹ Based on the conversion rate in Indonesia in 1980s

³⁶⁰ Soekardono, *Hukum Dagang Indonesia [Indonesian Trade Law]* vol. 1 part 1 (Jakarta: Soeroengan, 4th ed, 1967) at 182-183

³⁶¹ Kaehlig, Carl-Bernd above n296 at 44

infringement, the police only confiscated counterfeit goods without laying criminal charges against the seller or the manufacturer of the counterfeit goods.³⁶² A criminal charge against a trademark infringer would normally be brought only when the infringement endangered people's lives, health, or safety, for example, trademark infringements relating to pharmaceutical drugs³⁶³, fertiliser³⁶⁴, herbicides and fungicide³⁶⁵, lubricating oil for motor engines. In the infringement case of herbicides "Roundup" and "Daconil 75" and a fungicide "Dithane M.45" in Java and Sumatra, the police and the Office of the Public Prosecutor arrested the counterfeiters and laid criminal charges against them based on two provisions in the Act No. 11/PNPS/1963 on the Fight against Subversive Activities.³⁶⁶ As Kaehlig noted, the provisions said that:

Anyone who directs this actions against the power of the state, authority of the government or state apparatus or who disturbs, obstructs or confuses industry, production, distribution, trading, co-operatives or transportation managed by the government, based on the decision of the government or having extraordinary influence on essential needs of the people, is subject to the following severe penalties: death sentence, life sentence or at least 20 years' imprisonment.³⁶⁷

"Pemalsuan Merek Garmen, Negara dan Produsen Dirugikan Sekitar Rp 300 Milyar Setahun" [Infringement of Garment Trademark, Country and Producers Lose Around Rp 300 Billion per Year] *KOMPAS* (13 February 1994) at 3

³⁶² "Fake Chanel Products Confiscated" *The Jakarta Post* (3 February 1996)

"Police Seize Pirated Goods" *The Jakarta Post* (30 April 1997)

"Polres Bandung Sita Ribuan Pakaian Merek Levis yang Diduga Palsu" [The Resort Police of Bandung Confiscated Thousands of Suspected Fake Levis Garments] *Suara Pembaruan Daily*, <http://www.SuaraPembaruan.com/News/1997/09/130997/Hukum/huk02/huk02.html> (13 September 1997)

"Dirazia, Hasil Kerajinan Kulit Tanggulangin" [Raided, Leather-crafts in Tanggulangin] *KOMPAS Online*, <http://www.kompas.com/9710/04/DAERAH/dira.htm> (4 October 1997)

³⁶³ See "Krisis Moneter Menguak Bisnis Obat Palsu" [Monetary Crisis Reveals the Business of Fake Pharmaceutical Drugs] *KOMPAS Online*, <http://www.kompas.com/9803/27/IPTEK/kris.12.htm> (27 March 1998)

"Pemalsu Minyak Kayu Putih Diringkus di Klaten dan Solo" [Counterfeiter of Medicinal Maleleuca Oil was Arrested in Klaten and Solo] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1997/08/140897/Hukum/huk01/huk01.html> (14 August 1997)

³⁶⁴ See "Contoh Kasus Merek di Indonesia" [Examples of Trademark Cases in Indonesia] *KOMPAS Online*, <http://kompas.com/9702/26/HUKUM/cont.ht> (26 February 1997)

³⁶⁵ Kaehlig, C-B, "Counterfeit Agrochemicals" (8 February 1990) *IP Asia* at 35

³⁶⁶ *Ibid*

³⁶⁷ *Ibid*

In this case, the police and the Office of the Public Prosecutor preferred applying the anti-subversion law, which was commonly used by the government to control political and social stability, to applying the trademark infringement provisions of the *Criminal Act*.

For most trademark infringement cases that would not harm public safety, such as, trademark infringements in garments³⁶⁸, accessories, perfumes³⁶⁹, footwear³⁷⁰, sportswear³⁷¹, and stationaries³⁷², criminal charges were very rarely brought by the police.³⁷³ Instead, trademark owners themselves had to bring civil action to the Court to claim the annulment of counterfeit trademarks³⁷⁴ and after that, to claim civil damages provided by the tort provision of Article 1365 of the *Civil Act*.

b. No Protection for Well-known Trademarks

Well-known trademarks were not protected under the *Trademark Act* 1961, as the Preamble to the Act defined that the purpose of the Act was to

³⁶⁸ *KOMPAS* (13 February 1994) above n361 at 3

“Garmen Palsu Merk Terkenal Sampai ke Mal” [Counterfeit Garments with Well-Known Trademarks Reach Malls] *Bisnis Indonesia* http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=51397 (24 December 1997) at 2

“Court Nullifies Local NBA Brand and Logo” *The Jakarta Post* (11 June 1997) at 3

“Pengadilan Membatalkan Merk Dagang NBA” [Court Annulled the NBA Trademark] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=32101 (6 July 1997)

³⁶⁹ “Rimba Raya Barang Bermerek, Dari yang Asli Hingga Tiruan” [Jungles of Brand-name Goods, From the Genuine to the Counterfeit Ones] *KOMPAS Online*, <http://kompas.com/9710/11/EKONOMI/dari.htm> (11 October 1997)

³⁷⁰ “Kasus Revlon Lawan Revlon Diputus, Satu Dibatalkan” [The Case of Revlon Versus Revlon was Settled, One was Annulled] *KOMPAS* (30 April 1987) at 3

³⁷¹ *The Jakarta Post* (11 June 1997) above n368 at 3

³⁷² “Pentel Menangkan Gugatan Merek” [Pentel Won the Trademark Dispute] *KOMPAS* (14 April 1994) at 6

³⁷³ *KOMPAS* (13 February 1994) above n361 at 3

“Razia Pelanggar HAKI Harus Kontinyu” [Police Raid Against Violators of Intellectual Property Rights Must Continue] *KOMPAS* (28 April 1995) at 10

³⁷⁴ Based on Article 10 of the *Trademark Act* 1961 or Article 56 of the *Trademark Act* 1992

protect the public interest only. However, the Indonesian courts developed the case law that also could give protection to first users of trademarks in Indonesia who acted in good faith. This meant that trademark protection in Indonesia would be given to those who could prove that they were the first users of trademarks who acted in good faith and the public interest would not be harmed by their trademarks. In other words, there was no trademark protection for well-known trademarks in Indonesia.

Indonesian courts almost never applied Article 6bis (3) of the *Paris Convention* that gave protection to well-known trademarks³⁷⁵, which were always owned by foreigners. They relied more on the *Trademark Act 1961* that provided protection to the consumer interest and to the first users of trademarks in Indonesia. On most occasions, Indonesian courts were very reluctant to rule that the appropriation of a well-known trademark was a use of that trademark in bad faith. In the cases of the “Levis” and the “Pierre Cardin” trademarks, the High Court in Jakarta found in favour of the Indonesian first users who also first registered those trademarks in Indonesia.³⁷⁶

In 1982, 1984, and 1988 Sarl De Gestion Pierre Cardin Paris, the owner of the “Pierre Cardin” trademark, brought legal action in the District Court of Central Jakarta against PT. Makmur Perkasa Abadi, the owner of “Pierre Cardin” Indonesia. In all lawsuits, the District Court of Central Jakarta always found in favour of PT. Makmur Perkasa Abadi and the Supreme Court also upheld the District Court’s decisions.³⁷⁷ The District Court of Central Jakarta rejected the claim of the Sarl De Gestion Pierre

³⁷⁵ Kaehlig, Carl-Bernd, above n296 at 7

³⁷⁶ Blakeney, Michael, “‘Well-known’ Marks” (1994) 16 *European Intellectual Property Review* 485

³⁷⁷ “Sengketa Merek, Langkah Mundur UU Merek?” [Trademark Dispute, A Backward Step of the Trademark Act?] *TEMPO* (12 March 1994) at 63

Cardin Paris for cancellation of the registration of “Pierre Cardin” made by PT. Makmur Perkasa Abadi. According to the Court, PT. Makmur Perkasa Abadi was the lawful owner of the trademark “Pierre Cardin” in Indonesia, as they had registered and used the trademark in Indonesia since 1977, eleven years before the Sarl De Gestion Pierre Cardin Paris had attempted to register the “Pierre Cardin” trademark with the Trademark Office in 1988. Even in 1986, the Trademark Office renewed the registration of the “Pierre Cardin” trademark owned by PT. Makmur Perkasa Abadi until 1996. Therefore, based on the decision of the District Court of Central Jakarta and the renewal of their trademark registration, PT. Makmur Perkasa Abadi sued the Director of the Trademark Office for accepting the application for registration of the “Pierre Cardin” trademark made by the Sarl De Gestion Pierre Cardin Paris, while maintaining the registration of the “Pierre Cardin” trademark made by PT. Makmur Perkasa Abadi. In this case, the Director of the Trademark Office argued that he accepted the registration of the “Pierre Cardin” trademark made by the Sarl De Gestion Pierre Cardin Paris because the term of protection of the “Pierre Cardin” trademark owned by PT. Makmur Perkasa Abadi would certainly end in 1996, which was the end of 10 year-term of protection.³⁷⁸

³⁷⁸ Article 18(1)d. of the *Trademark Act* 1961 provided 10 year term of trademark protection
“Berebut Pierre Cardin [Fight Over Pierre Cardin]” *Forum Keadilan* (19 August 1993) at 23 “Pierre Cardin Asli dari Muarakarang [The Genuine Pierre Cardin is from Muarakarang]” *TEMPO* (2 October 1993) at 72
TEMPO (12 March 1994) above n377 at 63
“UU Merek Diuji, Banyak Merek Terkenal Asing Digugat: Pierre Cardin akan ke Indonesia Lagi” [The Trademark Act was under Scrutiny, Many Foreign Well-known Trademarks were Claimed: Pierre Cardin will Comeback to Indonesia] *KOMPAS* (15 October 1993) at 6
“Cardin Mengharapkan Adanya Perlindungan Merek Dagangnya” [Cardin is Hoping for Protection of His Trademark] *KOMPAS* (10 November 1993)
“Pierre Cardin Puas Mendengar Penjelasan Menkeh Soal Merek: Pemilik Merek Levi Strauss akan Datang ke Indonesia” [Pierre Cardin is Satisfied with the Explanation about Trademark Given by Minister for Justice: Owner of Levi Strauss Trademark will Come to Indonesia] *KOMPAS* (11 November 1993) at 6

In June 1986, PT. Makmur Perkasa Abadi also brought legal action in the District Court of Central Jakarta to cancel the registration of the “Levis” trademark for shirts and trousers granted by the Jakarta Trademark Office, which was made by Levi Strauss & Co. from the US. The District Court held that PT. Makmur Perkasa Abadi was the owner of the “Levis” trademark as they were the first party to use and register the “Levis” for shirts and trousers in Indonesia. Therefore, the District Court ordered the Trademark Office to cancel the registration of the “Levis” trademark made by Levi Strauss & Co. The Supreme Court in August 1990 upheld the District Court decision. Then, in October 1991, Levi Strauss & Co. brought a new legal action in the District Court of Central Jakarta against PT. Makmur Perkasa Abadi to cancel PT. Makmur Perkasa Abadi’s registration of the “Levis” trademark for belts. In February 1994, the District Court held that the registration made by PT. Makmur Perkasa Abadi was lawful, as based on the 1990 court decision, they had been held as the lawful owner of the “Levis” trademark for shirt and trousers in Indonesia.³⁷⁹

In the 1980s, there had been a lot of economic pressure from Western countries demanding that the Indonesian government improve protection for intellectual property rights, including trademark. In response to this pressure, in June 1987 the Minister for Justice issued the Ministerial Decree No. M.02-IIC.01.01 year 1987 concerning well-known trademarks.³⁸⁰ According to this Decree, a well-known trademark was a trademark that had been known and used long enough for certain kinds of goods within Indonesian territory. An application for the registration of a trademark similar to a well-known one for the same kinds of goods had to be refused by the Trademark Office.

³⁷⁹ *TEMPO* (12 March 1994) above n377 at 63
KOMPAS (11 November 1993) above n378 at 6

However, the 1987 Decree had not satisfied many foreign owners of well-known trademarks, like Mr. Pierre Cardin, owner of the Sarl De Gestion Pierre Cardin Paris. This was because the Decree only prohibited registration of well-known trademarks by unauthorised parties for the same kinds of goods, not all kinds of goods. Mr. Cardin had found that the “Pierre Cardin” trademark had been registered by sixteen Indonesian companies for a variety of goods.³⁸¹

Following repeated visits to Indonesia and ongoing pressure from Mr. Cardin, and after direct representation by him to the Indonesian Minister for Justice³⁸², in 1991 the Minister issued the Ministerial Decree No. M.03-HC.02.01 year 1991 concerning the “Refusal for Registering Well-known Trademarks or Trademarks that Have Similarities with Well-known Trademarks”. In its Preamble, it was stated that the purpose of the Decree was to protect consumers from falsification of the source and quality of the goods.

The 1991 Ministerial Decree replaced the 1987 one. The 1991 Decree extended protection of well-known trademarks to goods which were not of the same kind and gave protection to well-known trademarks which were used either in Indonesia or abroad.³⁸³ Article 2(1) of the Ministerial Decree 1991 ordered the Trademark Office to refuse registration of a well-known trademark or a trademark which was similar to a well-known one, even when the goods with the relevant trademark were only traded abroad. Article 2(2) of the Ministerial Decree 1991 also prohibited

³⁸⁰ Antons, Christoph, above n54 at 372

³⁸¹ “Pierre Cardin: Nama Saya, Bagian Diri Saya” [Pierre Cardin: My Name, Part of My Body] *KOMPAS* (1 May 1988) at 1

Antons, Christoph, above n2 at 421

³⁸² Blakeney, Michael, above n376 at 485

³⁸³ Antons, Christoph, Paper, above n1 at 18

registration of a well-known trademark or a trademark, which was similar to a well-known one, irrespective of the kinds of goods for which registration was sought. Under Article 3, the Trademark Office would also refuse to renew the registration of a well-known trademark or a trademark which was similar to a well-known one. The Trademark Office would accept registration of a well-known trademark only if the applicant had proof that it had a right to the trademark based on a license or some other form of agreements made between it and the legitimate owner of the well-known trademark (Article 2(3)).

The Ministerial Decree 1991 was widely regarded as exceeding the requirements of Article 6bis of the *Paris Convention*. It extended protection to well-known trademarks which were used not only in Indonesia, but also abroad. The protection also extended to all kinds of goods, not just the class of goods for which the registration of the well-known trademarks was granted.³⁸⁴ Therefore, the Ministerial Decree 1991 had raised some criticism. Dylan A. MacLeod noted that, “it gives protection to owners of well-known trademarks who either have not yet used their marks in Indonesia or who have no proof of use in Indonesia”.³⁸⁵ It meant that the Ministerial Decree 1991 violated the use requirement of a trademark in Indonesia stipulated by Article 18 of the *Trademark Act* 1961.

The Ministerial Decree 1991 defined well-known trademarks as trademarks that were generally known and used for goods which were traded either in Indonesia or abroad (Article 1). However, the Decree did not set any criteria to determine whether a trademark was well-known or

³⁸⁴ Kusoy, Erna L., “Improvements in Protection for Well-known Trademarks” (30 June 1994) *IPAsia* at 25

Dermawan, P.D.D. and Gengerich, Duane J., “A Fresh Look at Protecting Well-known Trademarks” (30 May 1991) *IP Asia* at 13;

³⁸⁵ MacLeod, Dylan A, above n144 at 368-9, footnote no. 183

not. Many legal practitioners demanded further clarification regarding the concept of well-known trademark. They argued that a trademark could be famous in one place but not in another.³⁸⁶ As a matter of practice, to determine whether a trademark was well-known and thus qualified for protection under the Decree, the Trademark Office would consider some evidences, such as:³⁸⁷

- a list of registered trademarks provided by the Indonesian Embassy in the applicant's country and by the applicant's Embassy in Indonesia;
- material from the applicant or their Trademark Agent;
- a legally binding court decision which decided that the trademark was well-known;
- the registration of the trademark in the General Register of Trademarks in Indonesia;
- particulars of world-wide registrations of the trademark;
- editorial materials that described the renown of the trademark;
- national and international recognition and awards;
- historical information regarding the use of the trademark.

To implement the Ministerial Decree 1991, the Trademark Office had asked Indonesian Embassies in sixteen countries to assist the Trademark Office in compiling lists of well-known trademarks.³⁸⁸ The Office also made similar requests to a number of foreign Embassies in Jakarta to provide lists of well-known trademarks. The most cooperative ones were

³⁸⁶ Keyzer, Patrick, above n317 at 9

³⁸⁷ Dermawan, P.D.D. and Gengerich, Duane J., above n384 at 13

Kusoy, Erna L, above n384 at 25

³⁸⁸ Dermawan, P.D.D. and Gengerich, Duane J., above n384 at 13

Saleh, Ismail, "Upaya Peningkatan dan Pemantapan Pelaksanaan Perlindungan Hukum Bidang Hak Milik Intelektual di Indonesia" [Efforts to Improve Legal Protection of Intellectual Property Rights in Indonesia] in Koordinator Bidang Hukum & Umum, DPP Golkar, *Hasil-hasil Diskusi Panel Bidang Hukum Hak Milik Intelektual* [Results of the Panel Discussion in Intellectual Property Law] (Jakarta: Golongan Karya, 1992) at 51

the Embassies of the US, France, Japan and Italy.³⁸⁹ The US Embassy in Jakarta had responded by providing the Trademark Office with documentation obtained from the US Patent & Trademarks Office (USPTO) that described the criteria applied by the USPTO when determining whether or not a trademark was well-known. This practice had raised criticism which argued that the Trademark Office should not simply acknowledge the renown of foreign trademarks registered in other jurisdictions.³⁹⁰ The critic also argued that the Office had to maintain their own guidelines as to what could be considered as well-known trademarks that entitled the protection of the Ministerial Decree 1991. This was what Article 6bis of the *Paris Convention* also suggested. The Article 6bis of the *Paris Convention* limited the definition of well-known trademark to the mark considered by the authority of the country of registration to be well-known in that country.

In practice, Indonesian courts often did not agree with the Ministerial Decree 1991 which was made to comply with pressure from Western trademark owners. Following the issuance of the Ministerial Decree 1991, the Trademark Office rejected 4,304 application for registration of well-known trademarks made by unauthorised parties. However, some of the unauthorised parties challenged the Trademark Office's decisions and brought legal action to the court. In most cases, the court found in favour of the unauthorised parties and ordered the Trademark Office to accept their applications for trademark registration. The reasons most frequently cited by judges in overturning the decisions of the Trademark Office were:³⁹¹

³⁸⁹ Hutapea, Yosia Cemby, *Indonesian Intellectual Property Law: An Overview of Enforcement Aspects*, Paper presented at "Inter-Pacific Bar Association Sixth Annual Meeting and Conference Manila, at 8

³⁹⁰ Rouse, Peter, "Well-known Trademarks" (6 July 1989) *IP Asia* at 15

³⁹¹ Kusoy, Erna L, above n384 at 25

- the Trademark Office wrongly rejected the application, because the rejection was not based on the *Trademark Act* 1961, but on a Ministerial Decree which was subordinate to the *Trademark Act* 1961. The *Trademark Act* 1961 itself did not provide for the protection of well-known trademarks³⁹²;
- the Trademark Office had no convincing evidence of the well-known character of the disputed trademark. The court was stricter if the well-known trademark in question had not been registered at the Trademark Office for the same class of goods as the “unauthorised” trademark;
- the Trademark Office could not respond to the request of the court to produce the original registration certificate or proof of how long the trademark had been well-known and the kinds of goods included in the protection of the trademark.

3.2. The Trademark Act 1992

a. Reform of Trademark Protection

As part of the extensive law reforms made in the area of intellectual property law which began in the middle of the 1980s, the Indonesian government enacted a new trademark law to replace the *Trademark Act* 1961 which was regarded by many Western trademark owners as not giving enough protection for their trademarks.

The new *Trademark Act* No. 19/1992 came into force on 1 April 1993, after the Indonesian government enacted a new *Copyright Act* in 1987 and a

³⁹² Lumenta, J.B., “Peranan Penegak Hukum Dalam Pelaksanaan Hukum Hak Milik Intelektual” [The Role of Law Authorities in Implementing the Intellectual Property Law] in Koordinator Bidang Hukum & Umum, DPP Golkar, *Hasil-hasil Diskusi Panel Bidang Hukum Hak Milik Intelektual* [Results of the Panel Discussion in Intellectual Property Law] (Jakarta: Golongan Karya, 1992) at 223

new *Patent Act* in 1989. Like the other two laws, the new *Trademark Act* No. 19/1992 came as a response to economic pressure from Western countries that demanded better protection for trademarks owned by Western companies in Asia, including Indonesia. The US government considered that Indonesia's existing trademark law (the *Trademark Act* 1961) was outdated and claimed that the 1961 Act could not protect American trademarks in Indonesia.³⁹³

One hundred and thirty-three US companies had complained about inadequate protection of trademark rights in 66 countries. Indonesia was among the countries most frequently cited, together with Mexico, Taiwan, Brazil, and Korea.³⁹⁴ The companies cited inadequate civil and criminal penalties, the absence of preliminary or final injunctive relief, and the limited training and resources for enforcement as the most common remedy and enforcement problems.³⁹⁵ A study claimed that trade in counterfeit goods took more than 5% of global trade, and much of this trade originated from the Asia Pacific region³⁹⁶, including Indonesia. In 1987, during the Tokyo Round, the International Anti-counterfeiting Coalition that comprised one hundred multinational corporations was established. They lobbied governments of developed countries, such as, the US, the EC, Japan, Canada, to strengthen protection against counterfeit trademarked goods.³⁹⁷ A 1984 Report presented in the US Congress claimed that counterfeit merchandise had directly caused tens of billions of dollar loss to American companies. In the Report, the US

³⁹³ MacLeod, Dylan A, above n144 at 369

³⁹⁴ U.S. International Trade Commission, Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade, ITC Pub. No. 2065 (Feb 1988) at 3-7, as cited in Gutterman, Alan S., above n195 at 102

³⁹⁵ *Id.*, at 102-103

³⁹⁶ Cheetham, Simon, "Protection Intellectual Property in Asia" in Allen, Stuart and Sorab, Beena (ed), *Intellectual Property Protection in Asia: Practical Strategies* (Hongkong: Asia Law & Practice Ltd, 1996) at 15

³⁹⁷ Ross, Julie C., and Wasserman, Jessica, above n200 at 2259

Automotive Parts and Accessories Association estimated that its industry lost US\$ 12 billion in revenue because of counterfeit automotive parts. The agricultural chemical industry claimed that increasing counterfeiting had eroded the foreign market of US agricultural chemicals and destroyed the good reputation of US manufacturers. An agricultural chemical company noted that they had failed to recoup their average initial investment of US\$ 30 to 35 million expended in R&D to assure that their product was effective and environmentally safe.³⁹⁸ Another report made by the President of International Anti-Counterfeiting Coalition said that the video industry lost US\$ 6 billion annually in sales to counterfeiting, and in 1980, the apparel industry lost US\$ 450 million due to counterfeiting.³⁹⁹

With this background of economic pressures and the threats of trade sanctions, the Indonesian government undertook significant reform by enacting the *Trademark Act* No. 19/1992 (hereinafter called the *Trademark Act* 1992). The Preamble to the *Trademark Act* 1992 promulgated that the legislation was necessary to protect trademarks which played an important role to develop trade in goods and services. This Preamble marked a significant change of attitude in trademark protection in Indonesia. Previously, based on the Preamble to the *Trademark Act* 1961, trademark protection was needed to protect the public (consumers) from counterfeit goods. After 1992, trademark protection was no longer needed to protect consumers, but was needed to protect trademarks. In other words, the *Trademark Act* 1992 was enacted to protect the interest of trademark owners who had registered their trademark or the interest of

³⁹⁸ *Unfair Foreign Trade Practices, Stealing American Intellectual Property: Imitation Is Not Flattery*, 98th Cong., 2d Sess. 1-3 (Comm. Print 1984) at 1, as cited in Ross, Julie C., and Wasserman, Jessica, above n200 at 2254

³⁹⁹ *Possible Renewal of the Generalized System of Preferences - Part I: Hearing Before the Subcomm. on Trade of the US House of Rep. Comm. on Ways and Means*, 98th Cong., 1st Sess. 57 (1983) (statement of James L. Bikoff, President, International Anti-Counterfeiting Coalition) as cited in Ross, Julie C., and Wasserman, Jessica, above n200 at 2254

foreign owners of well-known trademarks in Indonesia. As a matter of fact, the enactment of the *Trademark Act* 1992 took place when franchise businesses were booming in Indonesia.⁴⁰⁰

While the *Trademark Act* 1992 maintained the 10 year of term of protection, it no longer relied on the “first to use” system. Instead, the *Trademark Act* 1992 adopted the “first to register” system. Article 3 of the *Trademark Act* 1992 granted protection to those who registered their trademarks for the first time in Indonesia. In the Elucidation of the Act, it was claimed that the “first to register” system was better than the “first to use” system used under the *Trademark Act* 1961 because it provided greater legal certainty.⁴⁰¹ However, Article 4(1) of the *Trademark Act* 1992 explicitly required that a trademark be registered only by those who were acting in good faith. The Act did not give a definition of “good faith”, but it was assumed that the definition of “good faith” developed by case law should be adopted.

Other reforms made by the *Trademark Act* 1992 were that the Act covered marks on goods, service marks and collective marks (Article 1 and 2). The old *Trademark Act* 1961 only covered marks on goods. Furthermore, the *Trademark Act* 1992 expressly recognised licensing and provided registration for licensing agreements (Article 44(1), 44(3)). Use of registered trademarks in Indonesia would be regarded sufficient for the “use” requirement (Article 47). To prevent the abuse of trademark rights by trademark owners, Article 48(1) of the *Trademark Act* 1992 prohibited any licensing agreement from containing a provision, which directly or indirectly, was detrimental to the Indonesian economy, or contained limitations which could hamper the capability of Indonesians to master

⁴⁰⁰ Antons, Christoph, above n2 at 409

⁴⁰¹ The Elucidation of the *Trademark Act* No. 19/1992, General, no. b

and develop technology. The Trademark Office had to refuse an application for registration of a trademark licensing agreement that contained such provisions (Article 48(2)). However, Article 48 had been criticised as too vague, as there was no further guidance to determine in what situation a licensing agreement could hamper the Indonesian economy.⁴⁰²

Unlike the *Trademark Act* 1961, the *Trademark Act* 1992 provided criminal penalties for trademark infringement. Criminal penalties in the *Trademark Act* 1992 were more severe than the provisions of the *Criminal Act*. According to Article 81 of the *Trademark Act* 1992, the criminal penalty for trademark infringement was imprisonment for up to seven years and a fine up to 100 million rupiah (around US\$ 50,000⁴⁰³). Traders of counterfeit goods could face imprisonment for up to one year or a fine up to 50 million rupiah (around US\$ 25,000) (Article 84).

However, the legal reform in trademark law which came about as a result of economic pressure from Western countries, was not accompanied by reform in trademark administration and law enforcement. The implementation of the “first to register” system had been hampered by a lack of financial, technological and human resources in the administration of the Trademark Office.⁴⁰⁴ Until 1997, there was a backlog of at least 40,000 pending applications in the Office with delays of two to three years to register trademarks. The manual process in handling trademark applications and the complicated bureaucratic procedures had been

⁴⁰² Gautama, Sudargo, and Winata, Rizawanto, above n321 at 26

⁴⁰³ Based on the conversion rate when the *Trademark Act* 1992 was enacted

⁴⁰⁴ Lumenta, J.B., above n392 at 226, 272

“UU Merek Baru: Memberikan Harapan pada Produsen dan Konsumen” [The New Trademark Act: Gives Hopes to Producers and Consumers] *KOMPAS* (16 May 1993) at 1

blamed for the backlog and delays.⁴⁰⁵ In addition to that, the Trademark Office often could not operate optimally because implementing regulations for most of the provisions of the *Trademark Act* 1992 had not been issued by the government or Minister for Justice⁴⁰⁶, for example, regulations for recording license agreements⁴⁰⁷, and for the establishment of Trademark Appeal Commission.⁴⁰⁸

Weak law enforcement was also a problem in implementing the *Trademark Act* 1992. Although the police increased the frequency of raids against traders of counterfeit goods, they and judges were reluctant to impose the criminal sanctions provided by the *Trademark Act* 1992 against counterfeiters. Very rarely did the police arrest them and the courts jail them⁴⁰⁹, unless their infringement clearly endangered lives, public health and public safety⁴¹⁰. Most trademark counterfeiters who produced clothing, accessories, perfumes, and shoes only received probationary sentences and the sellers of counterfeit goods were freed.⁴¹¹ The reluctance

⁴⁰⁵ “40 Pemohon Merk Masih Antre” [40 Trademark Applications are still Pending] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id_40321 (16 September 1997) Kardono, A. Supriyani and Johnson, Darrell R., above n196 at 171-172
Antons, Christoph, in Lindsey, Timothy (ed), above n1 at 320
“Mensesneg tentang Pembajak HAKI: Hukuman Diperberat, Sedang Frekuensi Razia Ditingkatkan [The Statement of Secretary of State on Violators of Intellectual Property Laws: Criminal Penalties is More Severe, Raid is more Frequently] *KOMPAS* (27 April 1995) at 10
Keyzer, Patrick, above n317 at 12

⁴⁰⁶ Kardono, A. Supriyani and Johnson, Darrell R., above n196 at 171-172
Antons, Christoph, in Lindsey, Timothy (ed), above n1 at 319-320
“Pelaksanaan UU Merk Masih Hadapi Kendala” [The Enforcement of the Trademark Act still Faces Problems] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=51834 (29 December 1997)

⁴⁰⁷ Kardono, A. Supriyani and Johnson, Darrell R., above n196 at 172
Bisnis Indonesia (29 December 1997) above n406

⁴⁰⁸ Antons, Christoph, in Lindsey, Timothy (ed), above n1 at 318-319
Bisnis Indonesia (29 December 1997) above n406

⁴⁰⁹ *KOMPAS* (28 April 1995) above n373
Bisnis Indonesia (24 December 1997) above n368 at 2
“Pemberlakuan Komisi Banding di Bidang Haki Sudah Mendesak” [The Establishment of Appeal Commission of Intellectual Property Rights is very Urgent] *Suara Pembaruan Daily*, <http://www.SuaraPembaruan.com/News/1997/09/120997/Kota/Kot05/kot05.html> (12 September 1997)

⁴¹⁰ Examples of cases on this matter have been mentioned above at 107-108

⁴¹¹ *KOMPAS* (28 April 1995) above n373

of the Indonesian legal authorities to impose criminal sanctions against counterfeiters, unless their infringement endangered lives, public health and public safety, could be attributed to the Indonesian culture that was unfamiliar with the idea of intellectual property protection.⁴¹²

b. Protection for Well-known Trademarks

Because of the growing pressure from Western owners of well-known trademarks who demanded protection for their trademarks in Indonesia⁴¹³, the *Trademark Act* 1992 expressly provided protection for well-known trademarks. Article 6(2)a of the *Trademark Act* 1992 ordered the Trademark Office to refuse any application for the registration of trademarks which were the same or similar to the names of famous people, well-known photographs, trademarks, or company name without prior written approval from their owners. Moreover, Article 56(3) allowed owners of well-known trademarks to claim cancellation of unauthorised registration of their well-known trademarks in the courts, after they submitted their own applications for registration of their trademarks to the Trademark Office. The Trademark Office, then, would process their applications after a court decision canceling the unauthorised registration of the well-known trademark became enforceable (Elucidation of Article 56(3)). The Elucidation of the Act explained that this provision was designed to encourage owners of well-known trademarks to register their trademarks in Indonesia. As a matter of fact, the courts very rarely granted the cancellation of well-known trademarks that had been

⁴¹² Keyzer, Patrick, above n317 at 19-21

⁴¹³ Blakeney, Michael, “The Impact of the TRIPs Agreement in the Asia Pacific Region” (1996) 10 *European Intellectual Property Review* at 549
Blakeney Michael, “Intellectual Property Law Reform in the Asia Pacific Region” (1996) 7 *Australian Journal of Corporate Law* at 34

registered by Indonesian parties under the *Trademark Act* 1961.⁴¹⁴ The courts usually held that the trademark registration that was valid under the *Trademark Act* 1961 should be protected and recognised until the end of their term of protection.⁴¹⁵

The special protection given to well-known trademarks under the *Trademark Act* 1992 had raised some concern from legal practitioners. They argued that there was a possibility that owners of well-known trademarks only registered their trademarks to get trademark protection, but they did not intend to use the trademarks in Indonesia. This would violate the use requirement of Articles 51(2) and 37. Agung Setiawan, a judge in the Supreme Court, and Gunawan Suryomucito, a trademark consultant, also criticised this new policy of protection of foreign well-known trademarks in Indonesia. They called this policy *The Extended Area of Protection*. Agung and Gunawan said that they were doubtful whether other countries would also give equal protection to well-known trademarks owned by Indonesian citizens or companies. They argued that the previous policy of protection of well-known trademarks had not violated the “National Treatment” principle of the *Paris Convention*. In their opinion, too much protection for foreign well-known trademarks would violate the “territorial” principle underlying the protection of intellectual property rights. Based on the “territorial” principle, the government of a country only gave protection to a trademark registered within the country’s sovereignty and to a trademark that complied with the trademark law of that particular country. According to them, the Indonesian government should not apply the “universal” protection of

⁴¹⁴ Blakeney, Michael, (1996) 10 *European Intellectual Property Review* above n413 at 549

⁴¹⁵ “RI Kesulitan Atasi Klaim Merk Asing” [RI Faces Difficulties in Handling the Claims of Foreign Trademarks] http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=39493 (9 September 1997) at 2

Also see the *Pierre Cardin* case, *Levis* case

well-known trademarks. However, they agreed that limited protection of foreign well-known trademarks should be given only to well-known trademarks that entered Indonesia through registered distributors who imported the goods bearing the well-known trademarks. Agung and Gunawan agreed that those registered distributors should be rewarded with trademark protection, as they had paid the customs fees when they imported goods bearing the well-known trademarks.⁴¹⁶

As the *Trademark Act* 1992 had provided protection for well-known trademarks, on 27 October 1993 the Minister for Justice cancelled the Ministerial Decree No. M.03-HC.02.01 year 1991.⁴¹⁷ However, unlike the Ministerial Decree 1991, the *Trademark Act* 1992 did not give any definition of what a well-known trademark was. The Elucidation of Article 6(2) of the *Trademark Act* 1992 only stated that the determination of a well-known trademark had to be done by observing public knowledge about the trademark of the related business field. According to a statement from the State Secretariat, that was also involved in the drafting of the *Trademark Act* 1992, there was no recognised academic and practical criteria to determine the fame of a trademark.⁴¹⁸ This was in line with the *Paris Convention* that also did not define the term “well-known trademark”.⁴¹⁹

The fact that there was no definition of the phrase ‘well-known trademark’ in the *Trademark Act* 1992 meant that the Trademark Office was left to make its own internal guidelines on the subject of well-known

⁴¹⁶ “Batasi Perluasan Perlindungan atas Merek Dagang Internasional [Limit the Extension of Protection of International Trademark]” *KOMPAS* (10 February 1993)

⁴¹⁷ The cancellation of the Ministerial Decree 1991 was issued by the Minister for Justice in the Ministerial Decree No. M.03-HC.02.01 year 1993 on 21 October 1993

⁴¹⁸ The State Secretariat of the Republic of Indonesia, *Masalah Perlindungan Merek di Indonesia [Problems of Trademark Protection in Indonesia]* (Jakarta, 13 March 1996)

⁴¹⁹ Blakeney, Michael, above n376 at 481

trademarks. One of the provisions was that parties who filed objections under Article 22 of the *Trademark Act 1992*, on the ground that their trademark was already well-known and therefore, could not be registered by other parties, had to demonstrate to the Trademark Office that their trademarks had been registered in at least three countries for a minimum of three years.⁴²⁰

After the enactment of the *Trademark Act 1992* and under pressure from Western countries, Indonesian police increased their raids against counterfeit goods and confiscated the goods from markets.⁴²¹ Representatives of the owners of well-known trademarks in Indonesia often requested the police to conduct the raids and even accompanied the police on such raids.⁴²²

The police also raided homes and small-scale industries in a village in East Java, well-known to produce good quality accessories, such as, belts, bags, purses, wallets, and confiscated these items. The local police, who acted under the instructions of the Police Headquarter in Jakarta, claimed that the products were counterfeit goods using well-known trademarks, such as, “Samsonet”, “Channel”, “Gucci”, “Etienne Aigner”, and “Benetton”.⁴²³ However, the police action had caused resentment among the villagers who lost their products because of the confiscation. They were traditional leather-craft makers and villagers who did not understand the concept of trademark right. They claimed that even

⁴²⁰ Kusoy, Erna L, above n384 at 26

⁴²¹ *Suara Pembaruan Daily* (13 September 1997) above n362

The Jakarta Post (3 February 1996) above n362

The Jakarta Post (30 April 1997) above n362

Dermawan, PDD, “Reebok Runs Pirates to Ground” (15 August 1991) *IP Asia* at 35-36

KOMPAS Online (4 October 1997) above n362

⁴²² *Suara Pembaruan Daily* (13 September 1997) above n362

The Jakarta Post (3 February 1996) above n362

Dermawan, PDD, above n421 at 35-36

without the trademarks they could make beautiful and high-quality leather products, as they had been experts from generation to generation in this field of product. Previously, like other traditional handicraft makers in Indonesia⁴²⁴, these villagers used to produce leather goods without bothering about trademark, as they did not know the concept of trademark. But in the era of consumerism, people wanted to buy products with well-known trademarks which conferred prestige on the consumer. This consumer demands had forced the traditional leather-craft makers to sell their leather products with copies or imitations of well-known trademarks, otherwise their products would be difficult to sell, despite its high quality. Their leather products were normally sold to middle-class consumers for one-tenth of the price of the genuine products. Therefore, they were shocked and traumatised when the police confiscated their leather products and accused them of violating the law, although the police did not make any arrests. The villagers claimed that they did not intend to break any law, but they only tried to satisfy market demands in order to allow their businesses to survive. They argued that using well-known trademarks on their products did not help increase the price of their products.⁴²⁵

Critics argued that the confiscation had no beneficial effect. Rather, it had the potential to destroy the economic life of the villagers and discourage them from continuing their business. The government should adopt a persuasive approach towards these people to help them understand trademark law, gave them time to adjust to the new situation and helped

⁴²³ *KOMPAS Online* (4 October 1997) above n362

⁴²⁴ “Pemalsuan Merek: Ancaman Masa Depan Perajin” [Trademark Infringement: Threat for the Future of Hand-craft Makers] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=43176 (11 October 1997) at 2-3

⁴²⁵ “Tanggulangi: “Italia van Sidoarjo” *KOMPAS Online*, <http://www.kompas.com/9711/01/EKONOMI/tang.htm> (1 November 1997) at 1-4

them establish their own trademarks⁴²⁶, which was not easy, because of the inefficient administration in the trademark registration and the distant location of the Jakarta Trademark Office from their village.⁴²⁷

As a matter of fact, some authorised distributors of products bearing well-known trademarks, such as, “Donna Karan”, “Aigner”, “Escada”, “Issey Miyake”, “Eternity”, “Bulgary”, “Calvin Klein” admitted that they were not concerned about the counterfeit products sold on street footpaths and in traditional markets. Those distributors said that the very big gap between the price of the genuine products sold in exclusive shops and the price of the counterfeit products sold on street footpaths could actually maintain the exclusive status of their genuine products which belonged to the high-class society in Indonesia. They knew that they had a different market and customers that were different from those who bought counterfeit products on street footpaths.⁴²⁸

The distributor of “Chanel” products was more concerned with shops in tourist resorts that sold counterfeit “Chanel” products with very high prices. They said that the very high prices would confuse consumers into believing that the counterfeit products were genuine “Chanel” products. In this case, they would take tougher measures against the counterfeiters, such as, requesting the police to conduct raids, confiscate the counterfeit products and arrest the counterfeiters.⁴²⁹

⁴²⁶ *KOMPAS Online* (1 November 1997) above n425 at 4
“Pengusaha Kecil Pelanggar HAKI Bisa Miliki Lisensi” [Small-scale Businesses that Violated Intellectual Property Rights could Have License] *KOMPAS Online*, <http://www.kompas.com/9707/07/DAERAH/peng.htm> (7 July 1997)

⁴²⁷ *Bisnis Indonesia* (11 October 1997) above n424 at 3

⁴²⁸ *KOMPAS Online* (11 October 1997) above n369 at 1

⁴²⁹ *The Jakarta Post* (3 February 1996) above n362

The Indonesian courts in enforcing the *Trademark Act 1992* often did not take a strict approach.⁴³⁰ So far, they never imposed the maximum penalties against counterfeiters, unless their conduct clearly injured consumers.

Most of the time, judges only gave probationary sentences.⁴³¹ This attitude might reflect their view that trademark protection was important only if it related to the Indonesian public or consumer interest, not trademark owner interest. This view was also supported by the fact that Indonesians mostly were not benefited by trademark protection given to foreign owners of well-known trademarks. For example, every year at least 1.27 trillion rupiah (US\$ 18 million⁴³²) was paid by Indonesians as royalties for food franchise restaurants in Indonesia.⁴³³ The owners of well-known trademarks often took advantage by charging high royalty payments from Indonesians who used their trademarks.⁴³⁴ In some trademark licensing agreements between Indonesians and foreign trademark owners, the weaker bargaining position of the Indonesian licensees meant that they often had to accept the licensors' terms which could be unfair. For example, the Indonesian licensees were required to buy raw materials from certain countries appointed by the licensors, although the raw materials were also available in Indonesia.⁴³⁵ Moreover, owners of well-known trademarks often ignored the welfare of Indonesian labourers who worked to produce their goods. For example,

⁴³⁰ *KOMPAS* (28 April 1995) above n373 at 10
Bisnis Indonesia (24 December 1997) above n368 at 2
Suara Pembaruan Daily (12 September 1997) above n409

⁴³¹ *KOMPAS* (28 April 1995) above n373 at 10

⁴³² Based on the conversion rate on January 1998

⁴³³ “Rp 1,27 Trilyun Devisa Terkuras untuk Royalti” [1.27 Trillions Rupiah of Foreign Exchange was Exhausted for Royalty] *KOMPAS Online*, <http://www.kompas.com/9801/15/UTAMA/tri.htm> (15 January 1998)

⁴³⁴ “Perlindungan Merek: Ah.. Teori” [Trademark Protection: Only in Theory] *KOMPAS Online*, <http://kompas.com/9702/26/HUKUM/perl.htm> (26 February 1997) at 1

Indonesian workers who worked in PT. HASI, an Indonesian factory in West Java, that produced sport-shoes for Nike, Inc. in the US, only received a wage of 156,000 rupiah per month (US\$ 78/month) which was lower than the “regional minimum wage” (UMR) in Indonesia set by the Decree of Labor Minister in 1997.⁴³⁶ This very low wage received by Indonesian workers was in sharp contrast to the very high price charged for each pair of Nike sport-shoes sold both in Indonesian⁴³⁷ and international market.⁴³⁸ For several years, Nike, Inc. had made vast profits from their worldwide shoe sales.⁴³⁹ Between 22 April and 3 May 1997, around ten thousand workers of PT. HASI demonstrated outside the Regional Legislative Assembly (DPRD) of Tangerang, West Java, to demand a better salary which was at least equal to the UMR. The demonstration that involved a one-day riot ended when the factory agreed to adjust the worker’s wage according to the UMR which was 172,500 rupiah per month (around US\$ 86.25/month⁴⁴⁰) and provided a monthly attendance premium of 16,000 rupiah per month (around US\$ 8/month).⁴⁴¹

⁴³⁵ “Perlu Segera Dibuat, Peraturan Pemerintah tentang Lisensi” [Government Regulation Regarding Licence must be Drafted Soon] *KOMPAS* (26 April 1993) at 6

⁴³⁶ “Ribuan Pekerja Tuntut Penyesuaian UMR” [Thousands of Workers Demand UMR Adjustment] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1997/04/230497/Headline/hl05/hl05.html> (23 April 1997)

“Unjuk Rasa Soal UMR Mulai Merebak Dan Cenderung Brutal” [Demonstration about UMR Started Spreading and Tended to be Brutal] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1997/04/260497Kota/kt07/kt07.html> (26 April 1997)

⁴³⁷ For example in September 1999, in Indonesia, the price of Nike Air shoes for men ranges between 350,000 rupiah (around US\$ 43.75) and 800,000 rupiah (around US\$ 100)

⁴³⁸ In 1999, in Sydney, Australia, the price of Nike Air shoes ranges between around AU\$ 129 to AU\$ 229

⁴³⁹ See <http://nikebiz.com>

⁴⁴⁰ Based on the conversion rate in 1997

⁴⁴¹ *Suara Pembaruan Daily* (23 April 1997) above n436

Suara Pembaruan Daily (26 April 1997) above n436

“Unjuk Rasa di PT HASI Karena Salah Paham” [Demonstration at PT HASI was Caused by Misunderstanding], *Suara Pembaruan Daily*, <http://suarapembaruan.com/News/1997/05/030597/Ekonomi/ek08/ek08.html> (3 May 1997)

“Upah, Kinerja Dan Kemampuan Kompetitif” [Wage, Work and Competitive Skill] *Suara Pembaruan Daily*, <http://suarapembaruan.com/News/1997/05/180597/OpEd/op06/op06.html> (18 May 1997)

It must be noted however, that in 1986, in the case of *Nike International Ltd. v. Lucas Sasmito and the Directorate of Patent and Copyright, the Department of Justice of the Republic of Indonesia*, the

4. Unfair competition practices

There had been no case of unfair competition practices caused by trademark infringement, brought before the courts since Indonesia gained its independence. The only provision that governed the prohibition of unfair competition practices, Article 382bis of the *Criminal Act*, had never been imposed. According to Article 382bis, a person found guilty of an unfair competition practice might be sentenced to a maximum of one year and four month imprisonment or fined up to 13,500 rupiah (around US\$ 6.75⁴⁴²), if:

1. the conduct was deceptive to mislead the public or a person and to enrich one's own business or company, and
2. the deceptive and misleading conduct caused a loss to one's competitor.

These two elements had to exist to bring a criminal charge under Article 382bis.⁴⁴³ To claim damages, plaintiffs could rely on the tort provision of Article 1365 of the *Civil Act*. The case law showed that Article 382bis of the *Criminal Act* had been frequently imposed by courts during the colonial era. The Raad van Justitie and Hoog Gerechtshof usually applied Article 382bis in broader infringement cases that were not covered by Article 393 of the *Criminal Act* that dealt only with trademark infringement. For example, the Raad van Justitie in Jakarta in 1926 held that deceiving consumers by labeling wine bottles with “produced in Portugal”, while in fact the wine was from Barcelona, Spain, was an unfair competition practice, prohibited by Article

Indonesian Supreme Court held that the Nike International Ltd. from Oregon, USA was the owner of the Nike trademark in Indonesia and annulled the Nike trademark which had been registered by Lucas Sasmito, an Indonesian businessman (the Supreme Court decision No. 220 PK/Perd/1986)

⁴⁴² Based on the conversion rate in Indonesia in 1980s

⁴⁴³ Soekardono, above n360 at 182-183

382bis.⁴⁴⁴ The Hoog Gerechtshof in 1930 held that imitating coffee tins of another company was also an unfair competition practice.⁴⁴⁵

It seems that Indonesian judges never applied Article 382bis of the *Criminal Act* because of their philosophical background that emphasised consumer protection, rather than company protection in infringement cases.

C. Conclusion

Trademark law was the only intellectual property law in Indonesia that was relatively well established and could be accepted by Indonesians. This was because trademark law was consonant with the communal culture of Indonesia that emphasised the need to serve the public interest. The Preamble to the *Trademark Act* No. 21/1961 promulgated that the *Trademark Act* No. 21/1961 was enacted to protect the Indonesian public from counterfeit goods that used trademarks commonly known for high-quality products. The long-standing acceptance of trademark law also meant that trademark law was believed to benefit the Indonesian people.

However, with increasing foreign investment and international trade in Indonesia, there were increasing demands for better protection of well-known trademarks, mostly owned by Western companies. This was because the *Trademark Act* 1961 did not emphasise trademark protection, but emphasised consumer protection.

⁴⁴⁴ The decision of the Raad van Justitie Jakarta of 9 July 1926, reported in the journal T 1925 at 162. Soekardono, above n360 at 184

⁴⁴⁵ The decision of the Hoog Gerechtshof of 26 June 1930, reported in the journal T. 1932 at 259. Soekardono, above n360 at 184-185

To avoid trade sanctions from Western governments, in 1993 the Indonesian government enacted the *Trademark Act No. 19/1992* which served the interests of trademark owners. The Preamble to the *Trademark Act 1992* promulgated that the Act was enacted to protect trademarks. It meant that the *Trademark Act 1992* no longer emphasised consumer protection, but emphasised the protection of individual trademark owners. The *Trademark Act 1992* clearly represented the philosophy of individualism which was common in Western countries.

The enforcement of the *Trademark Act 1992* was found to be ineffective. One of the reasons was that the enactment of the *Trademark Act 1992* was designed more to serve foreign interests rather than Indonesian interests. The Act was also not in line with the Indonesia's communal culture and brought more benefits to foreigners than to the Indonesian people. To some extent, the Act even went beyond what was required by the *Paris Convention*. Besides that, the Act was not supported by an efficient and well-equipped Trademark Office.

Unless trademark law is drafted in accordance with the interests of the Indonesian people and can bring clear benefits to the majority of the Indonesian people, the enforcement of trademark law will never be effective. Instead, in some cases, the law could hinder the development of Indonesia's economy, exhaust Indonesia's capital and inhibit the development of local businesses.

CHAPTER V

THE ENFORCEMENT OF COPYRIGHT LAW IN INDONESIA

A. Introduction

This chapter will review the history and development of copyright law in Indonesia and analyse why the Indonesian copyright law has been difficult to enforce in the country. The discussion in this chapter finds that modern copyright law, which has been largely formulated by and in accordance with the needs of Western developed nations, has not been in line with Indonesia's culture or stage of economic development and has not been consonant with the interests of the people of Indonesia.

Historically, copyright law in Indonesia was not enacted for Indonesians, but for the Dutch and those who gave deliberate submission to Dutch civil law. Only after Indonesian independence and because of Article II of Transitional Provisions of the Indonesian Constitution, was the Dutch copyright law, *Auteurswet* 1912, officially enforced on Indonesians.

However, in practice, the Indonesian government never enforced the *Auteurswet* 1912, as Indonesian communal culture and level of development did not support the enforcement of the *Auteurswet* 1912. In 1958, the Indonesian government's withdrawal of its membership of the *Berne Convention* left Indonesia free to use foreign works, especially books that were greatly needed to improve the level of education in Indonesia. The Indonesian government argued that the poor situation of the Indonesian economy and education after independence from Dutch colonialism, made Indonesia unable to fulfil its obligations under the *Berne Convention*.

In 1982, the Indonesian government replaced the *Auteurswet* 1912 with the *Copyright Act* 1982. The Elucidation of the Act stated that the Act attempted to reflect Indonesian culture which balanced the community interests and author interests. The Act reduced the duration of copyright protection to an author's lifetime plus 25 years, introduced "copyright expropriation" provisions, and did not provide copyright protection to foreign works. During its enforcement, the *Copyright Act* 1982 did not have any importance in changing the copyright environment in Indonesia. Most Indonesian people, including artists, authors and law enforcement authorities were unfamiliar with the concept of copyright, as they were still influenced by *Adat* that did not recognise intellectual property rights. The courts considered piracy a crime and sentenced it with criminal penalties only if the piracy injured the public interest, rather than the author's interests, for example in the case of the piracy of the song "Apanya Dong".⁴⁴⁶ Intellectual works so far had not played an important role in developing Indonesia's economy. Instead, Indonesia's economy relied more on sales of natural and manufactured products. Having no important role in Indonesian development, copyright law became a neglected area in Indonesian law.

In 1987, the Indonesian government enacted the *Copyright Act* 1987 to respond to US threats of trade sanctions if Indonesia did not improve its copyright protection. To accommodate the demands of the US and European Community (EC) countries, the *Copyright Act* 1987 increased the duration of copyright protection to be in line with the common practice in Western countries. The scope of copyright protection was also extended to include products in which US industries mostly dominated the market. The enactment of the Act, which was followed by the ratification of several bilateral agreements, improved copyright protection, especially in classes of works in which the US and the EC dominated, like sound recordings, films, and computer software. In practice, any crack-down against copyright piracy in Indonesia was often merely a response to

⁴⁴⁶ Unreported decision of the District Court of North Jakarta, 11 April 1984

Indonesia's listing on the USTR's "priority foreign countries" that listed countries targeted for US trade sanctions because of the lack of copyright protection to US works. There was little or no genuine intention on the part of the Indonesian government to provide copyright protection, except to avoid trade sanctions which might be imposed by Western countries, especially the US.

Copyright law was difficult to enforce in Indonesia because of the incompatibility of the law with Indonesian culture, and with Indonesia's degree of economic and scientific development. There were also inadequate copyright administration and law enforcement mechanisms to support the copyright law. Furthermore, copyright law did not have a significant effect on improving creativity or research and development in Indonesia. In fact, many Indonesian works became decimated in the market by big budget and powerful products of the US and other Western developed countries that were the main beneficiaries of Indonesian copyright law.

The conclusion reached in this chapter will contain a recommendation that new copyright legislation should be drafted in accordance with the reality of Indonesian culture, economic and scientific development in order to benefit the Indonesian people. Otherwise, copyright law will continue to be difficult or even impossible to enforce in Indonesia and will have no positive effect on the development of the country.

B. Discussion

The discussion will begin with a brief analysis of the *Auteurswet* 1912 which practically, did not play any significant role in the Indonesian legal system. It will continue with an analysis of the *Copyright Act* 1982, the first indigenous copyright law, and finally, analyse the *Copyright Act* 1987, which was found to be ineffective to provide adequate, appropriate copyright protection in Indonesia.

1. The Dutch Colonial Era

Many artistic and literary works had been created by Indonesians long before the arrival of Europeans. Indonesians were able to create dances, songs, stories, sculptures, batik, paintings and many other cultural forms which later became famous as part of Indonesian folklore. Immense creativity existed and a rich artistic culture flourished in the Indonesian archipelago, even though there was no intellectual property protection. The usual Western justification for the existence of copyright and other intellectual property protection, namely, that it is a necessary incentive for the production of works, seems very weak in the presence of the rich history of Indonesian folklore.

The first copyright law, *Auteurswet*, which gave protection to literary and artistic works in the Netherlands East Indies, was introduced in 1912 by the Dutch colonial government.⁴⁴⁷ The *Auteurswet* 1912 provided copyright protection for the period of authors' lifetime plus fifty years after their death.⁴⁴⁸ In 1913, the Netherlands government became a signatory of the 1886 *Berne Convention for the Protection of Literary and Artistic Works* on behalf of its

⁴⁴⁷ Staatsblad van Nederlandsch-Indie 1912 No. 600
Antons, Christoph, above n2 at 402

colonies, including the Netherlands East Indies. One year later, the *Berne Convention* was enacted in the Netherlands East Indies.⁴⁴⁹ The 1928 revision of the *Berne Convention* was signed by the Netherlands government on behalf of the Netherlands East Indies and enacted in 1931.⁴⁵⁰

Because of the colonial policy of law segregation, the *Auteurswet* and the *Berne Convention* were not enforceable to native Indonesians.⁴⁵¹ For them, the Dutch colonial government applied the *Adat* that did not recognise intellectual property rights. In addition, during the colonialisation, 90 percent of native Indonesians were illiterate⁴⁵² and did not attend schools.⁴⁵³ Very few Indonesians wrote books and an Indonesian company named *Balai Pustaka* was the only Indonesian publisher.⁴⁵⁴ The anonymity of many works created by Indonesian authors and artists also made the *Auteurswet* 1912 inapplicable to the Indonesian authors and artists who created the anonymous works.⁴⁵⁵ In contrast, there were several Dutch publishing companies that monopolised the Netherlands East Indies market.⁴⁵⁶ They became the main beneficiaries of the colonial copyright law, *Auteurswet* 1912.

During the colonial era, works created by Indonesian natives were not protected by copyright. *Adat* did not recognise property rights in literary and artistic works.⁴⁵⁷ References to property rights were usually limited to

⁴⁴⁸ Antons, Christoph, above n54 at 363

⁴⁴⁹ Staatsblad van Nederlandsch-Indie 1914 No. 797

Antons, Christoph, above n2 at 402

⁴⁵⁰ Antons, Christoph, above n54 at 361

⁴⁵¹ Antons, Christoph, above n2 at 402-403

⁴⁵² International Commission of Jurists, above n32 at 6

“Illiterate” here means to be unable to read and write Latin characters which are now used in bahasa Indonesia

⁴⁵³ Spruyt, J and Robertson, J B, above n14 at 121

⁴⁵⁴ Surachman, above n90 at 1

⁴⁵⁵ *Ibid*

⁴⁵⁶ Simorangkir, JCT, *Hak Cipta [Copyright]* (Jakarta: Djambatan, 2nd ed, 1973) at 69

Also see Antons, Christoph, above n2 at 408

⁴⁵⁷ The position of intellectual property rights in *Adat* has been discussed extensively in Chapter II

tangible and real goods.⁴⁵⁸ Among Indonesian natives who belonged to a communal society, there was a shared consciousness that intellectual works were a public good.⁴⁵⁹ Authors and artists usually allowed their literary and artistic works to be imitated and duplicated by others, even without their consent.⁴⁶⁰ They realised that all people borrowed from one another. Humans imitated other humans in every aspect of life, including in art and in literature.⁴⁶¹ Authors and artists would take great pride in having their works copied by others,⁴⁶² because it meant that their works had reflected their society. It has been found that the sharing of art and knowledge also took place between different ethnic groups across different islands of Indonesian archipelago. Similar oral literatures have been found across the archipelago.⁴⁶³

Art in the Netherlands East Indies had traditionally been a communal effort which was often anonymous.⁴⁶⁴ Balinese art, for example, was for a long time considered anonymous, as it was done as a communal effort. Balinese artists usually reinterpreted the works of others again and again by reproducing

⁴⁵⁸ Mahadi, above n95 at 126

Gutterman, Alan S., above n195 at 89

Kesowo, Bambang, above n92 at 3

⁴⁵⁹ “Most local artists care little about copyright” *The Jakarta Post* (1 July 1997) at 2

Konan, Denise Eby, et al., above n176 at 13

⁴⁶⁰ Saleh, Ismail, above n388 at 54, 225

⁴⁶¹ Vaver, David, above n182 at 152

⁴⁶² Saleh, Ismail, above n388 at 54

Heliantoro, above n93 at 372

“Penting, Budaya HAKI” [Important, Culture of IPR] *Kompas Online*, <http://208.150.216.210/kompas-cetak/9910/26/NASIONAL/pent15.html> (26 October 1999)

“Seni Ritual Menjadi Problem Penerapan UU Hak Cipta di Bali” [Ritual Art Causes Problems in the Enforcement of Copyright Act in Bali] *Kompas* (9 March 1996) at 9

“Editorial: Asia: Legal Culture and Enforcement of Rights” (March 18, 1988) *IP Asia* at 3

⁴⁶³ “Tradisi Lisan Nusantara: Mengandung Keragaman dan Kesamaan” [Nusantara Oral Tradition: Has Diversity and Similarity] *Suara Pembaruan Daily*, <http://www.SuaraPembaruan.com/News/199/10/19101999/Hiburan/hi01/hi01.html> (19 October 1999) at 1

⁴⁶⁴ Surachman, above n90 at 1

and duplicating them, striving to achieve their perfection.⁴⁶⁵ Imitating other people's works became part of Balinese culture.⁴⁶⁶

Art in Indonesian society was often not only about creativity, but also about community⁴⁶⁷ and dedication to art itself.⁴⁶⁸ Artists would allow their artistic works to be used for the community's ritual ceremonies.⁴⁶⁹

If people did not imitate a work, it did not mean that the work was protected by copyright. But rather, they did not dare to reproduce the work because of the sacred nature of the work. For example, in Irian Jaya (West Papua), a sculpture made by a member of the Asmat tribe would be regarded as sacred or precious, so nobody else in the tribe would dare to reproduce the sculpture.⁴⁷⁰ Another reason that people did not imitate a work might be because the work could only be used by a member of a noble or royal family.

⁴⁶⁵ "Copyright laws should cater to cultures' needs" *The Jakarta Post* (7 July 1997)

Compare with the Confucian tradition of scholarship that encourages learning by imitation. See (18 March 1988) *IP Asia* above n462 at 3

According to the Confucian thought, knowledge cannot be owned or controlled, but has to be duplicated. The Confucian Master would say that he only transmitted rather than created. See Gana, Ruth L., "Prospects For Developing Countries Under the TRIPs Agreement" (1996) 29 *Vanderbilt Journal of Transnational Law* at 766

⁴⁶⁶ *Kompas* (9 March 1996) above n462 at 9

⁴⁶⁷ Also see Gana, Ruth L., "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24 *Denver Journal of International Law and Policy* at 134

⁴⁶⁸ *The Jakarta Post* (1 July 1997) above n459 at 2

The Jakarta Post (7 July 1997) above n465

Similar thing happened in another developing country, Brazil. Carlos Cachaca, who died in 1999, in the age of 97 had been known to make samba the nation's theme music, and thus called Brazil's international "sambassador". Although he was credited with bringing the Rio de Janeiro's raucous pre-Lenten Carnival celebrations to the world's attention, the musician did not profit from his life's work. He maintained a day job with Brazil's state railways for 40 years. See "Milestones" *TIME Magazine* (August 30, 1999)

⁴⁶⁹ *Kompas* (9 March 1996) above n462 at 9

⁴⁷⁰ Heliantoro, above n93 at 372

In Imperial China, the use of copyright was only to control how and what kind of knowledge could be disseminated to the community. The copyright was also used to prevent dilution of sacred texts, to protect the purity of knowledge, but not to protect the author or author's rights. See Gana, Ruth L., above n465 at 766 and Gana, Ruth L., above n467 at 130, 133

For example, certain designs of batik cloth, like *Parang Rusak*, could only be used on dresses worn by members of the royal family in Java.⁴⁷¹

Copyright had not been part of Indonesian life and culture. This fact had been recognised by the Dutch colonial government which did not impose the *Auteurswet* 1912 on Indonesian natives.

2. The Sukarno Government

After Indonesia's independence, there was no time for the Sukarno government to develop an independent legal system, as the government had to keep fighting the Dutch, who intended to regain power in Indonesia. To avoid a vacuum of law in Indonesia, Article II of the Transitional Provisions of the Indonesian Constitution 1945 provided that all Acts and institutions remained in force until they were replaced by new provisions and as long as they did not conflict with the Constitution.

Based on Article II of the Transitional Provisions, the Sukarno government maintained the enforcement of the *Auteurswet* 1912 and upheld Indonesia's international obligations under the *Berne Convention* 1928.

This was the first time in which Indonesians were introduced to a law that protected copyright. However, unlike trademark law that had a significant practical effect in the Indonesian people's lives, copyright law or *Auteurswet*

⁴⁷¹ "Motif Batik "Parang Rusak" Banyak Dipakai Seniman Eropa" [Batik Design "Parang Rusak" Often Used by European Artists] *Suara Pembaruan Daily*, <http://www.SuaraPembaruan.com/News/1997/11/051197/Daerah/zdae02/zdae02.html> (5 November 1997) at 1
"Batik, Seni yang Tumbuh Bersama Lingkungannya" [Batik, Art that Grows Together with its Environment] *Kompas Online*, <http://www.kompas.com/9711/30/HIBURAN/bati.htm> (30 November 1997) at 2

1912 did not. It could be said that practically, the government never imposed the *Auteurswet* 1912. The fact that the majority of Indonesians were illiterate was one factor that made copyright law had no importance in Indonesia. Further, the Indonesian people who used to live with *Adat* norms, did not recognise property in intellectual works. The small number of Indonesian publishing, printing, audio and recording companies at that time was another factor that caused copyright law to have less importance among Indonesians.⁴⁷²

In 1948, Indonesia, as an independent nation, was not invited to attend a revision conference of the *Berne Convention* in Brussels, because Indonesia had been dropped from the list of members of the *Berne Convention*.⁴⁷³ As stated in the circular letter of 24 November 1950 issued by the Swiss Federal Council, the Foreign Department of the Republic of Indonesia had declared Indonesia's adherence only to the London Revision of the *Paris Convention* and the *Hague Agreement* concerning industrial designs and to the *Agreement of Neuchatel* concerning the restoration of rights to industrial property after the Second World War.⁴⁷⁴ However, although Indonesia did not declare explicitly its adherence toward the *Berne Convention*, legally Indonesia was still bound by the *Berne Convention* under Article 5 of the *Round Table Agreement* 1949. Article 5 of the Agreement that was made in the Hague between Indonesia and the Netherlands, contained a provision that guaranteed the continuing validity of the colonial laws in Indonesia.⁴⁷⁵

The uncertainty of Indonesia's membership status in the *Berne Convention* lasted until 1958, when the Indonesian government formally terminated its

⁴⁷² Saleh, Ismail, above n388 at 54

⁴⁷³ Simorangkir, JCT, above n456 at 50
Antons, Christoph, above n54 at 367

Antons, Christoph, above n2 at 408
⁴⁷⁴ above n174

membership in the Convention.⁴⁷⁶ Since the *Berne Convention* was the only international agreement on copyright to which Indonesia adhered⁴⁷⁷, the termination freed Indonesia from all international obligations in relation to the protection of copyright. The termination of Indonesia's membership of the *Berne Convention* also showed the lack of acceptance of the idea of copyright in Indonesia.

The reason given by the Indonesian government for terminating its adherence to the *Berne Convention* was that most books available in Indonesia after independence were written in foreign languages. These books had to be translated into Indonesian language in order to enable Indonesians to read the books.⁴⁷⁸ These books were also important to raise the education level of the Indonesian people. By terminating Indonesia's membership in the *Berne Convention*, the Indonesian government could allow the free use of foreign books to develop Indonesia without having to pay royalties to foreign authors.⁴⁷⁹

It was argued that in balancing the interests of Indonesian authors for copyright protection abroad and the interests of foreign copyright owners for copyright protection in Indonesia, the interests of the latter was clearly much

⁴⁷⁵ Antons, Christoph, above n2 at 404

⁴⁷⁶ Simorangkir, JCT, above n456 at 50

Antons, Christoph, above n54 at 367

Antons, Christoph, above n2 at 408

Gielen, Charles, above n5 at 101

⁴⁷⁷ Simorangkir, JCT, above n456 at 50

⁴⁷⁸ Simorangkir, JCT, above n456 at 69

⁴⁷⁹ Simorangkir, JCT, above n456 at 53, citing from the *Pewart* Magazine (October 1958) at 12, that reported the reasons made by the government to withdraw from the *Berne Convention* Gautama, Sudargo, "*Indonesia dan Konvensi-Konvensi tentang Hak Cipta*" [*Indonesia and Copyright Conventions*] paper presented at the Copyright Seminar (*Seminar Undang-undang Hak Cipta*), Denpasar (Bali) 21-23 October 1975, arranged by BPHN (*Badan Pembinaan Hukum Nasional*), National Legal Development Agency, Ministry of Justice, as cited in Gautama, Sudargo, above n7 at 52-53

Antons, Christoph, above n2 at 408

bigger.⁴⁸⁰ Therefore, the enforcement of the *Berne Convention* in Indonesia would confer greater benefits on foreign authors or foreign interests than on Indonesian interests. Furthermore, it was considered inappropriate for Indonesia to be a member of an international copyright agreement without having its own national copyright law.⁴⁸¹ The draft of the General Part of the Elucidation of the *Copyright Act* which was prepared by the National Institute of Legal Development (LPHN) in 1972, mentioned that in order to perform Indonesia's international obligation, it was necessary that there be a domestic law that provided copyright protection.⁴⁸²

However, the political reason for Indonesia's withdrawal from the *Berne Convention* was to hit the strong Dutch publishing industry in Indonesia. This was as a reprisal against the Netherlands that still occupied Irian Jaya (West Papua) until 1 May 1963.⁴⁸³

President Sukarno's nationalistic political view also influenced the government's decision to withdraw from the *Berne Convention*. During his presidency, he wanted the nation to be more nationalistic, self-reliant and cleansed of colonial influences.⁴⁸⁴

For many developing countries that just gained independence from Western nations, the *Berne Convention* was considered to represent the interest of Western colonial countries more than the interest of developing countries.

⁴⁸⁰ Gautama, Sudargo, above n7 at 53

⁴⁸¹ Simorangkir, JCT, above n456 at 53

Gautama, Sudargo, above n7 at 52

⁴⁸² As cited in Gautama, Sudargo, above n7 at 52

⁴⁸³ Antons, Christoph, above n2 at 408

Antons, Christoph, above n54 at 367

Simorangkir, JCT, above n456 at 53

Spruyt, J., *Indonesia: An Alternative History of the Timeless Isles* (South Melbourne, Vic. :

Macmillan, 1979) at 158-159

⁴⁸⁴ Lev, Daniel S., above n41 at xi

International Commission of Jurists, above n32 at 7

The *Berne Convention* was created by colonial powers during the heyday of colonialism. Most developing countries were covered by the *Berne Convention* while they were colonies.⁴⁸⁵ This also happened to Indonesia when it was under Dutch rule. Former colonies, which are now developing countries, had no voice during the drafting of the *Berne Convention*.⁴⁸⁶ Therefore, their political, economic and cultural interests could not be represented in the *Berne Convention*.

After they gained independence, developing countries found that they greatly needed copyrighted materials to develop their countries.⁴⁸⁷ They maintained that the improvement of living conditions after being freed from colonisation depended largely on the advancement of education that could be obtained from the dissemination of intellectual works.⁴⁸⁸ However, because of their extremely limited financial resources, they were unable to protect authors' rights, especially those of foreign authors, as they had agreed to do under the *Berne Convention*.⁴⁸⁹ In a seminar arranged by the Indonesian Ministry of Justice in 1975, Mr. Sudargo Gautama, a prominent Indonesian lawyer, argued that making royalty payments to foreign copyright owners was a heavy burden for Indonesian publishers who generally did not have ready access to foreign currency.⁴⁹⁰

Besides economic difficulties, developing countries also faced the cultural difficulties in recognising protection of intellectual property rights. They discovered that they did not share the same common principles of copyright

⁴⁸⁵ Tocups, Nora Maija, "The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries" (1982) 29 *Journal of the Copyright Society of the U.S.A.* at 402, 406
Gana, Ruth L, above n467 at 124, footnote 65

⁴⁸⁶ Tocups, Nora Maija, above n485 at 407

⁴⁸⁷ *Id.*, at 409

⁴⁸⁸ *Id.*, at 409-410

⁴⁸⁹ *Id.*, at 409

Trembath, Owen, "Copyright Laws in Asia" (October 1995) 5 *Arts and Entertainment Law Review* at 65

law with their former colonial rulers.⁴⁹¹ In the culture of many third world nations,⁴⁹² artists did not profit from their intellectual works. Their creative ability was about dedication to art itself⁴⁹³ and was attributed to God who inspired them and gave them the skill to create the products.⁴⁹⁴ This belief limited the desire and capacity of artists and scholars to commodify their intellectual works.⁴⁹⁵ In their society, the community interests in intellectual works were given priority over the authors' and artists' individual interests.⁴⁹⁶ Besides that, societies in many third world countries were not organised around individuals or the nuclear family as such, but around a clan or other extended family unit, beyond the nuclear family. Therefore, the forms and definitions of "ownership" were crafted in different conceptions from those in Western legal structure.⁴⁹⁷ Exclusive ownership that meant absolute possession and the right to exclude others from the use of the property, was a rare feature in some native tribes in the developing world. For them, ownership of intangible goods as well as other goods meant the right to be recognised as "owner", not the right to exclude other members of the society from the use of the goods. "Ownership" for these nations was

⁴⁹⁰ Gautama, Sudargo, above n7 at 53

⁴⁹¹ Tocups, Nora Maija, above n485 at 408

⁴⁹² As defined by Ruth L. Gana in her article, the term "Third World" includes indigenous groups or tribes which have not obtained formal statehood but are recognised both nationally and internationally as having a distinct political, cultural, and social identity within a formal state, eg.: Native Americans and aboriginal groups, and other indigenous or "traditional" societies. Gana, Ruth L, above n467 at 124

⁴⁹³ *The Jakarta Post* (1 July 1997) above n459 at 2

The Jakarta Post (7 July 1997) above n465

⁴⁹⁴ Gana, Ruth L, above n467 at 129, 135

⁴⁹⁵ *Id.*, at 135

Similarly, Islam teaches that knowledge is God's gift to human being and we should not abuse the gift for our own achievement. See Surah Iqraa (96) of the Holy Qur'an. Also see, A. Yusuf Ali, *The Holy Qur'an, Text, Translation and Commentary* (USA: Amana Corp, 1983) at 1762, footnote 6207-6209

⁴⁹⁶ (18 March 1988) *IP Asia* above n462 at 2

Blatt, Jeffrey J., above n211 at 674

Tocups, Nora Maija, above n485 at 407-408

"Tiga RUU HAKI Disahkan DPR RI" [The Indonesian Parliament Passed Three Intellectual Property Acts] *Kompas Online*, <http://kompas.com/9703/22/HUKUM/tiga.htm> (22 March 1997) at 2

⁴⁹⁷ Gana, Ruth L, above n467 at 132, 136

rather a form of stewardship.⁴⁹⁸ This situation also happened in Indonesia, where most Indonesian artists, because of their strong communal sense, were not assertive enough to claim copyright for their works.⁴⁹⁹

Some third world countries also maintained that knowledge and information were the common heritage of mankind and therefore should be made available at low cost.⁵⁰⁰ This right of mankind to have access to the fruits of knowledge was also recognised in Article 27(1) of the *Universal Declaration of Human Rights* adopted by the General Assembly of the United Nations on 10 December 1948.⁵⁰¹ Furthermore, the Preamble to the Constitution of the UNESCO claimed that

the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern.

The argument that by withdrawing from the *Berne Convention*, a country will jeopardise its own publishing, film making and similar industries, did not impress the Indonesian government. This was because in reality, Indonesia did not have valuable works to be protected abroad. Like many other developing countries, Indonesia did not possess a large body of copyrighted works created by their own authors which could be distributed internationally.⁵⁰² The Indonesian government admitted that there was no benefit in joining the *Berne Convention* with this stage of development.⁵⁰³ It

⁴⁹⁸ *Id.*, at 132-133

⁴⁹⁹ *The Jakarta Post* (1 July 1997) above n459 at 2

⁵⁰⁰ Giunta, Tara Kalagher and Shang, Lily H., “Ownership of Information in A Global Economy” (1993-1994) 27 *The George Washington Journal of International Law and Economics* at 330
Gana, Ruth L, above n467 at 131, footnote 112

⁵⁰¹ Article 27 (1): “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.
Tocups, Nora Maija, above n485 at 420

⁵⁰² Long, Doris Estelle, “The Protection of Information Technology in A Culturally Diverse Marketplace” (1996) XV *The John Marshall Journal of Computer & Information Law* at 162

⁵⁰³ Simorangkir, JCT, above n456 at 53, citing from the *Pewart* Magazine (October 1958) at 12

was not uncommon that developing nations, like Indonesia, in the absence of sufficient nationally created technology, often used the copyrighted products of other nations to promote their domestic economic growth. This also happened in a country like the United States, which used the works of foreign authors in its early days, to fulfil the needs of the American publishing industry.⁵⁰⁴ Until 1891, the US did not recognise British copyrights, although the British abided by the US copyright.⁵⁰⁵ Dru-Brenner Beck noted that, “the US was among the largest “pirates” of English works, earning the title of “the buccaneers of books” in 1884”.⁵⁰⁶ Until 1989, the United States, also refused to join the *Berne Convention* without any significant reason⁵⁰⁷, except that they could not accept the moral right protection required by the *Berne Convention*.⁵⁰⁸ Many other industrialised countries also introduced intellectual property law only when their economic development had made it profitable.⁵⁰⁹

However, despite the culture of copyright ignorance in Indonesia, it did not mean that there was no copyright awareness at all in Indonesia. In fact, some Indonesian authors had started demanding copyright protection as early as the 1950s. There were some factors that influenced these authors to demand copyright protection for their works, and thus, to depart from *Adat* values that did not recognise copyright. After Indonesia’s independence, there was an increasing role for Indonesian authors in the development of education in Indonesia. They had to write books in the Indonesian language -bahasa

⁵⁰⁴ Long, Doris Estelle, above n502 at 162

⁵⁰⁵ Konan, Denise Eby, et al., above n176 at 26
Brenner-Beck, Dru, above n140 at 87-88

⁵⁰⁶ Brenner-Beck, Dru, above n140 at 88, quoting from Kastenmeier, Robert W. and Beier, David, “International Trade and Intellectual Property: Promise, Risks, and Reality” (1989) 22 *Vand. J. Transnat’l L.* 302 n. 50

⁵⁰⁷ Gana, Ruth L, above n467 at 122, footnote 48

Ross, Julie C., and Wasserman, Jessica, above n200 at 2248

⁵⁰⁸ Ross, Julie C., and Wasserman, Jessica, above n200 at 2288

de Koning, Martine, “Why the Coercion-based GATT Approach is not the Only answer to International Piracy in the Asia-Pacific Region” (1997) 2 *European Intellectual Property Review* at 66

Indonesia- to replace books that were previously written in Dutch or other foreign languages. Writing which was previously dominated by European authors, after the independence, could also be enjoyed by Indonesian authors. The illiteracy elimination program held by the Indonesian government, increased the need for books written in Indonesian.⁵¹⁰ Besides that, most Indonesian authors made their living as professional writers. This was different from Indonesian artists who most of them had other profession or jobs outside creating artistic works, as source of living. Their art was only a secondary job for most of them.⁵¹¹ This difference made Indonesian authors more demanding of copyright protection than Indonesian artists did.

On 17 February 1956, the Organisation of Indonesian Authors (OPI) was established. Article V of its Memorandum of Association recognised the copyrights of its members' works. There also had been some copyright related disputes that involved some authors who were the members of the OPI. One author brought a piracy case that involved his writing to the court, and the judge fined the plagiarist. Another author demanded honorarium to a magazine that cited his writing without his consent, and the magazine finally paid the honorarium. On 30 September 1958, OPI demanded the Organisation of Soviet-Uni Authors to pay royalties on several Indonesian novels that had been translated into Russian. On 2 June 1958, through the pooling ballot, 141 members of OPI voiced their wish that Indonesia joined the *Berne Convention*.⁵¹² This was contrary to the government's decision to withdraw from the *Berne Convention* in the same year.

⁵⁰⁹ Antons, Christoph, above n139 at 78-79

⁵¹⁰ Simorangkir, JCT, above n456 at 69

⁵¹¹ Saleh, Ismail, above n388 at 54

“Kisah Pencipta 200 Lagu Daerah *Banyuwangen*: Menabur Sukses, Menuai Kecewa” [The Story of 200 Authors of *Banyuwangen* Folk-songs: Successful, but Disappointed] *Republika Online*, <http://www.republika.co.id/9704/07/07KISAH.192.htm> (7 April 1997) at 1

⁵¹² Simorangkir, JCT, above n456 at 96

In 1966 and 1968, the OPI also proposed a draft of a new copyright law to the Indonesian government. This was to follow up the draft that had been made by the Ministry of Justice and the Ministry of Education and Culture in 1958, as well as the draft that had been made by the Board of National Law Development in 1966.⁵¹³ The proposal of a new copyright law was based on their interest in replacing the *Auteurswet* 1912 which was considered not to represent Indonesian interests and communal culture.⁵¹⁴

However, none of these drafts ever reached the Indonesian Parliament.⁵¹⁵ The government was quite reluctant with the idea of copyright protection. Although the government maintained the *Auteurswet* 1912, in practice, the Act was almost never imposed.⁵¹⁶ Moreover, the majority of the Indonesian people also did not recognise copyright.⁵¹⁷ Therefore, until the end of the Sukarno government in 1966, copyright became a neglected area in Indonesian law.

⁵¹³ Gielen, Charles, above n5 at 101

The Ministry of Justice of the Republic of Indonesia, *Keterangan Pemerintah di Hadapan Sidang Paripurna Dewan Perwakilan Rakyat Mengenai Rancangan Undang-undang tentang Hak Cipta [The Government's Argument Before the General Assembly of the Parliament on the Draft of Copyright Act]* (Jakarta: 23 January 1982) at 3

⁵¹⁴ The Ministry of Justice of the Republic of Indonesia, above n513 at 1-2, 5
Simorangkir, JCT, above n456 at 19

⁵¹⁵ Antons, Christoph, above n2 at 405

⁵¹⁶ *Ibid*

Gielen, Charles, above n5 at 101

Saleh, Ismail, above n388 at 54

⁵¹⁷ Saleh, Ismail, above n388 at 54

The Jakarta Post (1 July 1997) above n459 at 2

Heliantoro, above n93 at 372

Kompas Online (26 October 1999) above n462

Kompas (9 March 1996) above n462 at 9

(18 March 1988) *IP Asia* above n462 at 3

The Jakarta Post (7 July 1997) above n465

3. The Suharto Government

Under the Suharto government, the demand of copyright protection was continued by the Indonesian Book Publishers Association (IKAPI). After the independence, the Indonesian publishing industry had emerged and competed with the publishing industries owned by Europeans and Foreign Orientals. In 1972, the IKAPI proposed a draft of Copyright Act to the government. The IKAPI needed copyright protection for books that they printed and published, and for their investment spent to pay royalties to authors as some Indonesian authors started demanding royalty payments for their writings published by Indonesian publishers. This had never happened before, as the situation in the colonial era did not support the system of royalty payments to Indonesian authors.⁵¹⁸

However, like previous drafts of Copyright Act, the 1972 draft proposed by the IKAPI also failed to reach the Parliament.⁵¹⁹ There was no strong support from Indonesian authors who did not join the OPI and from Indonesian artists on the idea of a new copyright law.⁵²⁰ It seemed that their traditional values did not recognise copyright protection like that suggested by the IKAPI and OPI. Besides that, the government was still reluctant about the idea of copyright protection, as they preferred the free availability of intellectual works to improve levels of education and development in Indonesia.⁵²¹

⁵¹⁸ Simorangkir, JCT, above n456 at 69

⁵¹⁹ Antons, Christoph, above n2 at 405

⁵²⁰ Also see Giunta, Tara Kalagher and Shang, Lily H., above n500 at 331

⁵²¹ Simorangkir, JCT, above n456 at 53, citing from the *Pewarta Magazine* (October 1958) at 12, that reported the reasons made by the government to withdraw from the *Berne Convention*

Gautama, Sudargo, above n479, as cited in Gautama, Sudargo, above n7 at 52-53

Antons, Christoph, above n2 at 408

Also see Giunta, Tara Kalagher and Shang, Lily H., above n500 at 331

However, with the improving economy, due to Indonesia's membership in the OPEC (Organisation of Petroleum Exporter Countries) and the oil boom in the mid 1970s, the copyright lobby had an opportunity to maintain their demands for better copyright protection and a new Copyright Act. They considered that the improved economic situation in Indonesia would enable the Indonesian people to pay royalties for works produced by Indonesian authors or artists. In 1976, the Ministry of Justice formed an interdepartmental committee to draft a new Copyright Act. After working for more than one year, at the end of 1977, they finished drafting the new Copyright Act.⁵²² After several amendments on the draft, on 23 January 1982, the Minister for Justice on behalf of the government presented the draft to the Parliament. In his speech before the Parliament, the Minister for Justice said that the *Auteurswet* 1912 should be replaced by an indigenous copyright law that represented Indonesian culture which balanced the community interests and individual interests.⁵²³ The Parliament passed the new Copyright Act, and on 12 April 1982, the government enacted the new *Copyright Act* No. 6/1982, the Indonesia's first copyright law.⁵²⁴

3.1. The Copyright Act No. 6/1982

The Preamble to the *Copyright Act* No. 6/1982 (hereinafter called the *Copyright Act* 1982) stated that the *Auteurswet* 1912 had to be revoked because it was not in line with the needs and ideas of national law.⁵²⁵

⁵²² The Ministry of Justice of the Republic of Indonesia, above n513 at 4
Gielen, Charles, above n5 at 101

⁵²³ The Ministry of Justice of the Republic of Indonesia, above n513 at 2, 5

⁵²⁴ State Gazette No. 15/1982

Saidin, *Aspek Hukum Hak Kekayaan Intelektual* [The Legal Aspects of Intellectual Property Rights] (Jakarta: PT RajaGrafindo Persada, 1995) at 25

Kaehlig, Carl-Bernd, "Copyright" in Kaehlig, Carl-Bernd, *Indonesian Intellectual Property Law* (Jakarta, Indonesia : Tatanusa, 1993) at 1

Kardono, A. Supriyani and Johnson, Darrell R., above n196 at 163-164

⁵²⁵ Kaehlig, Carl-Bernd, above n524 at 2

Recognising the public interest in intellectual works,⁵²⁶ the duration of copyright protection, which had been the lifetime of the author plus 50 years under the *Auteurswet* 1912, was reduced to the lifetime of the author plus 25 years under the *Copyright Act* 1982 (Article 26).⁵²⁷ Moreover, the *Copyright Act* 1982 provided “expropriation” provisions in Article 10(3) and (4) that allowed the Government, by passing a Presidential Decree, to take over the copyright of works deemed important to the national interest. The President would determine the amount of compensation given to the copyright owners of the works. The *Copyright Act* 1982 also did not give copyright protection to a foreign work unless the author⁵²⁸ of the foreign work published his work for the first time in Indonesia, before any other person published it in Indonesia (Article 48 b.). With this provision, the government could protect the national interest in the availability of foreign works for education and development. This was because, in practice, Article 48b was very difficult for foreign authors to comply with. It was almost impossible for them to prevent people not to make early publication or use of their works in Indonesia before they published it themselves in Indonesia. In short, almost all creations or works made by foreigners and published for the first time outside Indonesia, could be published, reproduced and translated in Indonesia without authorisation of the authors. Under the *Copyright Act* 1982, these unauthorised copies of foreign works could be freely commercialised by Indonesian individuals and companies.⁵²⁹

⁵²⁶ Simorangkir, JCT, above n456 at 40

⁵²⁷ The Ministry of Justice of the Republic of Indonesia, above n513 at 5
Kaehlig, Carl-Bernd, above n524 at 2
Antons, Christoph, above n1 at 306

⁵²⁸ “Author” in the *Copyright Act* 1982 is “Pencipta” that means creator of intellectual works (Article 1 a.)

“Work” in the *Copyright Act* 1982 is “Ciptaan” that means any works in science, art and literature (Article 1 b.)

For the purpose of discussing the Indonesian *Copyright Act*, the term “author” will mean both the author who produces literary works and artist who produces artistic works.

⁵²⁹ Gielen, Charles, above n5 at 101-102

In line with the communal culture that emphasised the protection of the community interest, piracy of copyrighted works would be considered a crime if it injured the public. In the piracy case of a famous Indonesian pop song “Apanya Dong”, the copyright owner of the song claimed that another song “Mau Apanya Dong” had pirated “Apanya Dong”. The claim was based on the fact that the titles of the songs were very similar, the melody of the songs from the middle to the end was the same, the refrain of the songs was the same, and in fact almost half of the songs’ tunes were similar.⁵³⁰ The Public Prosecutor brought the producer of “Mau Apanya Dong” to the District Court of North Jakarta on criminal charges under Article 380(1) of the *Criminal Act* and Articles 44(1), (2) and Articles 11(1), (3) of the *Copyright Act* 1982. Articles 44(1) and (2) provided criminal penalties on piracy, while Article 380(1) of the *Criminal Act* stipulated that it was a crime to deceive the public by putting a fake name or mark on a work of art, literature, science, or handicraft, to mislead the public to think that the work was originally created by the author whose name or mark was faked.⁵³¹ The District Court of North Jakarta found that the similarities in the song title, melody and refrain, had misled public to buy and belief that the cassettes of “Mau Apanya Dong” produced by the defendant, contained the music composed by Titiiek Puspa, the composer of “Apanya Dong”.⁵³² The Court sentenced the defendant to six month imprisonment.⁵³³ The Appellate Court and Supreme Court upheld this decision.⁵³⁴ In this case, it was clear that protecting the public interest and

⁵³⁰ Gingerich, Duane J., “Copyright Law Has Teeth” (February 8, 1990) *IP Asia* at 24, 25

⁵³¹ Saleh, Ismail, above n388 at 120

Gingerich, Duane J., above n530 at 25

Gielen, Charles, above n5 at 105

⁵³² Gielen, Charles, above n5 at 105

⁵³³ Unreported decision of the District Court of North Jakarta, 11 April 1984

⁵³⁴ Saleh, Ismail, above n388 at 120

not the copyright owner's interest was the main reason to sentence the defendant to imprisonment.

Besides that, the *Copyright Act 1982* would consider piracy as a crime only if the copyright owner reported the piracy to law authorities. If there was no report made by the copyright owner, there would be no crime (Article 45). This kind of provision showed that the government had cautiously and reluctantly classified the use of another person's work of mind as crime.⁵³⁵ This was because Indonesian culture actually did not recognise protection of intellectual works. So, the government let individual copyright owners determine whether there had been a crime if their works were pirated by others. In fact, there was almost no criminal report on piracy made under the *Copyright Act 1982*,⁵³⁶ as many Indonesian authors were still ignorant of the concept of copyright.⁵³⁷ If there were any of them who wished to bring a piracy case to the courts, they were deterred by the complicated law and court procedures in Indonesia.

In practice, there was no practical significant effect of the *Copyright Act 1982* to protect copyright in Indonesia.⁵³⁸ Piracy of both Indonesian and foreign works was growing. Several Indonesian works, such as songs and novels, were also copied and published without authorisation abroad, especially in Asian countries which had cultural and historical ties with Indonesia or had similar languages to Indonesian. However, it seemed that the Indonesian government did not think that copyright protection was an important national interest. Under the Suharto government, economic development and political stability were considered more

⁵³⁵ Also see Cheetham, Simon, above n396 at 20

⁵³⁶ Gingerich, Duane J., above n530 at 24

⁵³⁷ Saleh, Ismail, above n388 at 54-55

Kesowo, Bambang, above n92 at 11

⁵³⁸ Saleh, Ismail, above n388 at 207

Kesowo, Bambang, above n92 at 10

important to the development of Indonesia. Therefore, the government deliberately ignored the wide-spread incidence of copyright piracy in Indonesia. For the purpose of promoting economic development, the government did not prohibit piracy as long as companies and individuals dutifully paid duty on the works they produced and sold, regardless of whether or not the works were pirated ones.⁵³⁹

For political stability, the Suharto government did not appreciate freedom of expression in Indonesia. Literary and artistic works were very much controlled by the government to prevent any publication that could offend the government, endanger national security, harm public order, and contain communist doctrine. There were a lot of bans and censorship of films, books, speeches, dramas by the Attorney General motivated by political reasons,⁵⁴⁰ for example, the ban of a film based upon the novel 'Max Havelaar' and the film 'All the President's Men', the arrest of the poet W.S. Rendra after his poetry reading in Jakarta, the restriction on publication of the songs of Iwan Fals, Rhoma Irama, and the novels of Pramoedya Ananta Toer, a political prisoner accused of being a member of the banned Indonesian Communist Party.⁵⁴¹ Authors of the banned works were not allowed to defend their works because the bans and censorship were unilaterally decided by the Attorney General.⁵⁴² Generous copyright recognition in Indonesia would endanger the government's control on freedom of expression, because awarding copyright would mean to respect the creative works. William P. Alford noted that:

⁵³⁹ For example in the case of pirated audio cassettes of the Live Aid Concert in 1985
Lepp, Alan W, above n140 at 30

⁵⁴⁰ "Politik Pelarangan Buku Perlu Direformasi" [The Policy of Banning Books Needs Reform] *KOMPAS Online*, <http://www.kompas.com/9805/09/HUKUM/poli13.htm> (9 May 1998)

⁵⁴¹ International Commission of Jurists, above n32 at 94-95

⁵⁴² *KOMPAS Online* (9May 1998) above n540

. . . one finds that the greater a nation's commitment to the overall rights of its populace, the more likely it is to have serious protection for intellectual property. In a way, it would be hard for this to be otherwise-for societies that sharply constrain their citizens' rights are likely to tolerate far less in the way of private expressive activity, . . .⁵⁴³

Given all these circumstances, copyright protection under the *Copyright Act* 1982 was hard to be expected. Indonesia became a haven for copycats. Shops sold pirated cassettes of a wide range of mainly Western pop music, pirated videos of Western films and specialised in copying computer software for very cheap prices.⁵⁴⁴ At that time, one had to spend US\$ 4 to get one good quality music cassette in Europe and the US, but in Indonesia, one could get four high quality recordings of the same album with that price.⁵⁴⁵ Pirated cassette producers also exported their products to Saudi Arabia and other Middle East countries.⁵⁴⁶ Indonesian songs were also hit by piracy. The Association of the Indonesian Recording Industry (ASIRI) claimed that between 1985 and 1987, the recording industry which produced cassettes of Indonesian songs lost around 900 million rupiah (\pm US\$ 450,000) per month due to piracy.⁵⁴⁷ Despite this, the courts and other law enforcement authorities were not enthusiastic to enforce the *Copyright Act* 1982, partly because Indonesian lawyers, judges and police tended to be unfamiliar with intellectual property concept.⁵⁴⁸

⁵⁴³ Alford, William P., "How Theory does –and does not--Matter: American Approaches to Intellectual Property Law in East Asia", (1994) 13 *UCLA Pacific Basin Law Journal* at 17

⁵⁴⁴ Antons, Christoph, above n2 at 401

⁵⁴⁵ Hadiputranto, Hadinoto & Partners, above n234 at 11

⁵⁴⁶ Middle East News Network, January 12, 1992, above n143

Garnett, Nick, "Empty Shelves After EEC Copyright Agreement" (July 1, 1988) *IP Asia* at 30

"Licensing of Tapes" (September 16, 1988) *IP Asia* at 14

⁵⁴⁷ Saidin, above n524 at 80

Kesowo, Bambang, above n92 at 11

⁵⁴⁸ Hadiputranto, Hadinoto & Partners, above n234 at 9

Gingerich, Duane, "New Compulsory Copyright Licensing Regulations" (March 17 1989) *IP Asia* at 18

Kesowo, Bambang, above n92 at 20

Also see (18 March 1988) *IP Asia* above n462 at 3

Copyright counterfeiters in Indonesia generally received only suspended or probationary sentences.⁵⁴⁹ Even the government collected duty on pirated cassettes, which could be interpreted that the government legalised piracy. Most Indonesian authors at that time were also unfamiliar with the copyright concept, therefore they ignored piracy. In most cases, song authors no longer had copyright over their works after they sold their works to recording companies in exchange for a “flat-fee” payment set by the recording companies.⁵⁵⁰ They accepted such an arrangement because of *Adat* culture that only recognised “cash” type payment and not “royalty” type payment.⁵⁵¹ Effectively, at that time, only publishing and recording companies had concern with copyright protection in Indonesia.

Intellectual works did not play any important role in developing Indonesia’s economy. Under the Suharto government, the economic development relied heavily on the sales of oil and gas, mineral and agricultural products, as well as manufactured products.⁵⁵² Indonesia exported garments, shoes, telecommunication products, natural and synthetic rubber, timber and wood made products, coffee, tea, spices, fish, shells, furniture, woven thread, and textiles, to the US market.⁵⁵³ In 1980, the US government granted Indonesia the Generalised System of Preferences (GSP) privilege, after they changed their policy that would not grant the GSP to an OPEC member country.⁵⁵⁴ In 1985, Indonesia used

⁵⁴⁹ Kaehlig, C.B., “Indonesia Copyright Law Amendments” (January 1 1988) *IP Asia* at 19
“Fighting Book Piracy” *The Jakarta Post* (June 20, 1997)

⁵⁵⁰ Kesowo, Bambang, above n92 at 19

Also see Trembath, Owen, above n489 at 67

⁵⁵¹ The elaborate discussion on the *Adat* concept of “cash” type of payment and “royalty” type of payment has been given in Chapter II above at 33

⁵⁵² See Chapter II above at 43-44

⁵⁵³ “Produk Indonesia Terancam Pembalasan” [Indonesian Products are to be Retaliated] *KOMPAS* (28 April 1995) at 2

⁵⁵⁴ Nio, Threes, above n147 at 4

Gielen, Charles, above n5 at 102

this GSP privilege to export duty free goods to the US that valued up to US\$ 28 million.⁵⁵⁵ While from the European Union, Indonesia's textile export benefited US\$ 600 million in 1987 from the similar preferential import duty system.⁵⁵⁶ Besides relying on exports, the development of the Indonesian economy also relied on foreign loans and foreign investment,⁵⁵⁷ in which the US became one of the biggest foreign sources of investment with US\$ 758 million of direct foreign investment in 1988 alone.⁵⁵⁸

Beginning the mid 1980s, the US government started to link trade and intellectual property and thus, the modern machinery for international lawmaking in the area of intellectual property began to take shape.⁵⁵⁹ This had never happened before. Historically, the US was not the main force that developed global intellectual property protection. The US did not have a record on global intellectual property harmonisation. Earlier harmonisation efforts, such as the *Berne Convention*, *Paris and Madrid Convention*, were carried out and initiated in Europe. Often the US refused to participate in global harmonisation efforts. For example, they did not join the *Berne Convention* until 1988, and they never signed the *Rome Convention* to protect neighboring rights.⁵⁶⁰ Neither US universities nor government had paid sustained attention to the intersection of intellectual property and East Asia. Even American publishers failed to take even modest steps to secure protection of their works in that part of the

⁵⁵⁵ Gielen, Charles, above n5 at 102

Nio, Threes, above n147 at 4

⁵⁵⁶ Kesowo, Bambang, above n92 at 19

⁵⁵⁷ Antons, Christoph, above n54 at 375

⁵⁵⁸ Lepp, Alan W, above n140 at 29

Statistics drawn from S. Guisinger, "Foreign Direct Investment Flows in East and Southeast Asia" (1991) 8 *ASEAN Economic Bulletin* at 29 as cited in MacLeod, Dylan A, above n144 at 371

⁵⁵⁹ Drahos, Peter, above n226 at 49

Alford, William P., above n543 at 13

⁵⁶⁰ de Koning, Martine, above n508 at 66

world.⁵⁶¹ The US was more interested in the developmental aspects in intellectual property than the trade aspects.⁵⁶² However, with an increasing level of technology development, American industry became more intellectual property based⁵⁶³ and the US became a leading country in the export of intellectual property products⁵⁶⁴ with 23% to 25% of its total 1988 exports contained a high component of intellectual property.⁵⁶⁵ Therefore, in the 1980s when the US faced an increasing trade deficit, especially with East Asian countries, the US government hoped that the intellectual property based industries would be the very ones to restore the US to a positive trade balance with the world.⁵⁶⁶

By the mid to late 1980s, the link between intellectual property and trade, especially concerning East Asia, became an important element in the US public policy.⁵⁶⁷ This required the USTR each year to unilaterally decide what offences had been committed against American intellectual property by American trading partners and to initiate actions against such countries unless they made satisfactory amendments to their intellectual property regimes according to US standard.⁵⁶⁸ The US International Trade Commission surveyed 736 domestic companies. Of those firms, total worldwide losses because of inadequate intellectual property protection in 1986 were estimated to be US\$ 23.8 billion, or almost 15% of the US

⁵⁶¹ Alford, William P., above n543 at 10

⁵⁶² Gakunu, Peter, “Intellectual Property: Perspective of the Developing World. (Includes General Discussion) (Conference: Prospects for Multilateral Agreement on Services and Intellectual Property in the GAAT Multilateral Trade)” (1989) 19 *Georgia Journal of International and Comparative Law* at 362

⁵⁶³ Drahos, Peter, above n226 at 49

⁵⁶⁴ Ross, Julie C., and Wasserman, Jessica, above n200 at 2255

⁵⁶⁵ Brenner-Beck, Dru, above n140 at 88

Lepp, Alan W, above n140 at 28

⁵⁶⁶ Drahos, Peter, above n226 at 49

⁵⁶⁷ Alford, William P., above n543 at 13

Drahos, Peter, above n226 at 49

⁵⁶⁸ Alford, William P., above n543 at 13

trade deficit.⁵⁶⁹ Eighty-four American companies cited inadequate copyright protection in fifty-two countries. The most frequently reported countries included Taiwan, Brazil, Korea, Indonesia, and Argentina.⁵⁷⁰ In Indonesia alone, American copyright holders claimed to lose around US\$ 206 million in 1984 because of piracy.⁵⁷¹ The US government began to receive pressure from its industries, especially from major US companies with important intellectual property portfolio, to seek intellectual property protection in foreign market.⁵⁷² Clearly, the USTR did not have the resources to globally enforce the US intellectual property rights. Therefore, this work was mostly done by the US business community working through its global trading posts. Each major US company with an important intellectual property portfolio became a member of a trade association which joined an umbrella organisation like the International Intellectual Property Alliance (IIPA) and the Business Software Alliance (BSA). The IIPA represented 1,500 companies which had significant copyright interests. These companies provided the IIPA and the BSA with continuous reports and estimation as to the trade losses that US companies were experiencing worldwide. Then, the IIPA and BSA passed this information on to the USTR to enable them to take appropriate action under Section 301 of the US *Trade Act*. With this kind of practice, a question was raised whether the USTR had become a captive of the intellectual property lobby made by these organisations.⁵⁷³

⁵⁶⁹ Gutterman, Alan S., above n195 at 101

Brenner-Beck, Dru, above n140 at 88

Lepp, Alan W, above n140 at 28

⁵⁷⁰ Gutterman, Alan S., above n195 at 102

⁵⁷¹ Lepp, Alan W, above n140 at 29

⁵⁷² Ross, Julie C., and Wasserman, Jessica, above n200 at 2255

⁵⁷³ Drahos, Peter, above n226 at 52-53

Another critic was directed to the methodology and results of the survey conducted by the US International Trade Commission on 736 companies, which were deemed highly subjective. See “ASIA USITC Report: How did Asia Score?” (April 22, 1988) *IP Asia* at 30

In September 1986, the US based Intellectual Property Alliance petitioned the USTR to deny Indonesia's GSP privileges in retaliation for violation of American patents and copyrights. Then in 1987, the European Economic Community accepted a petition from the Geneva-based International Federation of Phonogram and Videogram Producers that criticised copyright violations on foreign sound recordings in Indonesia.⁵⁷⁴ At the same time, the Indonesian government had been condemned internationally for allowing the production of around 1.5 million pirated cassettes of the 1985 Live Aid concert that contained the famous "We are The World" song and even collecting duty on the cassettes. The sale of the concert recording was supposed to support humanitarian famine relief in Africa which was organised by Bob Geldof's Africa-Aid Organisation.⁵⁷⁵

Based on the USTR finding on intellectual property protection in Indonesia, the US government threatened to reconsider the classification of Indonesia under the GSP of the *Trade and Tariff Act 1984*, if there was no improvement in intellectual property protection until March 1987. In May 1987, the European Economic Community announced a similar investigation to the USTR's.⁵⁷⁶ These pressures followed the action from the Director General of WIPO who visited Indonesia in January 1987 in order to discuss with local authorities about possible changes to Indonesian intellectual property laws.⁵⁷⁷

⁵⁷⁴ Lepp, Alan W, above n140 at 30

⁵⁷⁵ Antons, Christoph, above n139 at 81

Kaehlig, Carl-Bernd, "Book Piracy Still Rampant, but Piracy of Western Music Cassettes Ended" (October 21, 1988) *IP Asia* at 32

Lepp, Alan W, above n140 at 30

⁵⁷⁶ Antons, Christoph, above n139 at 81

Antons, Christoph, above n54 at 371-372

Antons, Christoph, above n2 at 410

Gielen, Charles, above n5 at 102

⁵⁷⁷ Gielen, Charles, above n5 at 102

The Indonesian government took the international pressures and the US threats seriously. Although, the US\$ 28 million value of GSP was not a very large amount, the withdrawal of this preferential import duty would certainly hurt the Indonesian economy and prevent Indonesia from expanding its export volume to the US market.⁵⁷⁸ A decline in world oil prices at the end of 1982 also meant that Indonesia's economy depended more heavily on its exports. Moreover, Indonesia did not want to lose US investment in Indonesia.⁵⁷⁹ The international pressure resulted in President Suharto's decree on 30 July 1986 to form a special "Working Team for the Solution of Problems in the Implementation of Laws on Copyright, Company Brands and Trademarks, and the Drawing Up of a Patent Law", known as "Tim Keppres 34."⁵⁸⁰ As a result of the Indonesian government's assurance that it would move to amend the *Copyright Act* 1982, the US government extended their deadline until October 1987,⁵⁸¹ and the European Community suspended their proceedings against Indonesia until 29 February 1988.⁵⁸²

The amendment to the *Copyright Act* 1982 reached the parliamentary stage on 22 June 1987. Shortly before the expiration of the deadline, in September 1987, the Indonesian Parliament passed the amendment, and on 19 September 1987, the Indonesian government enacted the *Copyright*

⁵⁷⁸ *Ibid*

Nio, Threes, above n147 at 4

⁵⁷⁹ Lepp, Alan W, above n140 at 32

Antons, Christoph, above n2 at 413

MacLeod, Dylan A, above n144 at 367

⁵⁸⁰ Gielen, Charles, above n5 at 103

Antons, Christoph, above n2 at 413

⁵⁸¹ Gingerich, Duane J. and Hadiputranto, Sri Indrastuti, above n145 at 8

Antons, Christoph, above n139 at 81

Antons, Christoph, above n54 at 372

Gielen, Charles, above n5 at 102

⁵⁸² Gielen, Charles, above n5 at 102

Act No. 7/1987. As a result of the passage of the new copyright law, the USTR recommended that Indonesia's GSP status be maintained.⁵⁸³

Given the fact that culturally, economically, and technologically, Indonesia did not have much interest in promulgating and enforcing copyright law, the passage of the *Copyright Act* No. 7/1987 was clearly not expected or intended to serve Indonesia's interest, but to accommodate economic pressure from Western countries, the US in particular.⁵⁸⁴

Since the new Act was initiated because of economic frailty rather than real interest in copyright protection, the new Act did not bring much change to the actual level of copyright protection in Indonesia.⁵⁸⁵

3.2. The Copyright Act No. 7/1987

As a result of mounting pressures, both domestic and foreign, the principal effects of the amendment of the *Copyright Act* 1982 to the *Copyright Act* No. 7/1987 (hereinafter called the *Copyright Act* 1987) were to increase the duration of copyright protection, to expand the types of works eligible for copyright protection, to increase sanctions for piracy and to provide the means to enable more foreign works to be protected in Indonesia.⁵⁸⁶

⁵⁸³ Gingerich, Duane J. and Hadiputranto, Sri Indrastuti, above n145 at 8

Antons, Christoph, above n2 at 410

Antons, Christoph, above n54 at 372

Kaehlig, Carl-Bernd, above n524 at 1

⁵⁸⁴ Antons, Christoph, above n54 at 374

Antons, Christoph, above n139 at 84

Antons, Christoph, above n2 at 423

Gielen, Charles, above n5 at 102

⁵⁸⁵ Also see Antons, Christoph, above n139 at 84

Accommodating criticism from the US and other trading partners,⁵⁸⁷ but denying the public interest in intellectual works as maintained in the previous *Copyright Act 1982*, the new *Copyright Act 1987* increased the duration of copyright protection of original works to fifty years after the author's death (Article 26). The old *Copyright Act 1982*, in order to protect the public interest in intellectual works, had provided copyright protection for the lifetime of authors plus twenty-five years after their death. The Elucidation of the *Copyright Act 1987* stated that the increase in the duration of copyright protection was to adjust with the practice in other countries that generally gave copyright protection up to fifty years after the author's death. For derivative works and for works made by a legal entity, the period of protection was fifty years after first publication while for photographs, computer programs and compilations, the period of protection was twenty-five years after first publication.⁵⁸⁸

The scope of copyright protection under the *Copyright Act 1987* was extended to include video recording, sound recording, computer programs, and batik.⁵⁸⁹ This was clearly in line with products which the US industries had mostly dominated and thus, demanded intellectual property protection, except for batik, of course.

The scope of protection was also extended to foreign works that were not first published in Indonesia, provided such a protection was covered under a bilateral or multilateral agreement on copyright protection, in

⁵⁸⁶ Hutapea, Yosia Cemby, above n389 at 3

⁵⁸⁷ Kaehlig, Carl-Bernd, above n524 at 3

⁵⁸⁸ Antons, Christoph, above n1 at 307

⁵⁸⁹ *Ibid*

Antons, Christoph, above n54 at 372

Kaehlig, Car-Bernd, "Indonesia Practical Consequences of Recent Amendments to the Copyright Law" (April 22, 1988) *IP Asia* at 9

which Indonesia was a party to the agreement (Article 48).⁵⁹⁰ The Minister for Justice, Mr. Ismail Saleh, stated that at this stage the Indonesian government preferred entering bilateral agreements to entering multilateral agreements on copyright protection, because it would be easier to settle a copyright dispute by using a bilateral agreement rather than by using a multilateral agreement.⁵⁹¹ For a developing country like Indonesia, bilateral agreements could be a better alternative because the agreements could address the individual concerns and circumstances facing each signatory. Bilateral agreements might take into consideration the particular phases of development of each country, and provide for the gradual inclusion for the developing country into the global economy. When a developing country had become a stronger player in the global economy, it could then be expected to have greater responsibility in giving intellectual property protection.⁵⁹² Even the US and many other countries favoured bilateral agreements for many years preceding the Berne Convention.⁵⁹³

The *Copyright Act* 1987 raised the maximum penalties for piracy from three year imprisonment and 5 million rupiah (around US\$ 5,000⁵⁹⁴) fine to seven year imprisonment with 100 million rupiah (around US\$ 60,000⁵⁹⁵) fine (Article 44). These penalties had become the toughest sanctions for piracy in the Pacific Rim region.⁵⁹⁶ In addition to that, the

⁵⁹⁰ Antons, Christoph, above n1 at 307

⁵⁹¹ “Pelanggar UU Hak Cipta akan Dihukum Lebih Berat” [Copyright Offenders will Receive Harder Punishment] *KOMPAS* (9 June 1987) 1

⁵⁹² Giunta, Tara Kalagher and Shang, Lily H., above n500 at 329

Another alternative was proposed by Peter Drahos who says that “[m]uch could probably be achieved by states in the intellectual property area through regional agreements, rather than adopting one global standard of property protection to handle all their externality problems.” Drahos, Peter, above n226 at 61

⁵⁹³ Ricketson, Sam, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Center for Commercial Law Studies, Queen Mary College, Kluwer, 1987) at 25-30

⁵⁹⁴ Based on the conversion rate when the *Copyright Act* 1982 was enacted

⁵⁹⁵ Based on the conversion rate when the *Copyright Act* 1987 was enacted

⁵⁹⁶ Lepp, Alan W, above n140 at 30

Chief Justice of the Supreme Court issued a circular letter dated 7 April 1987 which required all judges to impose severe punishment for piracy. The General Attorney with his letter dated 14 September 1988 also required prosecutors to pursue more severe punishment against piracy.⁵⁹⁷ Under the *Copyright Act 1987*, piracy was considered a criminal offence and no longer depended on private complaints to initiate a prosecution (Article 46).⁵⁹⁸

The *Copyright Act 1987* abolished the “expropriation” provisions introduced in the *Copyright Act 1982* and replaced it with compulsory licensing provisions. The Elucidation of the *Copyright Act 1987* stated that expropriation of the author’s copyright was not appropriate and compulsory licensing provisions of the *Copyright Act 1987* would be sufficient to safeguard interests of the state.⁵⁹⁹ Under Article 15 of the *Copyright Act 1987*, a copyright owner could be obliged to grant a license to an Indonesian publisher -in the interests of education, science and R&D activities-, if his copyright protected work was not translated or reproduced within 3 years after its first publication. If the copyright owner refused to grant the license or the Indonesian licensee did not work the license, the Indonesian government could undertake the translation or reproduction of the work. The Minister for Justice would determine the amount of compensation to be paid to the copyright owner after the Indonesian Copyright Council had been consulted in this matter.⁶⁰⁰ To implement the compulsory licensing provisions, the Government issued the *Government Regulation No. 1/1989 on Translation and Reproduction of*

MacLeod, Dylan A, above n144 at 366

Kaehlig, C.B., above n549 at 19

⁵⁹⁷ Surachman, “Latar Belakang Amandemen Terakhir UU Hak Cipta” [The Background of the Latest Amendment of the Copyright Act] *Suara Pembaruan Daily*, <http://www.SuaraPembaruan.com/News/1998/01/080198/OpEd/op02/op02.html> (8 January 1998).

⁵⁹⁸ Antons, Christoph, above n54 at 372

⁵⁹⁹ Antons, Christoph, above n1 at 9

Material in the Interest of Education, Science, and Research and Development.⁶⁰¹ Article 11 of the *Government Regulation* provided that only institutions involved in education and in the advancement of science and R&D could have the right to initiate compulsory licensing.⁶⁰² Although it was not directed only to foreign works, the main goal of compulsory licensing provisions was to ensure that important foreign written works were available in sufficient quantities in Indonesia.⁶⁰³ Up until then, there had been no record of use of compulsory licensing provisions in Indonesia. Kaehlig noted that “[i]t was unlikely that the Indonesian government will make extensive use of the “compulsory licensing” provision”,⁶⁰⁴ given the fact that majority of people forming Indonesian society, including law authorities and well-educated, were still unfamiliar with the concept and rules of copyright.⁶⁰⁵

Besides providing a compulsory licensing provision, the *Copyright Act* 1987 also provided a “fair dealing provision” in Article 14. Article 14 allowed limited copying or duplication of copyrighted works by public libraries, scientific and educational institutions, and documentation centers for non-commercial purposes only. It also allowed the making of a back-up of computer software by the owner of the software for his or her own use only.⁶⁰⁶

⁶⁰⁰ Antons, Christoph, above n2 at 415

⁶⁰¹ Supplement to the State Gazette No. 3387-Jan 14, 1989

Gingerich, Duane, “New Compulsory Copyright Licensing Regulations” (March 17, 1989) *IP Asia* at 18

Kaehlig, Carl-Bernd, above n524 at 36

⁶⁰² Kaehlig, Carl-Bernd, above n524 at 41

⁶⁰³ Gingerich, Duane, above n601 at 18

Kaehlig, Carl-Bernd, above n524 at 36

⁶⁰⁴ Kaehlig, Carl-Bernd, above n589 *IP Asia* at 9

Gingerich, Duane, above n601 at 18

⁶⁰⁵ Gingerich, Duane, above n601 at 18

⁶⁰⁶ Kaehlig, Carl-Bernd, above n524 at 18

Trembath, Owen, above n489 at 67

Hornick, Robert N. and Nelson, Mark A., “Foreign Investment in Indonesia” (1988) 11 *Fordham International Law Journal* at 774

Like the previous *Copyright Act 1982*, the new *Copyright Act 1987* gave a significant role to the government in the control of copyright. This reflected a political structure that continued to have a low tolerance for individual freedom.⁶⁰⁷ Article 16 of the *Copyright Act 1987* allowed the government, after hearing the Copyright Council's opinion, to ban publication of works that were deemed against government policies of defense and state security, morality, and public order.⁶⁰⁸ So far, this provision has never been implemented. However, the inclusion of this provision in the *Copyright Act 1987* had added the list of the government strong political laws to control the government's opponents that had different political viewpoints. Between 1987 and 1996, the Attorney General banned the publication of sixty books, and in 1997 alone, there were thirteen bans⁶⁰⁹ with reasons given as offence to religious and ethnic groups, the promotion of separatism, and communist influence.⁶¹⁰ All of them never involved the Copyright Council. For books which were banned, consequently, there was no copyright protection for those books, as they were never published legally.⁶¹¹

According to Article 8 of the *Copyright Act 1987*, the copyright of works created by government officials in the course of their employment and used for the purposes of this employment would belong to the state as their employer, unless agreed otherwise, whereas the copyright of works created by employees in the private sectors would remain with the employee.⁶¹²

⁶⁰⁷ Also see Gana, Ruth L., above n465 at 767

⁶⁰⁸ Antons, Christoph, above n1 at 10

Antons, Christoph, above n2 at 415

⁶⁰⁹ *KOMPAS Online* (9 May 1998) above n540

⁶¹⁰ Antons, Christoph, above n1 at 311

⁶¹¹ Kesowo, Bambang, above n92 at 14

⁶¹² Antons, Christoph, above n1 at 310

Article 17 allowed the government to publish a work on the state owned radio or television, in the national interest, even without the prior consent of the copyright owner, provided that the government paid compensation to the copyright owner.⁶¹³

To implement Article 48 which gave copyright protection to foreign works whose authors were nationals or residents of countries which had bilateral agreement on copyright protection with Indonesia, the Indonesian government established bilateral agreements with several countries, which all of them were Western developed countries. On 27 May 1988, Presidential Decree No. 17/1988 was issued to implement an agreement on copyright protection between Indonesia and the EC.⁶¹⁴ This agreement covered copyright protection on sound recordings only.⁶¹⁵ In March 1989, the US and Indonesia signed a bilateral agreement to protect copyright in books, sound recordings, films, computer software and other creative works.⁶¹⁶ This agreement was ratified by Presidential Decree No. 25/1989. It was followed by the issuance of Presidential Decree No. 38/1993 to implement the bilateral agreement between Indonesia and Australia on copyright protection. A bilateral agreement with the United Kingdom on copyright protection was also reached in 1993.⁶¹⁷

Based on the Indonesia-US bilateral agreement, copyright protection in Indonesia extended to works first published in a member country of the

Antons, Christoph, above n2 at 415

Trembath, Owen, above n489 at 66

Kaehlig, Carl-Bernd, above n524 at 10

⁶¹³ Antons, Christoph, above n2 at 415

Antons, Christoph, above n1 at 311

⁶¹⁴ Garnett, Nick, above n546 at 30

⁶¹⁵ Trembath, Owen, above n489 at 66

⁶¹⁶ MacLeod, Dylan A, above n144 at 366

⁶¹⁷ Kesowo, Bambang, above n92 at 7

Berne Convention or UCC, provided that the economic rights of the works were owned by a corporate entity which was directly or indirectly owned by a US national or resident and he had acquired ownership of such economic rights within one year following first publication. For example, if a German corporate entity had first published a work in Germany, such a work would be protected by Indonesian copyright law if a US national or resident had a majority holding or controlling interest in the German corporate entity.⁶¹⁸ Works by US nationals and residents and works first published in the US prior to 1 August 1989 enjoyed copyright protection in Indonesia, provided such works were still protected by the US copyright law. However, the retroactivity principle did not extend to works of Indonesian nationals or residents. Copyright infringement of works made by US nationals or residents or works first published in the US prior to 1 August 1989 could not be prosecuted in Indonesia.⁶¹⁹

Recognising the importance of establishing bilateral agreements on copyright protection with Western countries, the Indonesian government did not establish any bilateral agreement on copyright protection with other Asian countries, where Indonesian works were mostly pirated and used freely. Unlike with Western countries, the Indonesian government did not have any pressure to establish agreement on copyright protection with Asian countries. There were no threats of trade sanctions from Asian countries, and no pressure to secure market access for Indonesia's exports in Asian countries. *The Europe World Year Book 1992* mentioned that the value of export-import made among ASEAN countries in 1990 was lower than the value of export-import made with industrial, non-ASEAN countries (with the exception of Singapore).⁶²⁰ Because of the GSP facility

⁶¹⁸ Kaehlig, Carl-Bernd, above n524 at 56-57

⁶¹⁹ *Id.*, at 57

⁶²⁰ For example, in 1989, Indonesia imported from Malaysia with total value only of US\$ 369 million. While import from the US valued of US\$ 2.217 billion, Japan valued of US\$ 3.766 billion, and the EC

provided by the US government, Indonesia's export increased significantly from US\$ 87 million in 1988 to US\$643 million in 1992.⁶²¹ The factor of securing a large market in Western countries certainly influenced Indonesia's decision to enter bilateral agreements on copyright protection with those countries.

Another reason for the lack of bilateral agreements on copyright protection with other Asian countries was that there was no copyright culture among Asian countries. In other words, there was a shared value among them that did not regard using others' intellectual property as stealing.⁶²² An example of this can be seen in the situation of an Indonesian author of popular martial arts comics, Mr. Gan KL, who admitted in an interview with the KOMPAS newspaper, that he adapted his stories from the works of a Chinese author, Mr. Tjien Jung. Mr. Gan had done this since 1958, producing a large number of martial arts comics without ever paying any royalties to the original author. However, Mr. Jung who knew about this practice, had no intention to demand royalties.⁶²³

valued of US\$ 2.282 billion. In 1990, Indonesia together with Thailand exported to Malaysia with total value of around Malaysian currency (MAC) 2 billion which was much less than value of non-ASEAN export to Malaysia that reached around MAC 45 billion. To the Philippines, Indonesia and other ASEAN countries exported with total value only of around US\$ 350 million which was much less than value of non-ASEAN export to the Philippines that reached around US\$ 4 billion. See Yusuf, Ramli HM, "Perdagangan Bebas ASEAN Ditinjau Kembali" [The ASEAN Free Trade must be Revised] *KOMPAS* (3 Agustus 1993) at 4

With industrial countries that were non-member of ASEAN –except with Singapore-, Indonesia could have bigger market. For example, in 1993, the value of Indonesia's export to the US was US\$ 4,752,159,000, to Japan was US\$10,292,278,000, and to Australia was US\$ 723,859,000 (data from January to November 1993). Data from the Central Bureau of Statistic, as quoted in "Memanfaatkan Momentum Perdagangan Bebas" [To Benefit the Moment of Free Trade] *KOMPAS* (4 April 1994) at 9

⁶²¹ "Penghapusan GSP Mempengaruhi Arus Investasi ke Indonesia" [The GSP Removal Influences the Flow of Investment to Indonesia] *KOMPAS* (24 November 1993) at 3

⁶²² Cheetham, Simon, above n396 at 20, citing Professor J.V. Feinerman, Director of Asian Studies, Georgetown University Law Center, at the *Economist Conference on Intellectual Property Protection in Asia*, in June 1995.

Shortly after the ratification of the bilateral agreements on copyright protection with the EC and the US, the government took aggressive enforcement against piracy on sound recordings and computer software which were US' & EC's major intellectual property-based products. Following the ratification of the bilateral agreement with the EC on 27 May 1988, the Minister for Justice issued a statement ordering that all unauthorised cassettes be removed from the market from 1 June 1988. The result of this was a flood of customers in the cassettes shops seeking to buy as many unauthorised cassettes as possible before the deadline. On 1 June and several days afterwards, many shops closed to remove and return stocks of unauthorised cassettes to producers and distributors in Jakarta. When they reopened, they had to sell a single cassette for 5,000 rupiah (US\$ 3) as opposed to 2,500 rupiah (US\$ 1.5) before the bilateral agreement.⁶²⁴ The 1991 US National Trade Estimates reported that copyright protection in general had improved in Indonesia as a result of particularly aggressive enforcement against sound recording piracy.⁶²⁵ Sound recording piracy in Indonesia had almost been completely eradicated because of the pressure of the bilateral agreements.⁶²⁶ Many well-known cassette shops in Jakarta changed their business and sold other goods.⁶²⁷ The crack-down against Western sound recording piracy had impact on the Indonesian music industry. Together with confiscating Western unauthorised cassettes, the police also confiscated Indonesian unauthorised cassettes. The aggressive crack-down against unauthorised cassettes had increased the sale of Indonesian cassettes. Previously, the national cassette production was estimated to be a maximum of four

⁶²³ "RUU HAKI, Ditunggu Menjadi UU" [Drafts of Intellectual Property Acts, Waited to be Acts] *KOMPAS Online*, <http://kompas.com/9704/07/HUKUM/ruu.htm> (7 April 1997) at 1

⁶²⁴ Garnett, Nick, above n546 at 30

⁶²⁵ MacLeod, Dylan A, above n144 at 367

⁶²⁶ *Id.*, at 365-366

"Asia" (May 25, 1989) *IP Asia* at 33

⁶²⁷ Kaehlig, Carl-Bernd, above n575 at 32

million cassettes per month. After the piracy crack-down, the production was increased to between six to seven million cassettes per month, 15% of them were cassettes that contained foreign songs.⁶²⁸

Pirated versions of US computer software also disappeared from Jakarta stores following the US-Indonesia agreement.⁶²⁹ The stores no longer sold pirated versions of computer software openly, although they still secretly sold the pirated versions if customers ordered it. In August 1991, government officials met with hundreds of video rental shop owners to warn them that they had one month to withdraw both local and foreign unauthorised video-cassettes from their shops.⁶³⁰

Indonesia was under constant surveillance by the US trade watchdogs,⁶³¹ like the IIPA, BSA, Motion Picture Export Association of America (MPEAA), that regularly reported to the USTR about the situation of intellectual property protection in Indonesia. Based on their reports, the USTR would determine Indonesia's category of trade sanctions under the *Super 301* or *Special 301* of the *Trade Act* 1988. In 1989, the USTR named Indonesia on its "watch list" for failing to provide adequate copyright protection to US copyrighted works. The "watch list" was the least strict procedure of *Special 301* that "only" made a country subject to US serious scrutiny.⁶³² In 1991, the USTR downgraded Indonesia's category to "priority foreign countries" because the Indonesian government failed to provide copyright protection to US copyrighted works and in the same time, according to the MPEAA, restricted market access for distribution of

⁶²⁸ "Pembajak Dibekuk, Produksi Meningkat" [Pirates Arrested, Production Increased] *KOMPAS* (25 February 1995) at 16

⁶²⁹ "US Bilateral Agreement Takes Effect" (August 10, 1989) *IP Asia* at 33

⁶³⁰ "Serious Piracy of Video-Cassettes in Jakarta" (19 September 1991) *IP Asia* at 32-33

⁶³¹ "Asia's Big Worry: After Japan, Who's Next on the U.S. Trade Hit List?" *Asiaweek Online*, June 30, 1995

US films and videotapes in Indonesia.⁶³³ Under *Special 301* procedure, the classification of “priority foreign countries” was a very serious category, which would allow the USTR to trigger an accelerated six-month investigation on those priority foreign countries, leading towards the imposition of trade sanctions. In 1993, the USTR upgraded Indonesia’s category to “watch list” after the Indonesian government agreed to open the Indonesian market for US film distributors.⁶³⁴ Indonesia was again named under “priority foreign countries” in 1995, for failing to provide intellectual property protection to US works.⁶³⁵ But in 1997, Indonesia was upgraded to category of “priority watch list” which was less serious than “priority foreign countries”.⁶³⁶

A crack-down on piracy to confiscate pirated computer software, compact discs, videos, cassettes, an laser discs, was often carried out by the Indonesian law authorities only after Indonesia was named by the USTR in their priority list countries. Sometimes the crack-down also involved high-ranking Indonesian officers to show the seriousness of the Indonesian government to control piracy. For example, in August 1990,

⁶³² “Pelanggaran Hak Cipta, Film, dan Video, Penyebab Indonesia Masuk “Watch List”” [Copyright Infringement on Film and Video Makes Indonesia under “Watch List”] *KOMPAS* (4 May 1993) at 2

⁶³³ “China, Thailand, Indonesia Among Countries Criticized for Inadequate Protection of Intellectual Property” (March 1991) *East Asian Executive Reports* at 8
Asiaweek Online, June 30, 1995 above n631

“Indonesia Dipuji Berhasil Berantas Pembajakan Kaset” [Indonesia was Praised for its Success in Stopping Cassette Piracy] *KOMPAS* (23 May 1989) at 1
Lepp, Alan W, above n140 at 30

“US Firms Press for Overseas Copyright Actions” *Reuters* (February 21, 1992)

“Hearing of the Senate Finance Committee” *Federal Information Systems Corporation; Federal News Service* (March 6, 1992)
KOMPAS (4 May 1993) above n632 at 2

⁶³⁴ “AS Umumkan Daftar Negara yang Berdagang tak Jujur: Indonesia Masuk “Watch List”” [The US Published the List of Countries that Conduct Unfair Trade Practices: Indonesia is under “Watch List”] *KOMPAS* (5 March 1993) at 4

⁶³⁵ “Indonesia Termasuk 45 Negara Sasaran Sanksi Dagang AS” [Indonesia is among 45 Priority Countries Targeted for US Trade Sanctions] *KOMPAS* (3 April 1995) at 2
KOMPAS (28 April 1995) above n553 at 2

⁶³⁶ “Indonesia Masuk “Priority Watch List” AS” [Indonesia is under US “Priority Watch List”] *KOMPAS Online*, <http://kompas.com/9705/02/EKONOMI/indo.htm> (2 May 1997)

the Coordinating Minister for Politics and Security, Mr. Sudomo, personally ordered a crack-down on piracy and burned thousands of confiscated pirated video-cassettes in a heavily covered media event.⁶³⁷ In October 1995, a few weeks before the US President, Bill Clinton, visited Jakarta to attend the Asia Pacific Economic Cooperation (APEC) Summit meeting, the Unit of Economic Detectives of the Jakarta Local Police raided the seven biggest distributors of pirated video-cassettes in West Jakarta and confiscated 12,788 video cassettes. The Head of the Unit of Economic Detectives told the press that the piracy crack-down was carried out before the APEC Summit meeting, so that foreign governments that would join the APEC Summit meeting, would not think that the Indonesian government allowed copyright violation.⁶³⁸ A piracy crack-down would also be carried out when the BSA, that had an influential role in the yearly USTR reports on priority countries, filed a complaint with the police about copyright infringement in Indonesia.⁶³⁹ With this kind of situation, one could say that copyright enforcement in Indonesia was not based on the *Copyright Act 1987*, but on the US threats of trade sanctions. In other words, the reason for copyright enforcement was not genuinely to protect copyright, but to avoid trade sanctions that could be imposed by Western countries, particularly the US.

By the end of 1990s, piracy in sound recording in Indonesia had been eradicated almost completely⁶⁴⁰ and pirated cassettes had disappeared

⁶³⁷ (March 1991) *East Asian Executive Reports* above 672 at 19

“Piracy Crackdown” (May 24, 1990) *IP Asia* at 34

⁶³⁸ “Polisi Sita 12.788 Kaset Video Bajakan di Glodok” [The Police Confiscated 12,788 Pirated Video-Cassettes in Glodok] *KOMPAS* (29 October 1994) at 7

⁶³⁹ “Fifteen Arrested for Selling Pirated Cassettes” *The Jakarta Post* (26 October 1995)

“Indonesia Branded World’s Leading Software Pirate” (November 1996) *IP Asia* at 11

⁶⁴⁰ MacLeod, Dylan A, above n144 at 366

(May 25, 1989) *IP Asia* above n626 at 33

KOMPAS (23 May 1989) above n633 at 1

from the market.⁶⁴¹ Video piracy had also subsided somewhat, although the piracy penetration to the video market was still deemed to be 100%,⁶⁴² especially in fully wired hotels and condominium.⁶⁴³ While this could be a hopeful sign, the book piracy was still rampant, with an estimated increase of 100% each year.⁶⁴⁴ Piracy of computer software also remained extensive.⁶⁴⁵ The Indonesian Book Publishers Association (IKAPI) complained to the Attorney General about widespread book piracy in Indonesia.⁶⁴⁶ They said that publishers lost around 2 billion rupiah (US\$ 600,000) every year due to book piracy.⁶⁴⁷ Balai Pustaka and Gramedia, two of the biggest book publishers said that their text-books for elementary, junior and senior high-schools had been widely pirated. Balai Pustaka, the state owned book publisher claimed that they had lost 125 billion rupiah (US\$ 41 million) because of piracy.⁶⁴⁸ US publishers stated that almost 100% of university text-books were pirated books.⁶⁴⁹ However, according to the IKAPI, foreign books or periodicals were rarely pirated.⁶⁵⁰ This was because the majority of Indonesians could not speak English, so they did not really need to read foreign books or periodicals. As the result of this, the US could delay its enforcement campaign against book piracy in Indonesia.⁶⁵¹ Many Indonesian books

⁶⁴¹ Kaehlig, Carl-Bernd, above n575 at 32

⁶⁴² (May 25, 1989) *IP Asia* above n626 at 33

⁶⁴³ (March 1991) *East Asian Executive Reports* above n633 at 19

⁶⁴⁴ (May 25, 1989) *IP Asia* above n626 at 33

KOMPAS (23 May 1989) above n633 at 1

“Ring of Software Pirates Smashed” (29 December 1993) *IP Asia* at 32

⁶⁴⁵ *KOMPAS* (23 May 1989) above n633 at 1

(May 25, 1989) *IP Asia* above n626 at 33

MacLeod, Dylan A, above n144 at 367

(29 December 1993) *IP Asia* above n639 at 32

⁶⁴⁶ Kaehlig, Carl-Bernd, above n575 at 33

⁶⁴⁷ “Penerbit Rugi Rp 2 Miliar per Tahun Akibat Pembajakan Buku” [Publishers Lose 2 Billion Rupiah Each Year Because of Book Piracy] *Republika Online*,

<http://www.republika.co.id/9706/18/18XBUKU.072.html> (18 June 1997)

⁶⁴⁸ Hadiputranto, Hadinoto & Partners, above n234 at 9

⁶⁴⁹ *KOMPAS* (23 May 1989) above n633 at 1

⁶⁵⁰ Kaehlig, Carl-Bernd, above n575 at 33

⁶⁵¹ (March 1991) *East Asian Executive Reports* above n633 at 8

were also pirated abroad, especially in Malaysia and Singapore.⁶⁵² Regarding piracy on computer software, the BSA Vice-President, Mr. David Sigler, revealed that 98% of software used in Indonesia was pirated, costing software producers US\$150 million in 1995. He based his statement on the International Planning and Research study that surveyed eighty-two countries in 1995. The survey was commissioned by the BSA and Software Publishers Association.⁶⁵³ According to Mr. Sigler, Indonesia had the highest rate of software piracy in the world.⁶⁵⁴

It was not easy to enforce copyright law in Indonesia. The ability to commence normal criminal actions against copyright infringement was often hindered by bureaucratic inefficiency and a lack of coordination among institutions and people involved, such as, copyright investigators, public prosecutors, police investigators, head of district courts.⁶⁵⁵ An investigation could be suspended because the law enforcement authorities had to wait for executive directives before taking further action.⁶⁵⁶ There was also a large number of implementing regulations to fully enforce the *Copyright Act 1987*, which took years to be issued by the government or the Ministry of Justice.⁶⁵⁷ The other constraint was a lack of qualified law enforcement officials who fully understood copyright law.⁶⁵⁸ For example, the police did not have the knowledge to determine whether or not a piece of computer software was authorised. They did not check the license of the computer software, instead they used a method similar to

⁶⁵² “Ratusan Judul Buku Dibajak Di Luar Negeri” [Hundreds of Books are Pirated Abroad] *KOMPAS* (14 January 1988)

⁶⁵³ “RI World’s Second Worst Software Pirate: Survey” *The Jakarta Post* (14 December 1996) (November 1996) *IP Asia* above n639 at 11

⁶⁵⁴ (November 1996) *IP Asia* above n639 at 11

⁶⁵⁵ “Poor Enforcement Subject of Panel Discussion” (February 27, 1992) *IP Asia* at 36
Kaehlig, Carl-Bernd, above n524 at 55

⁶⁵⁶ Gingerich, Duane, “Department of Justice to Increase Assistant Investigators of Copyright Cases” (March 17, 1989) *IP Asia* at 28

⁶⁵⁷ Antons, Christoph, above n1 at 319-320

⁶⁵⁸ (February 27, 1992) *IP Asia* above n655 at 36

that for checking the forgery of money.⁶⁵⁹ Besides that, public and law enforcement authorities tended to be unfamiliar with the concept of copyright, and thus, failed to appreciate the value of copyright.⁶⁶⁰ In many instances, the police only conducted raids and confiscated pirated products, but rarely brought the counterfeiters to the court. After confiscating 2,462 pirated cassettes in Palembang, South Sumatra, the Palembang township police detective chief, Major Ike Edwin said that the confiscation of the cassettes was the only punishment to be imposed on the businessmen. He explained that the police were not detaining anyone, since the piracy did not have a serious impact.⁶⁶¹ When cases of piracy did reach the courts, the Indonesian courts were inclined to be lenient on counterfeiters who normally got away with a mere probationary sentence, or with a prison sentence of less than a year.⁶⁶² Until 1989, there were 600 cases processed by the authorities. Apparently, the *Copyright Act 1987* was only applied to one of the cases.⁶⁶³ In 1995, two counterfeiters in East Jakarta were sentenced to only three month imprisonment. In 1996, a counterfeiter in Central Java was sentenced to four month imprisonment, and a ten million rupiah fine, while another counterfeiter was sentenced to ten month imprisonment with a two month probationary period. In Padang, West Sumatra, a counterfeiter was sentenced to three month imprisonment. In 1997, a counterfeiter in West Jakarta was sentenced to one year imprisonment, and another counterfeiter in North Jakarta was sentenced to nine month imprisonment and a three million rupiah fine.

⁶⁵⁹ Murad, Royono R., “Peran Serta Penegak Hukum Dalam Upaya Menjamin Tertib Hukum di Bidang Hak Cipta” [The Role of Law Enforcement Authorities in Enforcing Copyright Law] in Koordinator Bidang Hukum & Umum, DPP Golkar, *Hasil-hasil Diskusi Panel Bidang Hukum Hak Milik Intelektual* [Results of the Panel Discussion in Intellectual Property Law] (Jakarta: Golongan Karya, 1992) at 217

⁶⁶⁰ (March 18, 1988) *IP Asia* above n462 at 3
Gingerich, Duane, above n548 at 28
(February 27, 1992) *IP Asia* above n655 at 36

⁶⁶¹ “2,462 Pirated Tapes Seized” *The Jakarta Post* (16 May 1997)

⁶⁶² *The Jakarta Post* (20 June 1997) above n549
Lumenta, J.B., above n392 at 224

Other counterfeiters in Central Jakarta were sentenced to two month imprisonment.⁶⁶⁴ A counterfeiter in Surabaya was sentenced to six month imprisonment.⁶⁶⁵ PT. Gramedia, one of the biggest publishers in Indonesia that suffered significant losses from piracy, also complained about the lenient sentences given to counterfeiters.⁶⁶⁶ The lenient sentences imposed by the courts were another reason why the police did not view piracy as a serious crime, and therefore, did not follow up their raids and confiscation of pirated products with bringing counterfeiters to the courts.⁶⁶⁷

The enforcement of the *Copyright Act 1987* was also difficult because of the economic situation in Indonesia. Most Indonesians at the time when the *Copyright Act 1987* was enacted, could afford the price of authorised cassettes which only cost 5,000 rupiah (US\$ 3) for Western cassettes, and 2,000 rupiah (US\$ 1) for Indonesian cassettes.⁶⁶⁸ Therefore, the affordability of authorised cassettes helped eradicate sound recording piracy in Indonesia. Most Indonesians, however, could not afford the price of computer software which was too high for them. Authorised computer software could cost between US\$ 200 and US\$ 1,000, while the cost offered by computer shops to -illegally- copy computer software was

⁶⁶³ Gingerich, Duane, above n548 at 28

⁶⁶⁴ “Konvensi Bern dan Pembajakan di Bidang Musik” [The Berne Convention and Music Piracy] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1997/09/120997/Hiburan/hib01/hib01.html> (12 September 1997) at 3-4

⁶⁶⁵ “Vonis Kasus Pembajakan Sering Patahkan Semangat” [Court Decisions on Piracy are Often Upsetting] *KOMPAS Online*, <http://kompas.com/9709/02HUKUM/voni.htm> (2 September 1997)

⁶⁶⁶ “Ada “Belenggu”, Harus Ada Kebebasan” [There is Handcuff, There is Freedom] *KOMPAS Online*, <http://kompas.com/9709/10/HUKUM/ada.htm> (10 September 1997) at 1

⁶⁶⁷ *KOMPAS Online* (2 September 1997) above n665

⁶⁶⁸ Garnett, Nick, above n546 at 30

Hadiputranto, Hadinoto & Partners, above n234 at 11

“HAKI Terpojok Saat Ekonomi Sulit” [Intellectual Property Law is in Dilemma during Economic Crisis] *KOMPAS Online*, <http://www.kompas.com/9802/13/HUKUM/hako.htm> (13 February 1998) at

only between 500 and 1,000 rupiah (US\$ 0.25 to 1.00).⁶⁶⁹ Because of the increasing role of computers in commercial and everyday life, the Indonesian people tended to buy unauthorised copies of computer software that they could afford. Owners of computer shops in Jakarta said that “although illegal, the sale of unauthorised copies of computer software could not be stopped” (**translated by writer**).⁶⁷⁰ The similar situation also happened in book piracy. The price of books was too high for many Indonesians. The high prices were caused by high production costs that burdened publishers. It included the royalties, many kinds of taxes imposed by the government on publishers,⁶⁷¹ and the cost of good quality paper.⁶⁷² Counterfeiters who could sell unauthorised books at half the price of authorised ones⁶⁷³ did not have to pay the high taxes to the government. Many suggested that there would be less cases of book piracy if books were more affordable at official prices. One example was in India, a developing country that had produced a comparatively high number of world-acclaimed scientists and intellectuals. Publishers in Indonesia demanded that they and printing companies in Indonesia be waived of some of the taxes and other financial burdens they bore.⁶⁷⁴ According to them, cutting prices was the best way to combat book piracy. People would buy the cheapest books regardless of the quality of the paper of the books.⁶⁷⁵ However, it seemed that the government that was more focused on economic development and increasing state income, was unwilling to waive some taxes imposed on publishers and printing

⁶⁶⁹ “Berlangsung Terus , Jual Beli “Copy” Bajakan Program Komputer” [Continues, the Buying and Selling of Unauthorised Copies of Computer Program] *KOMPAS* (9 August 1989) at 3 (August 10, 1989) *IP Asia* above n629 at 33

⁶⁷⁰ *KOMPAS* (9 August 1989) above n669 at 3

⁶⁷¹ “Tajuk Rencana: Kita Sepakat tentang Seriusnya Persoalan Praktek Pembajakan Buku” [Editorial: We Agree on the Seriousness of Problem of Book Piracy] *KOMPAS Online*, <http://kompas.com/9704/11/OPINI/taju.htm> (11 April 1997) at 1

⁶⁷² “Buku: Kunci Kecerdasan Bangsa, Mengapa Dibajak” [Books: The Key of Knowledge for the Nation, Why Pirated] *KOMPAS Online*, <http://kompas.com/9705/31/OPINI/buku.htm> (31 May 1997) at 3

⁶⁷³ *KOMPAS Online* (11 April 1997) above n671 at 2

⁶⁷⁴ *The Jakarta Post* (20 June 1997) above n549

companies, regardless of the role such taxes could have played in the ongoing problem of book piracy.

Cultural factors also played a role in difficulties of enforcing the *Copyright Act*. Many Indonesian artists were not concerned with copyright. For example, Emha Ainun Nadjib, a famous Indonesian artist and Islamic scholar, did not take any legal action when his popular cassette “Kado Muhammad” was widely pirated in Java. Sales of pirated cassettes of “Kado Muhammad” had exceeded the sales of authorised cassettes. The sales manager and the cassette producer also did not take legal action because as they said, they understood that those who bought cheap and low quality pirated cassettes were poor people who wanted to enjoy the cassettes, but were financially incapable. They also understood that sellers, who sold the pirated cassettes in small kiosks and on streets, did that only for economic survival. However, they did complain that the law enforcement authorities did not take any legal action against large-scale producers of pirated cassettes, who they described, had built a kingdom or a Mafia of piracy. Emha Ainun Nadjib, the artist, commented that “piracy of cassettes, books and others was often misunderstood. Unfortunately, in some Islamic cultures, piracy was common and legitimate”. (translated by writer) He gave examples, such as, the unauthorised copying of Umi Kultsum works, cassettes of Azan (Islamic call for prayer), Arabic books.⁶⁷⁶

Thus far, the *Copyright Act 1987* brought little effect on eliminating piracy in Indonesia. Moreover, the *Copyright Act 1987* did not have real effect to improve creativity and research and development in Indonesia. Especially

⁶⁷⁵ “Publishers Seek Ways to Cut Down Book Piracy” *The Jakarta Post* (18 June 1997)

⁶⁷⁶ “Sudah 250 Ribu Kaset Bajakan di Jawa Timur, Kaset ‘Kado Muhammad’ Emha Dibajak” [There were already 250 Thousands of Pirated Cassettes in East Java, Emha’s Cassettes ‘Kado Muhammad’ are Pirated] *Republika Online*, <http://www.republika.co.id/9702/25/25SEMHA.192.ht> (25 February 1997)

in the field of film, the enactment of the *Copyright Act 1987* could not improve film-making creativity in Indonesia. With the threat of trade sanctions from the US, the Indonesian government had to open the Indonesian market to US films and give copyright protection to them.⁶⁷⁷ In exchange, the Indonesian film industry had been decimated by the competition from Hollywood big budget movies.⁶⁷⁸ Since the early 1990s, the film industry in Indonesia had collapsed as it lost the competition in the Indonesian market against Hollywood movies. They now could only produce less than five movies per year.⁶⁷⁹ Many complaints were also directed to US films as they could forcefully change, and damage cultural norms preserved by Indonesian community.⁶⁸⁰

C. Conclusion

Copyright law did not have practical importance for Indonesia, as copyright law did not fit with Indonesian culture and level of development and was not consonant with the interest of Indonesians.

⁶⁷⁷ *Asiaweek Online*, June 30, 1995 above n631
(March 1991) *East Asian Executive Reports* above n633 at 8
KOMPAS (23 May 1989) above n633 at 1
Lepp, Alan W, above n140 at 30

Reuters (February 21, 1992) above n633

Federal Information Systems Corporation; Federal News Service (March 6, 1992) above n633

KOMPAS (4 May 1993) above n632 at 2

⁶⁷⁸ *Asiaweek Online*, June 30, 1995 above n631

⁶⁷⁹ Sumarno, Marselli, "Menuju Sinema Indonesia Baru" [Heading for the New Indonesian Cinema] *KOMPAS Cyber Media*, <http://www.208.150.216.210/kompas-cetak/0004/02/HIBURAN/menu19.htm> (2 April 2000) at 1

⁶⁸⁰ The similar complaint was also raised by EU countries led by France that saw US audiovisual industry as a vehicle disseminating American values and a threat to their countries' domestic value. They claimed that films could constitute an excellent medium for propaganda and influence on the personal attitudes and political choices of the viewers. Therefore, in the Uruguay Round the EU insisted that motion picture was excluded from the scope of the GATT and trade liberalisation. Cahn, Sandrine and Daniel Schimmel, "The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPs?" (1997) 15 *Cardozo Arts & Entertainment Law Journal* at 282-301

Culturally, *Adat* did not recognise the concept of copyright as Western people did. However, *Adat* recognised the protection of works based on the ritual sacredness and precious value of those works that could be used only by members of the royal family.

The first Indonesian copyright laws, the *Auteurswet* 1912 and *Berne Convention* did not represent Indonesia's level of development and interest when Indonesia was just freed from colonialism. The laws were also incompatible with *Adat* that still had a strong influence in Indonesian life and culture. This made copyright law a neglected area in Indonesian law, as the government and most Indonesian people could not accept the idea of copyright protection on intellectual works.

The *Copyright Act* 1982, which was enacted when the Indonesian economy was improving, was deemed to be in line with the needs of and ideas on national law.⁶⁸¹ The purpose of the enactment of the *Copyright Act* 1982 was to balance the community interest and individual author interest.⁶⁸² Under the *Copyright Act* 1982, the court interpreted that copyright protection was to protect the interest of the public, and not necessarily the interests of individual authors.⁶⁸³ The *Copyright Act* 1982 did not give copyright protection to foreign works to ensure the availability of foreign works in the interests of education and development. To protect the public interest in intellectual works, the *Copyright Act* 1982 reduced the duration of copyright protection to only twenty-five years after the death of the author. However, the *Copyright Act* 1982 had no practical significance in Indonesian law, and became a neglected area of law. This happened because most Indonesian people, including authors, artists, and law enforcement authorities were unfamiliar with the concept of copyright, and Indonesia was still unable to produce significant intellectual works which were worthy of international trade and copyright protection.

⁶⁸¹ See the Preamble to the *Copyright Act* No. 6/1982

⁶⁸² The Ministry of Justice of the Republic of Indonesia, above n513 at 2, 5

⁶⁸³ See the case of the song "Apanya Dong"

The *Copyright Act 1987* was enacted by the Indonesian government to avoid trade sanctions being imposed by Western countries, particularly the US. The Indonesian government also established bilateral agreements on copyright protection with several Western countries. Provisions in the *Copyright Act 1987* were drafted mostly in accordance with US demands. The enactment of the *Copyright Act 1987* improved copyright protection especially on US and EC works in Indonesia, like sound recordings, films, and computer software. In general, however, piracy continued unabated. Most Indonesians, because of their low standard of living, did not have economic capabilities to buy expensive authorised works. Besides that, the people, including law enforcement authorities were still influenced by the culture that did not recognise the importance of copyright. This culture had influenced Indonesian law enforcement authorities to impose lenient sentences upon counterfeiters. The lack of a developed and efficient judicial infrastructure also hindered the implementation of the *Copyright Act 1987* in Indonesia.

To be enforceable, copyright law must be drafted in line with Indonesians' own concept of copyright, which was based on the Indonesian culture. The law has to support Indonesian interests, rather than foreign interests. Besides that, copyright law must fit the level of economic and scientific development in Indonesia.⁶⁸⁴ An efficient and less bureaucratic judicial infrastructure will be essential for the enforcement of copyright law.

⁶⁸⁴ Long, Doris Estelle, above n502 at 163
Konan, Denise Eby, et al., above n176 at 19
Cheetham, Simon, above n396 at 15, 19
Gakunu, Peter, above n562 at 359

CHAPTER VI

THE IMPLEMENTATION OF THE TRIPs AGREEMENT IN INDONESIA

A. Introduction

This chapter will begin with a review of the history of the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement and the reasons for Indonesia's adherence to the TRIPs Agreement. That review will lead to an analysis of the reasons why the TRIPs Agreement has failed to be implemented in Indonesia. The conclusion drawn from this analysis is that the intellectual property norms and standards laid down in the TRIPs Agreement are not in the interests of the majority of the Indonesian people and are inconsistent with contemporary economic, cultural, social and legal conditions in Indonesia.

The history of the negotiations leading up to the incorporation of the TRIPs Agreement into the GATT Agreement reveals that those negotiations were dominated by developed countries, in particular, the United States, acting in their own economic interests to protect their intellectual property-based industries and correct their losses in international trade. To achieve their own economic objectives, developed countries insisted upon regulating the protection of intellectual property rights within the GATT rules. The developed nations, acting both individually and jointly, believed that by linking international trade regimes to the enforcement of intellectual property standards, they could effectively force developing countries to provide better protection for those intellectual property based products which played a dominant role in their economic growth.⁶⁸⁵

⁶⁸⁵ Drahos, Peter, above n226 at 48-49

In the Uruguay Round (1986-1994) the developed, industrialised, intellectual property-exporting countries began to table their proposals for the TRIPs Agreement that would regulate the protection of intellectual property rights within the GATT rules. Developing countries opposed the proposal and argued that the GATT's jurisdiction was limited to tangible goods only, and therefore, the GATT was not competent to regulate intellectual property protection.⁶⁸⁶ They also argued that originally, intellectual property protection was a matter of public policy of each sovereign nation, and therefore, every country had a sovereign right to determine the level and scope of intellectual property protection. Developing countries argued that a uniform, global international intellectual property regime was inappropriate and unjust because of wide disparities in socio-economic conditions and cultural backgrounds of each nation.⁶⁸⁷

However, developing countries were in a considerably weaker position than developed countries during the TRIPs negotiations, because the US and European Community (EC) held an important bargaining chip, namely the liberalisation of their markets for the textiles, apparel and agricultural produced by developing countries if they agreed on the TRIPs Agreement.⁶⁸⁸ Developing countries were also continuously threatened by unilateral trade sanctions if they refused to cooperate in the TRIPs negotiations.⁶⁸⁹ Therefore, although there were no tangible development benefits for developing countries, at the end of the Uruguay Round, they reluctantly agreed on the TRIPs Agreement as a bargained for exchange -intellectual property protection for fairer trade rules in

⁶⁸⁶ Ross, Julie C. and Wasserman, Jessica, above n200 at 2261

Loughlan, Patricia, above n181 at 577

⁶⁸⁷ Long, Doris Estelle, above n502 at 154

⁶⁸⁸ Emmert, Frank, above n278 at 1389

⁶⁸⁹ Drahos, Peter, above n226 at 57, 58

international trade,⁶⁹⁰ and a bargained -for protection from unilateral trade sanctions by the US and other powerful Western industrialised countries.⁶⁹¹

Like other ASEAN countries which had economic growth dependent on a freer global trading system, Indonesia agreed to the Uruguay Round despite the TRIPs Agreement because of improved market access for their exports.⁶⁹² This reluctant and bitter acceptance of the TRIPs Agreement which was not in fact based on a genuine intention to give better intellectual property protection within the country, could explain why the TRIPs Agreement has largely failed to improve intellectual property protection in Indonesia.

Other reasons for the failure of the TRIPs Agreement in Indonesia to be implemented in practice include, as discussed throughout this thesis, the incompatibility of Indonesian culture and socio-economic conditions with norms and standards articulated in the TRIPs Agreement. As noted above, many Indonesians are unfamiliar with the intellectual property idea and cannot see the benefit of the TRIPs Agreement for national economic development. When Indonesia was hard hit by the severe political and economic crisis that brought down the 32 year rule of the Suharto regime, the implementation of the TRIPs Agreement again came to be seen clearly as a burden for Indonesians struggling for economic survival. The new government replacing the Suharto regime accordingly also gave intellectual property law reform a low priority in their social and economic development policy. The new government considers the establishment of a human rights court, the enactment of anti-corruption, anti-monopoly, and consumer protection laws, the improvement of public health, transportation, and education system as more urgent and important than intellectual property law reform. In December 1999, one month before the

⁶⁹⁰ Gana, Ruth L., above n465 at 739

⁶⁹¹ Gutowski, Robert J., “The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven?” (1999) 47 *Buffalo Law Review* at 756

⁶⁹² Konan, Denise Eby, et al., above n176 at 28

deadline for the full implementation of the TRIPs Agreement, the new Indonesian government declared that they could not implement the TRIPs Agreement because of the political, security and economic crisis that Indonesia was experiencing.⁶⁹³

For a developing country like Indonesia, punishment for not implementing the TRIPs Agreement would not be helpful for the improvement of intellectual property protection. The first world governments and bodies, such as, the WTO, should link intellectual property laws to the social realities and cultural values of societies in developing countries, including Indonesia. The social realities and cultural values of developing countries could determine what kind of intellectual property laws the societies should have and how they should be implemented and enforced. This linking approach is more effective to secure the enforcement of intellectual property rights in developing countries, than approaches using threats or economic punishment. It could also boost the possibility that intellectual property laws may have some real impact on innovative and creative activities in developing countries, thus contributing to the economic welfare of the Third World.⁶⁹⁴

B. Discussion

The discussion will start with a brief analysis of the TRIPs Agreement and the position of developed and developing countries, as well as Indonesia during the TRIPs negotiations. This analysis finds that the reason for developing countries and Indonesia to adopt the TRIPs Agreement is not to give better protection for intellectual property rights, or foster innovation and creation of works, but to obtain greater market access in trade with Western developed countries. This finding explains why the TRIPs Agreement fails to give protection for

⁶⁹³ *The Jakarta Post.com* (22 December 1999) above n76 at 1

⁶⁹⁴ Gana, Ruth L, above n467 at 115-116

intellectual property rights in Indonesia, as the TRIPs Agreement is intended by the government as a bargaining chip for international trade, not intellectual property protection. Besides that, the TRIPs Agreement also fails to work in Indonesia because it is inconsistent with the public interest and Indonesia's economic, political and cultural conditions.

1. Background of the TRIPs Agreement

Intellectual property considerations have been present in the original General Agreement on Tariff and Trade (GATT Agreement) of 1947. For example, Article IX which deals with Marks of Origin requires contracting parties of the GATT Agreement to prevent the use of trade names in such manner that could misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Article IX also establishes that marks of origin should not be used in such a way as to hamper international trade.⁶⁹⁵ Further, Article XX(d) of the GATT Agreement allows contracting parties, under certain conditions, to restrict trade in goods so as to protect intellectual property.⁶⁹⁶ In addition, Articles XII 3(c) and XVIII 10 govern states that trade restrictions allowed during balance of payments crises should not be inconsistent with intellectual property laws. Many instruments negotiated under GATT auspices, using GATT procedures and practices, also take into account intellectual property rights, for example, the

⁶⁹⁵ Braga, Carlos A.P., "The Economics of Intellectual Property Rights and the GATT: A View from the South" (1989) 22 *Vanderbilt Journal of Transnational Law* at 247

Abbott, Frederick M., "Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework" (1989) 22 *Vanderbilt Journal of Transnational Law* at 696

⁶⁹⁶ Bronckers, Marco C.E.J., "The Impact of TRIPs: Intellectual Property Protection in Developing Countries" (1994) 31 *Common Market Law Review* at 1245

1958 recommendation on marks of origin, the Customs Valuation Code, and the Standards Code negotiated during the Tokyo Round.⁶⁹⁷

However, the GATT Agreement never required contracting parties to standardise their intellectual property laws worldwide to protect intellectual property rights. This was in line with the international conventions on the protection of intellectual property rights adopted by most of GATT contracting parties, such as, the *Berne Convention*, the *Paris Convention*, the *Universal Copyright Convention*, the *Madrid Convention*, the *Lisbon Agreement*. Those intellectual property conventions, administered by the WIPO and United Nations, recognised the territorial principle of intellectual property protection. The *Paris Convention* and *Berne Convention* embody the national treatment principle to allow each country the right to determine its own level and scope of protection of intellectual property rights.⁶⁹⁸ It has been long argued that besides a matter of trade, intellectual property is very much a matter of culture, politics and development policy⁶⁹⁹ which could not be standardised.

Therefore, originally, the GATT Agreement only dealt with the trade effects of counterfeit goods, without entering the discussion of what constituted counterfeiting.⁷⁰⁰ It was left to the existing international conventions, such as, the *Paris Convention*, *Berne Convention*, and others to set guiding principles of the protection of intellectual property rights. However, since the Conventions were only a set of guiding principles, it was up to its member countries to adopt its rules.⁷⁰¹ The Conventions did not set detailed rules on how judicial authorities of member countries enforced intellectual property rights. It only

⁶⁹⁷ Braga, Carlos A.P., above n695 at 247-248

⁶⁹⁸ Gakunu, Peter, above n562 at 361

⁶⁹⁹ Emmert, Frank, above n278 at 1374

⁷⁰⁰ Braga, Carlos A.P., above n695 at 249-250

⁷⁰¹ Gutowski, Robert J., above n696 at 738

required member countries to uphold the national treatment principle. The Conventions also did not provide dispute settlement mechanisms for disputes on intellectual property rights between member countries.⁷⁰² One of the reasons why the Berne and Paris Conventions only relied on the national treatment principle and the WIPO did not force member countries to adopt the Conventions' rules was because many developing countries resented the Conventions. They considered the international intellectual property regime, the pillars of which were the *Paris Convention* and *Berne Convention*, to be the creation of those industrialised countries, which were formerly their colonial masters, to maintain their colonial supremacy.⁷⁰³

Later on, the GATT Agreement was regarded essentially as a contract, and like any other contract, it could be modified by a later agreement of its parties.⁷⁰⁴ Thus, developed countries that needed a mechanism for protecting their intangible wealth, required the cooperation of developing countries and newly industrialised countries⁷⁰⁵ to expand the scope of the GATT Agreement to include new kinds of issues: Trade Related Investment Measures (TRIMs), Trade in Services, and Trade Related Aspects of Intellectual Property Rights (TRIPs).

In 1978-1979, during the Tokyo Round of the GATT Agreement, delegations from the US and the EC formed the International Anti-counterfeiting Coalition to study the counterfeiting problems and assisted the drafting of a proposed code on anti-counterfeiting. On 31 July 1979, the US and the EC reached an agreement and introduced a proposed draft code entitled

⁷⁰² Gervais, Daniel J., "The TRIPs Agreement: Interpretation and Implementation" (1999) 21 *European Intellectual Property Review* at 156

⁷⁰³ Blakeney, Michael, "Intellectual Property and Economic Development" (1998) 4 *International Trade Law & Regulation* at 2

Blakeney, Michael, above n214 at 197

⁷⁰⁴ Emmert, Frank, above n278 at 1373

⁷⁰⁵ Abbott, Frederick M., above n695 at 697

“Agreement on Measures to Discourage the Importation of Counterfeit Goods” (*Anti-counterfeiting Code*). The purpose of the proposed *Anti-counterfeiting Code* was to provide a mechanism to assist contracting parties in the interception of counterfeit merchandise at international borders and the disposal of such merchandise outside the channels of commerce. Under the proposed Code, contracting parties would implement measures to detain and seize counterfeit trademarked goods once the holder of the trademark right demonstrated their right to protection.⁷⁰⁶

The effort by developed countries to regulate the protection of intellectual property rights within the GATT was because the GATT had a number of advantages that the WIPO lacked.⁷⁰⁷ For example, the national treatment principle in the WIPO Conventions gave protection only to the degree that a member country protected its own citizens. Thus, inadequate intellectual property laws in a WIPO member country would not protect foreigners, particularly when a developing country preferred weak intellectual property laws.⁷⁰⁸ The WIPO Conventions also had enforcement problems because they did not provide enforcement mechanisms.⁷⁰⁹ Moreover, they were not self-executing treaties which meant that they required government action, such as a statute, to incorporate the treaties into domestic law.⁷¹⁰ With a GATT Code, by contrast, contracting parties found it impossible to agree on the GATT Agreement, but were abstaining from the Code. Previous experience with side-codes, such as, the Customs Valuation Code, the Technical Standards Code, the Subsidy Code, the Government Procurement Code, had

⁷⁰⁶ Ross, Julie C. and Wasserman, Jessica, above n200 at 2260

⁷⁰⁷ Emmert, Frank, above n278 at 1345

⁷⁰⁸ Gutowski, Robert J., above n691 at 720

⁷⁰⁹ Kastenmeier, Robert W. and Beier, David, “International Trade and Intellectual Property: Promise, Risks, and Reality” (1989) 22 *Vanderbilt Journal of Transnational Law* at 290

Gutowski, Robert J., above n691 at 738

⁷¹⁰ Gutowski, Robert J., above n691 at 738

demonstrated that no individual country liked to be viewed as the one preventing the conclusion of a new code.⁷¹¹

However, during the Tokyo Round, the developing countries were united in their decision not to actively participate in the negotiation of the anti-counterfeiting duty.⁷¹² The proposal to introduce anti-counterfeiting measures as part of the GATT Agreement was rejected because of the perceived lack of sound empirical evidence as to the trade implications of counterfeiting.⁷¹³ Developing countries argued that GATT's jurisdiction was limited to tangible goods, and therefore, the GATT Agreement lacked the legal competence to address intellectual property issues. They contended that counterfeit goods belonged to the exclusive jurisdiction of the WIPO.⁷¹⁴

The US and the EC jointly continued their effort to include counterfeiting issues in the GATT work program. Their effort gained support from other developed countries. Between 1980-1981, the US and EC held informal meetings to discuss the Anti-counterfeiting Code with Japan, Canada, and Switzerland.⁷¹⁵ By late 1982, the US, the EC, Japan and Canada had reached an agreement on a draft proposal⁷¹⁶ that would be brought to the next round of the GATT meeting.

As plans for the next round of GATT negotiations were laid, US and EC objectives for GATT involvement in intellectual property matters expanded.⁷¹⁷ When the Preparatory Committee requested GATT contracting parties to submit a proposal to the GATT Ministerial meeting, the US tabled a

⁷¹¹ Emmert, Frank, above n278 at 1345

⁷¹² Abbott, Frederick M., above n695 at 712-713

⁷¹³ Blakeney, Michael, ” (1996) 10 *European Intellectual Property Review* above n413 at 544

⁷¹⁴ Ross, Julie C. and Wasserman, Jessica, above n200 at 2261

⁷¹⁵ *Id.*, at 2260

⁷¹⁶ Emmert, Frank, above n278 at 1339

⁷¹⁷ Abbott, Frederick M., above n695 at 712-713

proposal to include all intellectual property rights rather than just trademarked goods. Similarly, Japan supported the inclusion of a broader program on intellectual property that was not limited to counterfeit goods.⁷¹⁸ Following highly contentious negotiations during 1985-1986, the US with support from the EC and other OECD countries, was able to persuade the full GATT membership to accept in the 20 September 1986, the Punta de Este Ministerial Declaration, a mandate for the GATT negotiation on TRIPs. As a result of the mandate, a GATT working group on TRIPs was established.⁷¹⁹ The insistence of the US, EC and OECD countries to pursue the TRIPs could not be exempted from demands of their IPRs-dependent industries, whose value of their assets was to a greater and lesser extent, defined by the level of protection accorded to IPRs.⁷²⁰

1.1. Position of the US and Other Developed Countries in the TRIPs Negotiations

Stronger intellectual property rights were needed to protect American ideas and industries. In the 1980s, there had been widespread fears over the loss of US competitiveness, and a belief that the US was losing its long-assumed supremacy in the world.⁷²¹ US corporations like IBM, Pfizer and Microsoft which had large intellectual property portfolios were worried about the loss of profits due to the piracy of their products, although this was not to say that US corporations were lost in the 1980s. In fact, many of them were still profitable. These intellectual property based industries were the very ones that could restore the US to a better trade balance with the world.⁷²² They and their congressional allies urged the US government to attempt to include intellectual property protection

⁷¹⁸ Ross, Julie C. and Wasserman, Jessica, above n200 at 2262-2263

⁷¹⁹ Abbott, Frederick M., above n695 at 712-714

⁷²⁰ Abbott, Frederick M., below n752 at 386

⁷²¹ Loughlan, Patricia, above n181 at 577

⁷²² Drahos, Peter, above n226 at 48-49

in the round of GATT talks.⁷²³ The US government agreed to solve the massive free rider problem by linking the international trade regime and the enforcement of intellectual property standards. They believed that the banning of imports of Brazilian software would not significantly change the attitude of Brazilian trade officials, but the imposition of a large tariff on Brazilian main export, coffee, certainly would.⁷²⁴

The problem for the US government was that in seeking intellectual property protection worldwide, it was dealing with sovereign states which were under the existing international conventions, entitled to fix lower levels of intellectual property protection if they chose to do so. Furthermore, the US acknowledged that many of these states were not culturally predisposed to accept the idea of intellectual property, or alternatively, saw intellectual property as a form of recolonisation or economic imperialism. The US could not hope for intellectual property protection from the WIPO, because in that forum the US had only one vote and could always expect to be outvoted by developing countries.⁷²⁵ They were disenchanted with the existing multilateral intellectual property conventions administered by the WIPO and UNESCO and the toothlessness of those organisations.⁷²⁶

For the US, GATT offered a new start for intellectual property protection. It might be easier to write a completely new treaty covering all aspects of intellectual property protection than to renegotiate and amend several existing treaties which could not keep up with technological developments, such as, software and computer chips, and could only

⁷²³ Kastenmeier, Robert W. and Beier, David, above n709 at 290

⁷²⁴ Drahos, Peter, above n226 at 49

⁷²⁵ *Id.*, at 51

⁷²⁶ Blakeney, Michael, above n413 at 544

provide inadequate protection.⁷²⁷ The membership in the existing treaties was so diverse and the parties' interests might be so contradictory that the likelihood of a consensus on amendments of the treaties was remote.⁷²⁸ Moreover, a completely new treaty which would be brought to US standard, would require little substantive change to the intellectual property regimes of the US and other industrialised countries.⁷²⁹

During the Uruguay Round, which started in September 1986, the US was better prepared than any other nation to secure the TRIPs negotiations.⁷³⁰ They were well prepared to define its negotiating objectives throughout the negotiation.⁷³¹ The US was one of the few countries that sent negotiators with strong expertise in intellectual property rights. Their negotiators already had experience with negotiations on intellectual property issues through the bilateral process and NAFTA. This had to give them an advantage over other negotiators from other countries who were unfamiliar with intellectual property,⁷³² and who could be forced to accept US demands during the negotiation.⁷³³

The US proposal in the TRIPs negotiations included recommendations on substantive standards in the areas of patent, trademark, copyright, trade secrets and semiconductor layout. These recommendations largely reflected US substantive intellectual property standards. The US proposal also suggested the mandatory adoption of minimum national standards for the enforcement of intellectual property rights, including provisions for border measures, provisional remedies, and the expeditious resolution

⁷²⁷ Emmert, Frank, above n278 at 1345, 1373

⁷²⁸ *Id.*, at 1345

⁷²⁹ Loughlan, Patricia, above n181 at 577

⁷³⁰ Drahos, Peter, above n226 at 55

⁷³¹ Blakeney, Michael, above n413 at 544

⁷³² Drahos, Peter, above n226 at 56

⁷³³ Konan, Denise Eby, above n176 at 31

of disputes.⁷³⁴ The EC also submitted a detailed proposal to the TRIPs working group.⁷³⁵

Although developed countries were united in supporting the TRIPs proposal that could provide extensive civil, criminal, administrative procedures and remedies in the form of damages, injunctions, the forfeiture, destruction or disposal of infringing goods,⁷³⁶ there were significant differences among them regarding the acceptable substantive norms under the TRIPs. The US, Japan and the EC hotly debated and made efforts to establish GATT norms that closely resembled their own domestic intellectual property systems.⁷³⁷ In fact, cultural diversity in the protection of intellectual property rights was not limited to North-South (developed countries – developing/least developed countries) division. Even between developed countries there were differences as to the philosophical basis for the protection of intellectual property and technology rights. For example, most common law countries, including the US and UK, adopted the concept of economic property protection of intellectual property rights. By contrast, continental Western European nations adopted a Hegelian view that placed authorship and its moral rights at the center of protection.⁷³⁸ The cultural background of the US had led them to insist that moral rights should not be subject to the TRIPs and this position was eventually adopted in the final agreement.⁷³⁹

The US and the EC were also divided on the issue of patentable subject matter. The US draft did not provide for any exceptions to patentable subject matter. The EC's and the developing countries' drafts, however,

⁷³⁴ Abbott, Frederick M., above n695 at 715

⁷³⁵ *Id.*, at 716

⁷³⁶ Ross, Julie C. and Wasserman, Jessica, above n200 at 2309

⁷³⁷ Long, Doris Estelle, above n502 at 155

⁷³⁸ *Id.*, at 157

⁷³⁹ Ross, Julie C. and Wasserman, Jessica, above n200 at 2282

included provisions that excluded patents for plant and animal varieties or the biological processes for their production and for inventions that would be contrary to public policy and health.⁷⁴⁰

Besides that, the US and EC differed on the issue of the appropriate protection for geographical indications including appellations of origin. The US and Australia were willing to provide protection only for “non-generic” appellations of origin and when the use of the geographical indications would mislead the public. They did not want to protect appellations of origins which had become generic or commonly used, such as champagne.⁷⁴¹ The EC draft, however, explicitly defined geographical indications and listed acts to restrict the use of geographical indications in trade, even where the products indicated their true place of origin or used the geographical indications along with such words as “imitation”. In addition, the EC’s draft included a provision concerning protective measures that a country might take to prevent geographical indications from becoming “generic”.⁷⁴² The EC’s far-reaching proposal was of particular importance to countries, like France and Italy that wanted to limit the use of the appellations of origins, such as Bordeaux, solely to products originating in the area.⁷⁴³ They were becoming concerned about new activities of countries, such as, Australia and New Zealand which often used French “appellations d’origine”, like Champagne and Burgundy.⁷⁴⁴ In the end, the EC proposed to protect all indications of geographical source, even for products other than wine.⁷⁴⁵

⁷⁴⁰ *Id.*, at 2273

⁷⁴¹ *Id.*, at 2273, 2303

⁷⁴² *Id.*, at 2273

⁷⁴³ *Id.*, at 2283

⁷⁴⁴ Blakeney, Michael, above n413 at 549

⁷⁴⁵ *Id.*, at 2302

Other issues that divided developed countries were “collective licensing” and “rental rights”. France adopted a method of video levy to compensate copyright owners on losses caused by home taping on blank video cassettes.⁷⁴⁶ In Japan, rental shops charged 60 cents for the right to rent and take a single CD home, and customers could then copy the music and avoid paying full price for author’s works. Under Japanese copyright law, foreign record companies were allowed to ban rental of their CD for one year after release.⁷⁴⁷ The US recording industry could not accept these practices at all. They wanted the TRIPs to copy US law (17 USC Section 114 (1990)) which accorded record companies the absolute right to prohibit the commercial rental of their works.⁷⁴⁸

It was admitted that the difficulty in establishing an international consensus regarding the scope of intellectual property protection could be attributed to the diverse cultural, philosophical, and economic backgrounds. The world was not single-culture.⁷⁴⁹ The subsequent negotiations of the Uruguay Round became dominated by a deadlock over intellectual property protection, besides agricultural policies.⁷⁵⁰ There were too many differing (and often irreconcilable) philosophical, cultural, historical, economic, and political points of view regarding the need for strong protection of technology and other intellectual products.⁷⁵¹ Since there was a fear that the Uruguay Round could fail as a whole if the parties could not reach an agreement on TRIPs⁷⁵² and in an endeavor to force a conclusion to the Uruguay Round, on 20 December 1993, Mr. Arthur Dunkel, Director General of GATT and the Chairman of the Trade

⁷⁴⁶ *Id.*, at 2280-2281

⁷⁴⁷ *Id.*, at 2281

⁷⁴⁸ *Id.*, at 2282

⁷⁴⁹ Long, Doris Estelle, above n502 at 154

⁷⁵⁰ Blakeney, Michael, above n413 at 544

⁷⁵¹ Long, Doris Estelle, above n502 at 154

⁷⁵² Abbott, Frederick M., “The WTO TRIPs Agreement and Global Economic Development” (1996) 72 *Chicago-Kent Law Review* at 389

Negotiating Committee, tabled a draft of Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations on a “take it or leave it” basis, which included a new TRIPs text that attempted to settle outstanding differences with a compromise formula.⁷⁵³ The new TRIPs text was later called “Chairman Text”.⁷⁵⁴ The “Chairman Text” with very few changes, resembled the final draft of the TRIPs Agreement that finally was adopted when the Uruguay Round was closed at the Ministerial meeting at Marrakesh on 12 to 15 April 1994.⁷⁵⁵

To indicate the US determination to bring the multilateral intellectual property regime to meet the US level, Mr. Mickey Kantor, the US Trade Representative, declared in his annual report of the *USTR Announcement and Fact Sheet on Special 301 Decisions* of 29 April 1995 that,

I look for and expect continued progress by all countries in meeting *our* (emphasised by writer) concerns. This includes raising the level of intellectual property protection at least to TRIPs standards as soon as possible. However in the coming months I will not hesitate to designate as a priority foreign country any country where such a designation is warranted.⁷⁵⁶

The TRIPs Agreement sets standards for IPR much higher than those existing under other international intellectual property treaties and conventions administered by WIPO.⁷⁵⁷ These standards are presumably modeled after the US law and are similar to the legislation existing in almost every developed country.⁷⁵⁸ For the first time, an intellectual property agreement provides an enforcement mechanism which could be

⁷⁵³ Blakeney, Michael, above n413 at 545

⁷⁵⁴ Kesowo, Bambang, above n92 at 40

⁷⁵⁵ Blakeney, Michael, above n413 at 545

⁷⁵⁶ *Id.*, at 546

⁷⁵⁷ Verma, S.K., above n244 at 281

Emmert, Frank, above n278 at 1375

Braga, Carlos A.P. and Fink, Carsten, above n185 at 538

⁷⁵⁸ Verma, S.K., above n244 at 281

utilised despite the lack of legislation in member countries.⁷⁵⁹ This is heralded by lawyers in developed countries as the main accomplishment of the TRIPs Agreement.⁷⁶⁰ The TRIPs Agreement details instructions on civil, administrative, and criminal remedies that must be made available to interested private individuals or rights holders to allow them to assert and enforce their intellectual property rights.⁷⁶¹ Before TRIPs, provisions dealing with the enforcement of rights were basically general obligations to provide legal remedies and in certain cases, the seizure of infringing goods, while the implementation of such obligations was left entirely to national legislation.⁷⁶² The TRIPs Agreement refers to the GATT procedures for settlement of disputes between governments concerning the implementation of the TRIPs Agreement.⁷⁶³

The final draft of the TRIPs Agreement was consistent with the US' position regarding moral rights which were excluded from TRIPs provisions.⁷⁶⁴ Under the TRIPs Agreement, parties are required to comply with the substantive provisions of the *Berne Convention* with the exception of the protection of moral rights.⁷⁶⁵ Article 11 of the TRIPs Agreement compromises the Japan's and US' positions and provides authors with the right to prohibit or authorise the common rental of their copyrighted works.⁷⁶⁶

⁷⁵⁹ Gutowski, Robert J., above n691 at 738

⁷⁶⁰ Samuelson, Pamela, "Challenges for the World Intellectual Property Organization and the Trade-related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age" (1999) 21 *European Intellectual Property Review* at 581

⁷⁶¹ Bronckers, Marco C.E.J., above n696 at 1251-1252

⁷⁶² Gervais, Daniel J., above n702 at 160

⁷⁶³ Bronckers, Marco C.E.J., above n696 at 1252

⁷⁶⁴ Ross, Julie C., and Wasserman, Jessica, above n200 at 2282

Gana, Ruth L., above n465 at 761

⁷⁶⁵ Drahos, Peter, above n226 at 29

⁷⁶⁶ *Id.*, at 2282

The final draft of the TRIPs Agreement accommodates the EC's demands on the protection of geographical indications with additional protection for wines and spirits.⁷⁶⁷

While the TRIPs Agreement reasserts the *Paris Convention* principles, it goes beyond the *Paris Convention* by introducing the Most Favored Nation clause for the first time in the protection of intellectual property. Article 4 of the TRIPs Agreement requires members to extend all advantages, favors, privileges or immunities which were granted to citizens of a country to citizens of other member countries.⁷⁶⁸

The TRIPs Agreement's wide coverage of all areas of technology for patent protection was adopted over the strong opposition of developing countries, which perceived the agreement as a new form of domination by developed countries over them.⁷⁶⁹ The TRIPs Agreement provides for patent protection for all inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Inventions may be excluded from patent protection under Article 27 of the TRIPs Agreement for reasons of public order or morality and if the inventions were therapeutic and surgical methods, plants or animals. Regarding plant varieties, they shall be protected either by patents or by the *sui generis* system established by the UPOV Convention, or by any combination thereof.⁷⁷⁰ However, the exclusion from patent protection on plants, animals and plant varieties will be reviewed four years after the WTO Agreement comes into force, when a decision may be taken in favor of

⁷⁶⁷ *Id.*, at 2283

⁷⁶⁸ Schmidt-Szalewski, Joanna, "The International Protection of Trademarks After the TRIPs Agreement" (1998) 9 *Duke Journal of Comparative and International Law* at 190

⁷⁶⁹ Verma, S.K., above n244 at 281

⁷⁷⁰ Blakeney, Michael, above n413 at 550

granting patent protection to them.⁷⁷¹ The TRIPs Agreement imposed 20 years of patent protection.

To persuade developing countries to accept the TRIPs provisions, developed countries provided concessions to developing countries' interests. The developed countries agreed to a transition period that would allow developing countries time to bring their level of intellectual property protection up to the standards created by the TRIPs Agreement, as well as giving them time to adjust to any economic dislocations caused by their adherence to the TRIPs Agreement.⁷⁷² Substantial transitional periods are built into the TRIPs Agreement, so that most TRIPs obligations will not apply to developing country members until five years after the *Agreement Establishing the World Trade Organisation* (the WTO Agreement) enters into force. In respect to countries that did not maintain patent protection for all areas covered by the TRIPs Agreement, there is an additional five year period to extend patent protection to the areas covered by the TRIPs Agreement. For the least developed countries, there is a ten year transitional period from the entry into force of the WTO Agreement.⁷⁷³

However, there is a loophole in these supposedly generous transitional provisions, as there are no established definitions of developed, developing, and least developed member countries.⁷⁷⁴ It is uncertain whether the WTO is bound by the classification made by the United Nation (UN) or that made by the World Bank, which name different countries in their respective lists of the least developed countries. For example, the 1994 United Nations Conference on Trade and Development

⁷⁷¹ Verma, S.K., above n244 at 281

⁷⁷² Gakunu, Peter, above n562 at 370

⁷⁷³ Abbott, Frederick M., above n752 at 388

⁷⁷⁴ McGrath, Michelle, above n224 at

(UNCTAD) Report⁷⁷⁵ listed the names of 47 least developed countries that did not include China, Egypt, India, and Indonesia. The UN list was prepared to guide donor agencies and countries in making an equitable allocation of foreign aid.⁷⁷⁶ Differently, the 1994 World Bank Report⁷⁷⁷ comprised 46 least developed countries mentioned in the UNCTAD list, but added references to China, Egypt, India, Indonesia, and several other countries. The World Bank, in its development analysis, classified countries according to per capita income as low income, middle income and high-income countries. This was consistent with the US approach which, since 1984, had used per capita income as the sole criterion to select the developing countries that could benefit from trade preferences under its GSP. For the TRIPs purposes, however, the developed countries found that it would be unacceptable if countries like China and India were to claim the TRIPs Agreement's generous preferences for the least developed countries. It would be more relevant within the context of the TRIPs Agreement to consider China's and India's high technological achievements than its low per capita income level.⁷⁷⁸ Even the US has already taken steps to pressure China and Taiwan to forgo their developing country status.⁷⁷⁹ Besides that, there were some developing countries like Indonesia and India that preferred not to adopt the least developed country status, as this might cause their governments to lose political influence.⁷⁸⁰ It is a distinct weakness in the TRIPs Agreement that it does not define the classification of countries based on economic development more explicitly.⁷⁸¹ This causes considerable ambiguity for countries that could actually benefit from the least developed country

⁷⁷⁵ UNCTAD, *The Least Developed Countries: 1993-1994 Report* (1994), at xi, as cited in Bronckers, Marco C.E.J., above n696 at 1255

⁷⁷⁶ Bronckers, Marco C.E.J., above n696 at 1255

⁷⁷⁷ *World Development Report 1994* as cited in Bronckers, Marco C.E.J., above n696 at 1257

⁷⁷⁸ Bronckers, Marco C.E.J., above n696 at 1256-1257

⁷⁷⁹ McGrath, Michelle, above n224 at 403

⁷⁸⁰ Bronckers, Marco C.E.J., above n696 at 1257

⁷⁸¹ McGrath, Michelle, above n224 at 403

status under the TRIPs Agreement. Because of this loophole, it is difficult to determine whether developing countries have all received the preferential treatment to which they are entitled.⁷⁸²

Finally, it is clear that the TRIPs Agreement is actually the product of a trade negotiation initiated by the US in order to reduce trade friction, to correct the trade deficits suffered by the US and other industrialised countries, and to protect their intellectual property based industries. The TRIPs Agreement, in fact, was not really intended to stimulate innovation in technology and the creation of artistic, literary and scientific works.⁷⁸³

1.2. Position of Developing Countries in the TRIPs Negotiations

From the outset, developing countries have had little interest in those aspects of the GATT negotiations leading to the TRIPs Agreement. This lack of interest was caused by the perception that the TRIPs regime would yield no concrete benefits for them.

The US effort to regulate counterfeiting within the GATT framework drew contentious opposition from many developing countries. Brazil and India, the countries most vocally opposed to the idea, argued that the GATT's jurisdiction was limited to tangible goods, and therefore, the GATT lacked legal competence to address intellectual property protection issues.⁷⁸⁴ They contended that counterfeit goods belonged to the jurisdiction of the WIPO⁷⁸⁵ and added that countries of the developing world should be allowed to determine the existence and nature of

⁷⁸² Bronckers, Marco C.E.J., above n696 at 1257

⁷⁸³ Sherwood, Robert M., above n279 at 494-495

⁷⁸⁴ Ross, Julie C. and Wasserman, Jessica, above n200 at 2261
Loughlan, Patricia, above n181 at 577

domestic intellectual property regimes in line with their own social and developmental needs.⁷⁸⁶ The People's Republic of China also asserted that the level of intellectual property protection should keep pace with economic development of the country concerned.⁷⁸⁷

At the 1982 Ministerial Declaration, opposition from developing countries against the proposed draft of *Anti-counterfeiting Code*, had prevented the adoption of the Code.⁷⁸⁸ While at the December 1988 meeting in Montreal, Canada to review the progress made in the Uruguay Round with respect to intellectual property, the developing countries presented their view which was antithetical to the proposal of intellectual property protection within GATT. They questioned the nature and scope of the mandate of the Punta de Este Declaration and sought to have intellectual property standards set by the WIPO only.⁷⁸⁹

Developing countries preferred to maintain the supremacy of the WIPO in the field of intellectual property rights, because the historical objective of the WIPO was to provide a framework for international cooperation in the field of intellectual property rights, and not to act as an international enforcement body that threatened the interests of developing countries. The WIPO also had a history of assisting developing countries in preparing laws, training intellectual property office personnel, and assisting in the creation of a patent protection system infrastructure.

⁷⁸⁵ Ross, Julie C. and Wasserman, Jessica, above n200 at 2261

⁷⁸⁶ Loughlan, Patricia, above n181 at 577

⁷⁸⁷ Gutterman, Alan S., above n195 at 123

⁷⁸⁸ Emmert, Frank, above n278 at 1339

Ross, Julie C. and Wasserman, Jessica, above n200 at 2261

⁷⁸⁹ Kastenmeier, Robert W. and Beier, David, above n709 at 292

Therefore, many developing countries regarded the WIPO Secretariat as friendly and understanding to their interests.⁷⁹⁰

Not until April 1989, did the developing countries agree to let negotiations on substantive standards proceed, but they still reserved the issue of the GATT's competence to promulgate new rules on intellectual property protection.⁷⁹¹ Then, in 1990, during the discussion of five draft texts on TRIPs, the developing countries once again reiterated their argument against the formation of the TRIPs Agreement. Four of the draft texts were from developed countries: the EC, the US, Switzerland, and Japan, and the fifth text was tabled by a group of developing countries that included Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay. While the texts from developed countries all supported negotiation of a comprehensive agreement on trade related aspects of intellectual property,⁷⁹² the developing countries' text viewed intellectual property not as a property right, but rather as an instrument of public policy.⁷⁹³ In their draft titled "*Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay*", developing countries demanded that the signatories of a new intellectual property code retain the sovereign right to determine the level and scope of protection of

⁷⁹⁰ Abbott, Frederick M., "The Future of the Multilateral Trading System in the Context of TRIPS" (1997) 20 *Hastings International and Comparative Law Review* at 674,678

⁷⁹¹ Abbott, Frederick M., above n695 at 714

⁷⁹² *Draft Agreement on Trade-Related Aspects of Intellectual Property, Communication from the European Community*, GATT Doc. No. MTN.GNG/NG11/W/68 (March 29, 1990) at 2; *Draft Agreement on Trade-Related Aspects of Intellectual Property, Communication from the United States*, GATT Doc. No. MTN.GNG/NG11/W/70 (May 11, 1990) at 2; *Draft Amendment to the General Agreement on Tariffs and Trade on the Protection of Trade-Related Intellectual Property Rights, Communication from Switzerland*, GATT Doc. No. MTN.GNG/NG11/W/73 (May 14, 1990) at 2-3; *Main Elements of a Legal Text for TRIPs, Communication from Japan*, GATT Doc. No. MTN.GNG/NG11/W/74 (May 15, 1990) at 2-4, as cited in Ross, Julie C. and Wasserman, Jessica, above n200 at 2273

⁷⁹³ *Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay*, GATT Doc. No. MTN.GNG/NG11/W/71 (May 14, 1990) at 2 as cited in Ross, Julie C. and Wasserman, Jessica, above n200 at 2273

intellectual property rights, particularly in sectors that involved public concern, such as, health, nutrition, agriculture and national security. They also demanded provisions prohibiting unilateral measures in retaliation for infringements of the new code and a rapid and effective dispute settlement procedure. They based their s on a general practice, supported by an opinio juris reflected in the *Friendly Relations Declaration in Accordance with the Charter of the United Nations*. The general practice had long accepted that every state was entitled under international law to freely select its economic order. This was explicitly affirmed by Article 1 of the non-binding *Charter of Economic Rights and Duties of States*. Therefore, the present efforts of the US and other developed countries to maintain their international economic leadership by translating their domestic provisions on intellectual property protection into international standards, negated the freedom of developing and least developed countries to select their own political and economic systems.⁷⁹⁴

The developing and least developed countries also claimed that developed countries were unfair by demanding developing countries to adopt a new code on intellectual property protection, but always opposing to the *Code of Conduct for the International Transfer of Technology*. The Code had been prescribed by the UNCTAD since the mid 1970s, but developed countries always prevented it from being brought to the negotiating table. The developed countries' opposition to the *Code of Technology Transfer* was viewed by developing and least developed countries as the attempt by developed countries to protect the interests of a handful of wealthy intellectual property owners to the detriment of whole society in developing countries and their vast masses of impoverished consumers.⁷⁹⁵ Since all developing countries were net

⁷⁹⁴ Emmert, Frank, above n278 at 1354, 1355

⁷⁹⁵ *Id.*, at 1355

importers of technological and cultural information,⁷⁹⁶ new stricter rules on intellectual property protection would deny them the technologies they needed for their economic development.⁷⁹⁷ They would be unable to break the cycle of dependence on developed countries.⁷⁹⁸ Developing countries found that so far developed countries had made no clear commitment to transfer their technology to developing countries, although developing countries had sought to improve their intellectual property laws since before the TRIPs negotiations was started.⁷⁹⁹ If there had been a transfer of technologies, the technologies transferred to developing countries tended to be significantly older than those transferred to industrialised economies.⁸⁰⁰

The lack of avid participation by developing countries in the TRIPs negotiations was attributable to the fact that developing countries were always convinced that strong intellectual property protection would increase the wealth gap between developed and developing nations, as it would make the acquisition of technology more expensive.⁸⁰¹ They asserted that many developed nations, before they reached their present status as developed countries, also resisted intellectual property protection to enable them to acquire technologies needed to develop their countries. There used to be very strong strain of patent abolition movements in Britain, France, the Netherlands, Switzerland and even the

⁷⁹⁶ Drahos, Peter, above n226 at 55
Kastenmeier, Robert W. and Beier, David, above n709 at 256
Maskus, Keith E., above n194 at 116

⁷⁹⁷ Lepp, Alan W, above n140 at 970

⁷⁹⁸ McGrath, Michelle, above n224 at 403

⁷⁹⁹ “Menjelang Sidang WTO di Seattle: Putaran Baru Untungkan Negara Maju” [The Coming WTO Meeting in Seattle: New Round Benefits Developed Countries] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/frame.fs...?cookie=2&cdate=26-NOV-1999&inw_id=106481 (26 November 1999) at 2

⁸⁰⁰ Maskus, Keith E., above n194 at 145

⁸⁰¹ de Koning, Martine, above n508 at 64

US.⁸⁰² Historical studies suggest that it was the colonialism committed by Western developed nations on developing and least developed countries that widened the gap of technological development between them. Before colonialism, developing countries were more or less at the same level of technological development as European nations.⁸⁰³

Developing countries wanted the US, particularly, to understand that there could not be uniformity in the substantive content of intellectual property law, given the wide disparities in the underlying socio-economic conditions and needs at the national level.⁸⁰⁴ Difficulty in establishing uniform intellectual property laws also flowed from the distinctive cultural, philosophical and economic backgrounds of each nation.⁸⁰⁵

Many East Asian jurisdictions did not have the same history of intellectual property protection as the US and other Western countries had. The laws of East Asian countries reflected a consensus building decision making process and greater concern for the protection of society and consequently, less protection for individuals. Intellectual property rights in East Asia were subject to the limitation that such rights would only be granted in order to serve the society.⁸⁰⁶ What was perceived as wrong by US cultural and legal standards might not be wrong under the cultural and legal standards of other nations. One study suggested that the concept of intellectual property was unamenable to indigenous people who practice collective ownership.⁸⁰⁷ In the 1989 conference of “Prospects for Multilateral Agreement on Services and Intellectual Property in the

⁸⁰² Blakeney, Michael, above n214 at 197

Blakeney, Michael, above n703 at 2

⁸⁰³ Henderson, Elizabeth, above n298 at 663

⁸⁰⁴ Gakunu, Peter, above n562 at 364

⁸⁰⁵ Long, Doris Estelle, above n502 at 154

⁸⁰⁶ Blatt, Jeffrey J., above n211 at 674-675

⁸⁰⁷ Gutowski, Robert J., above n691 at 748

GATT Multilateral Trade Negotiations”, Mr. Peter Gakunu, the Chief of Trade Cooperation Division of the African, Caribbean and Pacific Group of States (ACP Group), strongly argued that, “[i]t is also not in the interest of developing countries to fashion their intellectual property laws on the basis of criteria that are derived from the conditions and interests of the technologically advanced countries.”⁸⁰⁸ Furthermore, Mr. Gakunu questioned why intellectual property protection had to be on a multilateral basis, because developing countries did not see why their national laws were inadequate. Developing countries were wondering why intellectual property protection had to be on the basis of US laws and why the US laws should be more relevant than developing countries’ own laws. Mr. Gakunu warned that US laws might not work in developing countries.⁸⁰⁹ Another participant of the conference, Mr. Scott Birdwell, presented the fact that developing countries did not have US\$125 million to spend on research and development to develop a new marketable chemical; nevertheless, industrialised countries were calling for increased protection of intellectual property rights. According to Mr. Birdwell, it was like asking developing countries to protect something that they might never have.⁸¹⁰ Mr. Gakunu also raised a similar question to Mr. Birdwell’s, namely, what the benefits of intellectual property protection were for developing countries. He said that a country would not be able to develop in the future, because there were already preset rules to follow. It was contrary to the nature of laws, national laws particularly, which should evolve over time. If developing countries were to accept multilateral rules, then it meant that their domestic laws could not evolve, which would become a restriction on them.⁸¹¹ Economically, the enforcement of multilateral intellectual property law was also not viable for developing

⁸⁰⁸ Gakunu, Peter, above n562 at 364

⁸⁰⁹ *Id.*, at 379

⁸¹⁰ *Id.*, at 371

⁸¹¹ *Id.*, at 379

countries. Their busy, hard-pressed public enforcement authorities were obliged to divert scarce resources away from more important and urgent cases, such as, criminal trade in arms and drugs, to deal with counterfeit trademarks, infringed patents, or pirated copyrighted works in the interest of foreign proprietors.⁸¹²

The most politically volatile issue in the TRIPs negotiations was the extension of patent protection. The US negotiators proposed, *inter alia*, that patents should cover all fields, including pharmaceutical drugs; that patents should last for twenty years from the date of application; that compulsory licenses should apply only in extraordinary circumstances; and that there should be a strong dispute settlement mechanism.⁸¹³ Developing countries together with some EC countries tabled proposals that included provisions excluding patents for inventions that would be contrary to public policy and health, for plant or animal varieties and for essentially biological processes for the production of plants or animals other than non-biological and microbiological processes, and also for pharmaceutical products. The developing countries proposed further exceptions to patent protection for discoveries, materials, or substances already existing in nature, methods for medical treatment of humans or animals, and nuclear material.⁸¹⁴

The majority of developing countries did not confer patent protection on plant or animal varieties, relying heavily instead on informal innovation, traditional knowledge and the presence of biodiversity to develop and conserve plant and animal varieties. Farmers in developing countries still maintained the traditional resource rights to use traditional knowledge and exercise communal rights over seed varieties to improve species.

⁸¹² Blakeney, Michael, above n703 at 1

⁸¹³ Nogues, Julio, above n242 at 84

These traditional and communal rights were recognised in the *FAO's 1989 International Undertaking*, which underlined the belief that plant genetic resources belonged to the common heritage of mankind, with farmers acting as their guardians. It did not give rights directly to farmers but vested them in the International Community.⁸¹⁵ In Asia, many countries prohibited patent protection of plant varieties. Since most of the world's tropical rainforests existed in Asia, Asian countries feared that intellectual property protection on plant varieties would restrict their access to their own rainforests.⁸¹⁶ Indonesia, for example, owned 15% of the world terrestrial bio-diversity, with its marine bio-diversity still unaccounted for.⁸¹⁷ The inclusion of plant varieties and bio-technology for patent purposes had become a subject of widespread protests by Indian farmers, who feared the high price of seeds and regarded it as an attack on their traditional rights of saving, exchanging and selling seeds from their harvest.⁸¹⁸ India had already experienced heated controversy over a patent obtained by a US chemical company, W.R. Grace, on a process for extracting chemical materials from the famed "neem tree". The tree had been widely used by indigenous people for making traditional medicines, antiseptic toothbrushes, natural insecticides, contraceptives and even soap.⁸¹⁹ There had been around 65 other patent applications made on the neem tree.⁸²⁰ In Indonesia, the Minister of the Environment, Mr. Sarwono Kusumaatmadja, also warned that multinational companies could attempt a similar kind of patenting on Indonesia's rich bio-diversity.⁸²¹ Mr. Riza Tjahjadi, the Chairman of the Pesticide Action Network in Indonesia,

⁸¹⁴ Ross, Julie C. and Wasserman, Jessica, above n200 at 2273, 2283

⁸¹⁵ Footer, Mary, above n248 at 3, 4

⁸¹⁶ Konan, Denise Eby, et al., above n176 at 30

⁸¹⁷ "Hak Paten Jadi Isu Utama COP II" [Patent Becomes the Main Issue in the COP II] *KOMPAS* (24 October 1995) at 3

⁸¹⁸ Verma, S.K., above n244 at 281

⁸¹⁹ Gutowski, Robert J., above n691 at 748

⁸²⁰ "TRIPS: Seattle Leaves Issues Unresolved" (1999/2000) 95 *Managing Intellectual Property* at 5

⁸²¹ *KOMPAS* (24 October 1995) above n817 at 3

found that Shiseido, a famous Japanese cosmetic firm, had quietly patented several traditional Indonesian formulas of herbs and spices. The company had patented formulas for their anti-aging agents which were made from an Indonesian plant, *Sambiloto* (*Andrographis panicurata*) and hair tonic made of the Javanese spice, *lombok* (Javanese chili).⁸²² Critics were concerned that the TRIPs Agreement would take control of agricultural products, like neem seeds, away from local communities and give it to large, foreign companies.⁸²³

Developing countries also resisted the extension of patent protection for pharmaceutical products. Most developing countries considered this issue one of health policy and technology transfer.⁸²⁴ As a matter of fact, pharmaceutical products were routinely excluded from patent protection in developing countries.⁸²⁵ This was to protect most of the third world consumers of pharmaceutical products who were overwhelmingly poor and unable to afford important drugs. Furthermore, unsanitary conditions and various conditions associated with poverty in the third world countries made their citizens more susceptible to illness than people in industrialised countries.⁸²⁶ Without patent protection on pharmaceutical products, consumers in the Third World would have lower prices for drugs and more affordable health care. Besides that, the Third World would be able to produce their own generic drugs that were cheaper than patented drugs.⁸²⁷ By contrast, increased patent protection for pharmaceutical products would result in higher prices and the flow of

⁸²² “NGO Seminar Urges Campaign Against ‘Unfair’ Biopiracy” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/iscp_render?/menu_name=hitlist_details&id=660483 (20 March 2000) at 2

⁸²³ Gutowski, Robert J., above n691 at 748

⁸²⁴ Kastenmeier, Robert W. and Beier, David, above n709 at 295

⁸²⁵ Nogues, Julio, above n242 at 83

Konan, Denise Eby, et al., above n176 at 19

⁸²⁶ Weissman, Robert, above n240 at 1111

⁸²⁷ *Id.*, at 1116

royalties to foreigners.⁸²⁸ Empirical studies revealed that over time, patents are a major factor in sustaining high drug prices.⁸²⁹

India used to adopt price controls and a process-only patent for pharmaceutical products. The result was that Indian manufacturers of bulk drugs and formulations not only dominated the Indian market but also were among the most fiercely competitive in the world, especially with regard to the production of generic drugs.⁸³⁰ It had transformed Indian drug prices from among the highest in the world to among the lowest. A no-patent system in Argentina also had driven down drug prices.⁸³¹

Limiting or abolishing patent rights could drive down drug prices because it facilitated entry of generic and cheaper imitative products. It provided an opportunity for less technologically sophisticated companies in Third World countries with large domestic markets to produce generic products. India, Argentina and Turkey had developed flourishing domestic pharmaceutical industries in the last three decades because of their policy of granting no pharmaceutical patents (Argentina and Turkey) or imposing significant limits on patent protection (India). Developing countries defended their policy by pointing to the fact that every industrialised country had also built up its technological capabilities through imitation. Although scholars from industrialised countries claimed that their countries maintained strong patent laws, virtually every industrialised country adopted strong patent laws after developing their technological infrastructure, significantly through copying strategies. Many industrialised countries had in fact only

⁸²⁸ Konan, Denise Eby, et al., above n176 at 30

⁸²⁹ Weissman, Robert, above n240 at 1117

⁸³⁰ Giust, John E., “Noncompliance with TRIPs by Developed and Developing Countries: Is TRIPs Working?” (1997) 8 *Indiana International & Comparative Law Review* at 95

provided patents on pharmaceuticals in the last few decades,⁸³² and developed their pharmaceutical industries in the absence of patent protection.⁸³³

A report released by the UNCTAD on 6 March 1997 on the result of its inquiry into the effects on social welfare arising from the increased patent protection for pharmaceuticals concluded that such protection would result in a *net* social loss, calculated on a global basis.⁸³⁴ With increased patent protection for pharmaceutical products, the welfare losses to individual southern countries outweighed the gains to pharmaceutical producers.⁸³⁵

Another concern for developing countries was the extension of the period of patent protection to 20 years. They argued that the period of patent protection should depend on the economic type and phase of economic development in a particular nation. Studies had found that for the least developed countries, a shorter period of patent protection had a more positive welfare effect than the longer period that was common in industrialised countries.⁸³⁶ A prolonged period of patent monopoly with a severely limited right of adaptation effectively sealed off the opportunity of developing countries to reap fully the benefits of granting patents.⁸³⁷ By forcing poor countries to pay monopoly prices for patented products for the full 20 years, the TRIPs Agreement would intensify economic

⁸³¹ Weissman, Robert, above n240 at 1118

⁸³² France granted patents for pharmaceuticals for the first time in 1960, Germany in 1968, Japan in 1976, Switzerland in 1977, Italy in 1978, the Nordic countries in 1968, and Sweden in 1978. Some other industrial countries, such as, Finland, New Zealand, Spain and Norway, did not grant patent protection to pharmaceuticals until the beginning of 1990s. Nogues, Julio, above n242 at 82.

Weissman, Robert, above n240 at 1119, footnote 264

⁸³³ Weissman, Robert, above n240 at 1123

⁸³⁴ Loughlan, Patricia, above n181 at 577 footnote 83

⁸³⁵ Subramanian, R, above n300 at 263

⁸³⁶ Loughlan, Patricia, above n181 at 562

⁸³⁷ Gana, Ruth L., above n465 at 755

dependence of the developing countries on the developed countries, worsen material conditions in the least developed countries and impede any hope of improving and fostering research and development in developing countries.⁸³⁸

During the TRIPs negotiations, the developing countries, led by Brazil and India, presented the above arguments and formulated counterproposals on the TRIPs issues. However, their proposals were then evaluated by negotiators from US industries who had years of experience in international intellectual property protection and licensing. The US negotiators could easily find the weaknesses in developing countries' proposals, caused by developing countries' lack of familiarity with intellectual property issues. The developing countries' proposals were also weakened by the inability of developing countries to unite their opposition to TRIPs, because of the different social conditions and phases of economic development among them.⁸³⁹ Moreover, their position during the TRIPs negotiations became vulnerable because, while talks of the TRIPs at various levels were occurring, they were threatened with the US Section 301 procedure. Developing countries that attempted to organise resistance found themselves subject to the 301 procedure. This threat had forced many developing countries to cooperate in the TRIPs negotiations to stop the use of the Section 301 procedure against them.⁸⁴⁰

During the TRIPs negotiations, the US and EC held an important bargaining chip, which was the liberalisation of their market access for exports from developing countries in textiles, apparel and agriculture, if the developing countries agreed on the TRIPs Agreement.⁸⁴¹ Historically,

⁸³⁸ McGrath, Michelle, above n224 at 399

⁸³⁹ Kesowo, Bambang, above n92 at 43

⁸⁴⁰ Drahos, Peter, above n226 at 57, 58

⁸⁴¹ Emmert, Frank, above n278 at 1389

textiles and agricultural products had been controversial issues in the many of GATT negotiations. Textiles and clothing were not governed under the GATT rules, but under the “Multi-fiber Agreement” (MFA), which legitimated market protectionism by developed countries. Similarly, trade in agriculture received special treatment that denied the general GATT rules against non-discrimination and quotas.⁸⁴² The European Union (EU) provided massive subsidies for its farmers’ exports of important staple crops, such as wheat. The EU measure had allowed its farmers to undercut the prices of developing countries’ products and thereby diminished developing countries’ export opportunities. During the Uruguay Round, the US pressed the EU for concessions on agricultural subsidies, partly in their effort to push the developing countries’ acceptance of the TRIPs Agreement.⁸⁴³ The US and the EC also had agreed to gradually eliminate the quota system in the MFA and to revoke it within the period of ten years,⁸⁴⁴ as well as to reduce their agricultural export subsidies and to increase market access for tropical products,⁸⁴⁵ if developing countries accepted the TRIPs Agreement.

In any situation, developing countries faced a difficult position. They could not afford to reject the TRIPs Agreement, because it would risk the sanctions authorised under the WTO Agreement. Another alternative, which was the withdrawal from the WTO altogether, was also impossible, because that entailed forfeiting all their trade rights.⁸⁴⁶ The acceptance by developing countries of the TRIPs Agreement thus could be regarded as a

⁸⁴² Gana, Ruth L., above n465 at 739

⁸⁴³ Abbott, Frederick M., above n752 at 387

⁸⁴⁴ Usman, Marzuki, “Implications of the GATS and Indonesia’s Experience” <http://www.icdt.org/tradeinsces/mfimu.htm> at 3

“Asia Pasifik Hati-hati Sambut Putaran Uruguay” [Asian-Pacific Cautiously Welcome the Uruguay Round] *KOMPAS* (17 December 1993) at 13

Abbott, Frederick M., above n752 at 387

⁸⁴⁵ Gutowski, Robert J., above n691 756

⁸⁴⁶ McGrath, Michelle, above n224 at 403

bargained for exchange – intellectual property protection in return for fairer trade rules in specific industries.⁸⁴⁷ The TRIPs Agreement was also bargained for protection from unilateral measures primarily by the US and other powerful Western industrialised countries. Developing countries hoped that the dispute resolution procedures of the World Trade Organisation made them less vulnerable to bilateral disputes with the US and EU.⁸⁴⁸ However, a closer look at the TRIPs Agreement would reveal a disproportionate burden in the area of intellectual property protection without any tangible development benefit for developing countries. They might have received some benefits from the GATT Agreement over textiles and agriculture, but the negative impact of an international intellectual property regime on the development of developing countries remained unchanged from what existed in the pre-TRIPs Agreement era.⁸⁴⁹

1.3. Indonesia's Position in the TRIPs Negotiations

Although the ASEAN countries, including Indonesia, belong to the group of developing countries, they did not align themselves firmly with either the developed or developing world during the Uruguay Round.⁸⁵⁰ In the December 1988 meeting in Montreal, Canada to review the progress of the Uruguay Round with respect to intellectual property, the ASEAN countries were willing to continue the intellectual property discussions, but argued that the final product should acknowledge the developmental situation of the Third World.⁸⁵¹ They also maintained that principles and norms within the GATT for the protection of intellectual property rights

⁸⁴⁷ Gana, Ruth L., above n465 at 739

⁸⁴⁸ Gutowski, Robert J., above n691 at 756

⁸⁴⁹ Gana, Ruth L., above n465 at 740

⁸⁵⁰ Lepp, Alan W., above n140 at 38

should be built upon existing international and regional agreements. They hoped that strong anti-piracy legislation and enforcement could encourage research and development activities and attract foreign investment and transfer of technologies.⁸⁵²

The ASEAN countries, including Indonesia, had an interest in the success of the Uruguay Round, because their export-led economic growth depended on a reasonably free world trading system.⁸⁵³ Mr. Bambang Kesowo, a member of the Indonesian delegation in the Uruguay Round admitted that Indonesia and other developing countries were reluctant to object to the contents of the “Chairman Text”, as it could lead to further arguments from other parties and protract the Uruguay Round.⁸⁵⁴ Indonesia and other Asian countries agreed to the Uruguay Round accord in spite of the TRIPs Agreement, mostly because of improved market access for their exports.⁸⁵⁵ In their studies, Blackhurst, Enders, and Francois, asserted that the most significant new export opportunities from the Uruguay Round accrued to developing economies in Asia, primarily because of the phase-out of the Multi-fiber Arrangement.⁸⁵⁶ In 1991 and 1992, Indonesia was the fourth biggest textiles and garment exporter, after China, South Korea, and Taiwan. The gradual elimination of the Multi-fiber Arrangement would give more international market access to Indonesian textiles and textile products. With the decline of national income from oil and gas, the Indonesian government projected textiles

⁸⁵¹ Kastenmeier, Robert W. and Beier, David, above n709 at 292

⁸⁵² Lepp, Alan W, above n140 at 38

⁸⁵³ *Ibid*

⁸⁵⁴ Kesowo, Bambang, “Ringkasan Eksekutif Hasil Perundingan TRIPs dari Ketua Perunding TRIPs” [Executive Summary of the Results of the TRIPs Negotiations from the Chairman of Indonesian Negotiators in the TRIPs Negotiations] (15 December 1993) at 1,8

⁸⁵⁵ Konan, Denise Eby, et al., above n176 at 28

⁸⁵⁶ Blackhurst, Richard, et.al., “The Uruguay Round and Market Access: Opportunities and Challenges for Developing Countries” (26-27 January 1995) *Unpublished Paper, World Bank Conference on the Uruguay Round and the Developing Economies* as cited in Konan, Denise Eby, et al., above n176 at 28

and other products to substitute the role of oil and gas in the foreign exchange raising.⁸⁵⁷

The position of Indonesia during the TRIPs negotiations was similar to that of other developing countries. The acceptance of the TRIPs Agreement by Indonesia was not based on a genuine intention to promote innovation, research and development and the transfer of technology through intellectual property protection, but rather was based on securing more market opportunities for Indonesian products offered by the Uruguay Round and by Western developed countries, if Indonesia and other developing countries agreed to the TRIPs Agreement. This background could explain why Indonesia still ignored intellectual property protection after the TRIPs Agreement was implemented in Indonesia in 1997.

2. Implications of the TRIPs Agreement in Indonesia

Under the TRIPs Agreement, Indonesia was classified as a developing country that, according to Article 65(2), was entitled to a five year transitional period before fully implementing the TRIPs Agreement on 1 January 2000.⁸⁵⁸ However, although Indonesia was granted the transitional period until year 2000, the Indonesian government was determined to pass new intellectual property laws to comply with the TRIPs Agreement before the Indonesian general election in 1997.⁸⁵⁹

Also see *KOMPAS* (17 December 1993) above n844 at 13

⁸⁵⁷ Usman, Marzuki, above n844 at 3

⁸⁵⁸ Kesowo, Bambang, above n92 at 42, 57

⁸⁵⁹ Kesowo, Bambang, above n854 at 3

“Three Intellectual Property Bills Given to House” *The Jakarta Post* (14 December 1996)

Between 2 December and 4 December 1996, the Indonesian government presented three bills to the parliament to amend the existing copyright, patent and trademark Acts.⁸⁶⁰ After only two months of deliberations, the members of parliament from four different factions unanimously approved the bills, and passed the amendment on 21 March 1997.⁸⁶¹ The Minister for Justice, Mr. Oetoyo Oesman, admitted that the process of passing the three new laws in the parliament was remarkably quick.⁸⁶² The quick and unanimous approval of the new laws from the parliament was possible because it had been widely known that the Indonesian parliament was only a “rubber-stamp” parliament that never opposed the government. It was believed that the parliament did not undertake elaborate review and discussion of the bills proposed by the government. The faction of the Indonesian Democratic Party (PDI) stated in its final overview that although the bills were not deliberated as thoroughly as the Party would have liked, they believed that the bills were good enough to protect intellectual property rights and boost innovation in Indonesia. None of the factions in the parliament made any argument on the content of the bills.⁸⁶³ The practice of passing laws without involving public hearings and public debates in Indonesia has frequently been cited by legal experts as a major cause of

⁸⁶⁰ “Menjelang Pemilu, Pemerintah Masukkan 11 RUU ke DPR” [Before the General Election, the Government Submits 11 Bills to the House of Representative] *KOMPAS Online*, <http://www.kompas.com/9612/11/HUKUM/menj.htm> (11 December 1996)

⁸⁶¹ “Penghormatan HAKI dan Falsafah “Guyub” Masyarakat Agraris” [Respect on Intellectual Property Rights and the “Comunal” Philosophy of an Agricultural Society] *Kompas Online*, <http://kompas.com/9703/26/EKONOMI/peng.htm> (26 March 1997) at 1

Priapantja, Cita Citrawinda, “IPR Law Development” (May/June 1997) *IP Asia* at 36

“Intellectual Property Laws Passed” *The Jakarta Post* (22 March 1997)

Khouw, Ida Indawati, “Mixed Reaction to Laws on Intellectual Property Rights” *The Jakarta Post* (22 March 1997)

KOMPAS Online (22 March 1997) above n496 at 1

⁸⁶² *KOMPAS Online* (7 April 1997) above n623 at 2

KOMPAS Online (22 March 1997) above n496 at 1

⁸⁶³ *The Jakarta Post* (22 March 1997) above n861 at 1

ineffective law enforcement in Indonesia.⁸⁶⁴ The public does not know the laws and never understand the importance of new laws to their lives.

On 7 May 1997, President Suharto enacted the three new amendment Acts: the *Copyright Act* No. 12/1997, the *Patent Act* No. 13/1997, and the *Trademark Act* No. 14/1997. On the same date, the President also signed five Presidential Decrees for adhering to several international conventions and treaties on intellectual property protection: the *Presidential Decree* No. 15/1997 concerning the Amendment of the Presidential Decree no. 24/1979 on the Ratification of the Paris Convention for the Protection of Industrial Property and Convention Establishing The World Intellectual Property Organisation, the *Presidential Decree* No. 16/1997 concerning the Ratification of the Patent Cooperation Treaty (PCT) and Regulations Under the PCT, the *Presidential Decree* No. 17/1997 concerning the Ratification of the Trademark Law Treaty, the *Presidential Decree* No. 18/1997 concerning the Ratification of the Berne Convention for the Protection of Literary and Artistic Works, and the *Presidential Decree* No. 19/1997 concerning the Ratification of the WIPO Copyrights Treaty.⁸⁶⁵ The speedy process of enacting the three new amendments Acts and five Presidential Decrees on intellectual property protection was quite remarkable. Moreover, earlier on 27 October 1994, Indonesia became one of the first initial 35 signatories of the *Trademark Law Treaty* established by the WIPO.⁸⁶⁶ All of this action indicated the Indonesian government's intention that Indonesia be accepted as a full member of the

⁸⁶⁴ "Supremasi Hukum Belum Terwujud" [The Law Supremacy Hasn't Come to Exist] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0005/29/NASIONAL/supr08.htm> (29 May 2000) at 2

⁸⁶⁵ Gautama, Sudargo, above n7 at 49
Suara Pembaruan Daily (12 September 1997) above n664 at 2

⁸⁶⁶ Drahos, Peter, above n226 at 33
Blakeney, Michael, " (1996) 10 *European Intellectual Property Review* above n413 at 549

“family of nations” in the globalisation process.⁸⁶⁷ The acceptance was also politically important for the government’s international position.⁸⁶⁸

Following the enactment of the *Copyright, Patent and Trademark Acts* 1997, the Indonesian government also prepared legislation granting protection for industrial designs, confidential information and integrated circuits.⁸⁶⁹ The bills covering industrial designs, confidential information and integrated circuits are still being discussed in the House of Representatives.⁸⁷⁰ Already enacted was the new *Customs Act* No. 10/1995 passed on 30 December 1995, and came into force on 1 April 1996.⁸⁷¹ The *Customs Act* 1995 was intended to comply with Section 4 of the TRIPs Agreement regarding Special Requirements Related to Border Measures. The Act replaced customs laws from the Dutch colonial era, and regulated several new subject matters, one of which was the control on imports and exports of products that infringed intellectual property rights. Article 62 of the *Customs Act* No. 10/1995 authorised the Directorate General of Customs and Excise to block the release of imported or exported goods from customs if the goods were suspected of infringing protected intellectual property rights.⁸⁷²

⁸⁶⁷ Gautama, Sudargo, above n7 at 53

⁸⁶⁸ See “Ratifikasi Kesepakatan GATT dan Kedaulatan Sebuah Bangsa” [GATT Ratification and National Sovereignty] *KOMPAS* (3 December 1994) at 4

⁸⁶⁹ Antons, Christoph, above n1 at 319

⁸⁷⁰ “DPR Harus Cermati Pembahasan Tiga RUU HAKI” [The House of Representative must Carefully Review the Three Intellectual Property Bills] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0005/15/EKONOMI/dpr14.htm> (15 May 2000)
The Jakarta Post.com (22 December 1999) above n76

“Pemerintah Siapkan Empat RUU Pelengkap HAKI” [The Government Drafts Four More Intellectual Property Laws] *Kompas Online*, <http://kompas.com/9711/07/HUKUM/peme.htm> (7 November 1997)

⁸⁷¹ Scholefield, Paul, “TRIPs Compliance in Asia” (1995) *IP Asia Highlight* at 8

Kusoy, Erna L., “Customs Law Ratified” (March 1996) *IP Asia* at 4

⁸⁷² Kusoy, Erna L., “Regulations Implemented for the Customs and Excise Law” (July/August 1996) *IP Asia* at 6

“Antisipasi Terhadap Pembajakan HAKI” [The Anticipation on Piracy] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1997/10/111097/OpEd/op01/op01.html> (11 October 1997) at 3

Joining in the effort to implement the TRIPs Agreement, the Chief Justice of the Indonesian Supreme Court on 9 June 1997 announced the establishment of a special council of the Supreme Court to specifically handle intellectual property cases.⁸⁷³

2.1. New Copyright, Patent, and Trademark Acts 1997

a. The Copyright Act No. 12 / 1997

The important changes brought into the *Copyright Act 1997* are the introduction of rental rights for cinematographic works and computer programs (Article 2(2) and (3)), the regulation on copyright licensing (Part IIIA), and the introduction of neighboring rights that covers protection for performers, producers of sound recordings as well as broadcasting institutions (Part VA).⁸⁷⁴ The *Copyright Act 1997* introduced the new rights to comply with the provisions of the TRIPs Agreement

Although the *Copyright Act 1997* recognises and introduces neighboring rights, it seems that Indonesian legislators do not really understand the concept of neighboring rights. This creates confusion with regard to the terms of protection. The concept of neighboring rights has been little discussed in the Indonesian literatures on copyright.⁸⁷⁵

It has been argued that the subject matters protected by neighboring rights are useful but not necessarily creative and original. Therefore, they

⁸⁷³ Khouw, Ida Indawati, “Mixed Reactions to Justice Council” *The Jakarta Post* (26 June 1997) “Jakarta Seminar Highlights IP Developments” (December 1997) *IP Asia* at 6

⁸⁷⁴ Antons, Christoph, above n1 at 307

Gautama, Sudargo, above n7 at 36

Hadiputranto, Hadinoto & Partners, above n234 at 1

⁸⁷⁵ Antons, Christoph, above n1 at 307

are not really deserving of the same length of copyright protection as “original” works. Moral rights also do not usually extend to the subject matters protected by neighboring rights.⁸⁷⁶

Article 11 of the *Copyright Act* 1982 and 1987 included performances and broadcasts in the list together with original works, such as, books, songs, paintings. Now, the rights of performers, producers of sound recordings and broadcasting organisations have been specifically regulated in the Part VA of the *Copyright Act* 1997, but have not been deleted from the list of original works protected by Article 11 of the *Copyright Act* 1997. This causes confusion with regard to the duration of copyright protection. Under Article 26(1) of the *Copyright Act* 1997, the subject matters of Article 11 receive copyright protection for the period of the lifetime of the author plus fifty years. The duration of copyright protection is reduced in Article 27(1) for certain kinds of works to 50 years after its first publication. Performances and broadcasts are mentioned in both Articles 26(1) and 27(1).⁸⁷⁷

The new provisions in the *Copyright Act* 1997 that regulate copyright licensing stipulate that in order to be legally valid, a copyright licensing agreement must be registered at the Copyright Office (Article 38C(2)). A licensing agreement that contains provisions which could harm Indonesia’s economy, cannot be registered (Article 38C(3)). The government will issue a Government Regulation to further regulate the details of copyright licensing agreements, including their registration procedures (Article 38C(4)). However, until now, there has been no Government Regulation on copyright licensing.⁸⁷⁸ In the past, the lack of

⁸⁷⁶ *Ibid*

⁸⁷⁷ Antons, Christoph, above n1 at 308

⁸⁷⁸ Hadiputranto, Hadinoto & Partners, above n234 at 2

implementing regulations in Indonesian intellectual property laws had caused difficulties among law authorities to fully enforce the laws.

The *Copyright Act* 1997 now provides copyright protection for works where the author is unknown. For this kind of work, the copyright will be held by the State on behalf of its unknown author, if the works have not yet been published. If the works have been published but the authors are unknown, their copyright will be vested in their publishers on behalf of their authors (Article 10A). There has been criticism of this provision because it ignores the fact that most works with unknown authors have become part of folklore or are “products of popular culture” which are owned collectively by society. The individual rights granted by copyright laws will be difficult to reconcile with the collective rights granted by customary law to folklore or products of popular culture.⁸⁷⁹

Regarding infringement, the previous *Copyright Act* 1987 did not consider the use of up to 10% of a copyrighted work as an infringement. However, the new *Copyright Act* 1997 abolishes this provision and considers as an infringement any use or quotation of a protected work if a reasonable interest has been violated, regardless of the percentage of the work used or quoted.⁸⁸⁰ However, the *Copyright Act* 1997 allows the making of limited copies of works for the purposes of education, research, scientific writing, report, criticism and review, provided that the work and its author are mentioned. It is also permissible to make a back-up copy of a computer program for self-use (Article 14).

Together with the enactment of the *Copyright Act* 1997, the government issued the *Presidential Decree* No. 18/1997 to ratify and rejoin the *Berne*

⁸⁷⁹ Antons, Christoph, above n1 at 311

⁸⁸⁰ Hadiputranto, Hadinoto & Partners, above n234 at 1

Convention, reversing its withdrawal in 1958. The ratification of the *Berne Convention* is imperative when Indonesia agrees on the TRIPs Agreement. However, the government places a reservation on Article 33 of the *Berne Convention*. Article 33 allows a country involved in a dispute on the interpretation or application of the Convention to bring the dispute before the International Court of Justice. With their reservation upon Article 33, the Indonesian government requires that there must be an agreement between Indonesian and all other parties involved in a dispute to confer jurisdiction on the International Court of Justice.

b. The Patent Act No. 13/1997

In accordance with the TRIPs Agreement, under the *Patent Act 1997*, the duration of patent protection is extended from fourteen years to twenty years for patents, and from five years to ten years for petty patents (Articles 9 and 10). These new provisions reverse the government's and parliament's previous position, embodied in the *Patent Act 1989*, namely that the term of patent protection should be granted in accordance with each country's conditions, needs and problems, and that a fourteen year period of patent protection was sufficient for inventors to derive a return of their investment in addition to a reasonable profit from the exploitation of their inventions.⁸⁸¹

To comply with the TRIPs Agreement, inventions of foods and beverages, including production processes and products in the form of raw material are now patentable. Inventions of new varieties of plants and animals as well as any processes to cultivate plants and animals are also now

⁸⁸¹ See Chapter III above at 69

patentable (Article 7 of the *Patent Act* 1997).⁸⁸² The Department of Agriculture is now preparing the legislation to provide protection for plant varieties.⁸⁸³ Because of the TRIPs Agreement, the Indonesian government and parliament are not longer able to maintain their previous policy that food-crops, livestock, foods and drinks were essential for social welfare in Indonesia and that it was for the interests of the Indonesian people to exclude these kinds of invention from patent protection.⁸⁸⁴ The government has also arguably gone too far by allowing patent protection for animals, a provision which actually is not even required by the TRIPs Agreement.

To comply with the TRIPs Agreement, the *Patent Act* 1997 no longer allows importation of patented products or of products produced by using a patented process by anybody other than the patent holder who has produced the products in Indonesia. This new provision is to meet the demand of foreign pharmaceutical companies which complained that the previous *Patent Act* 1989 allowed domestic pharmaceutical companies to produce pharmaceutical drugs made of “copy products” (imported materials that infringed patent of others).⁸⁸⁵ Since the domestic pharmaceutical companies were allowed to use “copy products”, they could produce much cheaper generic medicine, which was up to 400% cheaper than patented medicine.⁸⁸⁶ The state owned hospitals and clinics had widely used these cheap generic medicines.⁸⁸⁷ This has been blamed

⁸⁸² Hadiputranto, Hadinoto & Partners, above n234 at 2-3
Gautama, Sudargo, above n7 at 46-47

⁸⁸³ Hadiputranto, Hadinoto & Partners, above n234 at 3
“Dirjen HAKI: Pemohon Paten 90% Pihak Asing [The Director General of IPR: 90% of Patent Applicants are Foreigners] *Detickcom*, [wysiwyg://16http://www.detik.com/berita/199911/19991120-1310.htm](http://www.detik.com/berita/199911/19991120-1310.htm) (20 November 1999) at 2

⁸⁸⁴ The *Elucidation* of Article 7 of the *Patent Act* No. 6/1989
Also see Chapter III above at 74

⁸⁸⁵ Article 21 of the *Patent Act* 1989

⁸⁸⁶ *KOMPAS Online* (3 December 1997) above n232 at 1

⁸⁸⁷ Kesowo, Bambang, above n92 at 29

by foreign pharmaceutical companies as the cause of their loss of profits.⁸⁸⁸

The *Patent Act 1997* requires every patent licensing agreement to be registered at the Patent Office to have legal validity (Article 79). The Act maintains that licensing agreements shall not restrain the development of the Indonesian economy and technology. The Patent Office must not accept the registration of such licensing agreement (Article 78). This provision reflects the intention of the government to prevent intellectual property owners from engaging in anti-competitive conduct and abusing their dominant position. In fact, the TRIPs Agreement allows developing countries to establish and enforce domestic anti-competition laws and put limits on private exercises of intellectual property rights which they deem unacceptable (see Article 8(2) of the TRIPs Agreement).⁸⁸⁹ However, there is legal uncertainty on how anti-competitive practices that relate to patent licensing are actually regulated in Indonesia. While under the *Patent Act 1997*, the government prohibits anti-competitive practices in patent licensing, in the *Antimonopoly Act No. 5/1999*, which took effect on 5 March 2000, patent licensing and other intellectual property agreements are excluded from antimonopoly regulation (Article 50(b)). This conflict of rules has raised criticism from some experts in antimonopoly law, who say that there have been many instances of anti-competitive behavior in patent licensing agreements that must be controlled by the *Antimonopoly Act*, for example, grant-back provisions, restrictions regarding where the

⁸⁸⁸ “Pharmaceutical Industries Facing Patent Rights for Drugs” *Bisnis Indonesia* (13 May 1997) as cited in Hadiputranto, Hadinoto & Partners, above n234 at 10

⁸⁸⁹ Bronckers, Marco C.E.J., above n696 at 1270
Kesowo, Bambang, above n92 at 54

licensee should buy the raw materials and where the licensee could market their products.⁸⁹⁰

Together with the enactment of the *Patent Act 1997*, the government ratified the *Patent Cooperation Treaty (PCT)* with the *Presidential Decree No. 16/1997*. Indonesia makes reservation on Article 59 of the PCT which states that any dispute concerning the interpretation or application of the PCT should be brought before the International Court of Justice. Indonesia does not consider itself bound by Article 59.⁸⁹¹

Among seven ASEAN member countries, only Vietnam, Indonesia, and Singapore are the signatories to the PCT.⁸⁹² The reason of joining the PCT for the Indonesian government is that, under the burden of unsophisticated patent system and administration, the advanced multilateral system for rationalising application filing under the PCT could help reduce the administrative costs associated with costly technical examinations.⁸⁹³ Under the PCT, the member states will cooperate in the filing, searching, and examination of applications for patent protection, and in the rendering of special technical services, such as, the Patent Information Services. The PCT allows an application filed for patent protection in one contracting state to be treated as an international application under the treaty.⁸⁹⁴ Mr. Bambang Kesowo, from the Office of Cabinet Secretary said that Indonesia would benefit from the PCT as its members include developed countries, like the US, Germany, the UK,

⁸⁹⁰ “Pemerintah Belum Siap Tangani Kasus Monopoli” [The Government is not Ready to Handle Monopoly Cases] *KOMPAS Cyber Media*, <http://www.kompas.com/kompas-cetak/9910/05/EKONOMI/peme02.htm> (5 October 1999)

⁸⁹¹ Gautama, Sudargo, above n7 at 50

⁸⁹² Nguyen, Christian H., above n228 at 473

⁸⁹³ *Id.*, at 469, 473

⁸⁹⁴ Gautama, Sudargo, above n7 at 50

Australia and Japan.⁸⁹⁵ However, the ASEAN countries, except Indonesia, intend to establish their own regional ASEAN Patent and Trademark Office to create a one-door system of filing and examining applications for patent and trademark protection in ASEAN countries.⁸⁹⁶ The ASEAN countries might want to have their own regional Patent and Trademark Office, because of their different point of view on intellectual property protection from that embodied in the TRIPs Agreement. For example, in their joint communiqué (to be published), the ASEAN countries reject patent protection on all kinds of living organisms, as it is deemed to disadvantage ASEAN farmers and be unethical.⁸⁹⁷

Although the new *Patent Act 1997* complies with the TRIPs Agreement, it is found that the new Act contains provisions which are contrary to the interest of the Indonesian public, even to the common view shared by the ASEAN countries.

c. The Trademark Act No. 14/1997

To comply with the TRIPs Agreement, the *Trademark Act No. 14/1997* introduces new provisions dealing with “geographical indications” and “appellations of origin”, which were not known in the previous *Trademark Act 1992* and its predecessor, the *Trademark Act 1961*. It is now possible to register geographical indications at the Trademark Office (Article 79A(2)). Those who are eligible to register geographical indications at the

⁸⁹⁵ “Usul Dibentuk Kantor Bersama Paten ASEAN Kurang Bermanfaat” [The Establishment of the ASEAN Patent Office is Useless] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1997/10/221097/Kesra/kes05/kes05.html> (22 October 1997)

⁸⁹⁶ Hasugian, Maria, “Kita Terseok-seok Bila Perjanjian TRIPs Diberlakukan” [We are Unready for the TRIPs] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/1999/11/281199/Sorotan/asn00has3/asn003.html> (28 November 1999)

Trademark Office are the organisations of producers of natural products, producers of agricultural products, producers of handicrafts who all reside in the region where the goods are produced, and groups of consumers of the products. Those who already use the geographical indications for their products in good faith, although they are not eligible for registering it, will be allowed to keep using the geographical indications for two years after it is registered by the eligible parties. Further details relating to the registration procedure for geographical indications will be governed by a Government Regulation⁸⁹⁸ that has yet to be issued.⁸⁹⁹

However, the *Trademark Act 1997* does not provide specific protection for geographical indications of wines and spirits, as required by Article 23 of the TRIPs Agreement concerning Additional Protection for Geographical Indications for Wines and Spirits. As the majority of Indonesia's population is Moslem, for whom wines and spirits are religiously forbidden, the Indonesian government might consider that such provisions required by Article 23 of the TRIPs Agreement, inappropriate or unnecessary.⁹⁰⁰

There is doubt among legal practitioners as to the capability of the Indonesian Trademark Office to deal with the registration of geographical indications. With the lack of computer facilities and resources, the Trademark Office will have difficulty in determining whether a certain

⁸⁹⁷ Jhamtani, Hira, "WTO, Polisi Dunia Baru" [The WTO, the New Police of the World] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0005/12/OPINI/wato04.htm> (12 May 2000) at 3

⁸⁹⁸ Article 79A(8) of the *Trademark Act 1997*

⁸⁹⁹ Kusumah, Justisiari Perdana and McVicar, Shaun, "Indonesia Moves Ahead with Trademark Reform" (August 1997) *IP Asia* at 35

⁹⁰⁰ see Gaudarma, Sudargo and Winata, Rizawanto, *Pembaharuan Hukum Merek Indonesia (Dalam Rangka WTO, TRIPS) 1997* [The Amendment of the Indonesian Trademark Law (For WTO, TRIPS)] (Bandung: PT. Citra Aditya Bakti, 1997) at 29-30

product which is subject to an application for protection of geographical indication, is indeed from a particular geographical area.⁹⁰¹

The *Trademark Act 1997* now extends protection of well-known trademarks to goods and services which are not of the same kind (Article 6(4)). The extended protection for well-known trademarks is required by the TRIPs Agreement Article 16(3). According to Article 6(4) of the *Trademark Act 1997*, there are specific requirements to obtain this extended protection for well-known trademarks, which will be regulated in a Government Regulation. Like other implementing regulations required under other intellectual property Acts, up to now the Government has not issued any Government Regulation related to Article 6(4) of the *Trademark Act 1997*. This means that the extended protection of well-known trademarks to goods and services which are not of the same kind still cannot be provided for the time being.

Critics claim that many of the operating details of the new trademark law will be regulated further in implementing regulations which have yet to be issued. This could affect the effectiveness of the enforcement of the law.⁹⁰²

Together with the enactment of the *Trademark Act 1997*, the government ratified the *Trademark Law Treaty* with the *Presidential Decree No. 17/1997*. The *Trademark Act 1997* adopts the procedures of trademark registration set by the *Trademark Law Treaty*.

⁹⁰¹ Kusumah, Justisiari Perdana and McVicar, Shaun, above n899 at 35

⁹⁰² *Id.*, at 3

2.2. Enforcement of the New Intellectual Property Laws

Many legal experts and Indonesian non-governmental organisations (NGO) disagreed with the government's decision to hastily adopt the TRIPs Agreement and ratify five international conventions on intellectual property protection. For example, Mr. Insan Budi Maulana said that it is too risky to ratify the five international conventions on intellectual property protection, when Indonesia still does not have good human resources and a legal system capable of dealing with the new commitments.⁹⁰³ He referred to the lack of implementing regulations required to enforce the new intellectual property Acts,⁹⁰⁴ such as, the lack of Government Regulations on the registration of licensing agreements, on well-known trademarks for different kinds of goods and services, on intellectual property protection at the country's border by customs, as well as the Ministerial Decree on the appointment of members of the Trademark and Patent Appellate Commission.⁹⁰⁵ He also referred to the lack of efficient intellectual property administration and enforcement offices.⁹⁰⁶ Applications for registration are still processed manually by limited staff, which causes a huge application backlog in the Office of the Directorate General of Intellectual Property Rights.⁹⁰⁷ Even in 1999, the Patent Office ran out of patent application forms for several months and

Holder, Sara, above n76 at 56

⁹⁰³ “Soal Ratifikasi 5 Konvensi HAKI: Perlu Masa Peralihan dan Sosialisasi Menyeluruh” [The Ratification of IPR Conventions: Need Transitional Period and Throughout Socialisation] *KOMPAS Online*, <http://kompas.com/9706/07/HUKUM/perl.htm> (7 June 1997) at 1

⁹⁰⁴ Antons, Christoph, above n1 at 319

⁹⁰⁵ *Bisnis Indonesia* (29 December 1997) above n406

PP Merk Terkenal Segera Keluar” [The Government Regulation on Well-known Trademark is Issued Soon] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=114955 (22 March 2000)

Holder, Sara, above n76 at 56

The Jakarta Post.com (22 December 1999) above n76

Hasugian, Maria, above n896

⁹⁰⁶ Antons, Christoph, above n1 at 319

⁹⁰⁷ *Bisnis Indonesia* (16 September 1997) above n405

Antons, Christoph, above n238 at 345

stopped publishing pre-examined patent applications for public inspection. This situation had raised complaints from foreign patent owners who doubted the ability of the Office of the Director General of Intellectual Property Rights to administer the existing intellectual property laws effectively.⁹⁰⁸

Some NGOs in Indonesia argue that the adoption of the TRIPs Agreement is not in Indonesia's best interests. They urge the government a further delay of the enforcement of the TRIPs Agreement.⁹⁰⁹ Ms. Tini Hadad, the Chairperson of the Indonesian Consumer Foundation (YLKI), said that developed countries have abused the patent system for their own interests when they patent herbs and other aspects of bio-diversity already used in Indonesia since ancient times.⁹¹⁰ The YLKI also disagree with the grant of twenty years of patent protection for essential medicines, which are needed by poorer classes of consumers, arguing it violates the social function of medicine.⁹¹¹

Dr. I Made Titib, a Hindu Guru, in the Regional Seminar of Hindu Teaching held in Bali on 2 July 1997, condemned patents on living organisms. He argued that according to Hinduism, an inventor or patent owner could not own a living organism, because only God could own it.⁹¹² Mr. Insan Budi Maulana, also said that the Parliament had hastily passed the new *Patent Act* 1997 without having discussions about its provisions with religious experts and scientists specialising in genetics

⁹⁰⁸ *The Jakarta Post.com* (22 December 1999) above n76

⁹⁰⁹ *The Jakarta Post.com* (20 March 2000) above n822 at 1

Bisnis Indonesia (26 November 1999) above n799 at 2

⁹¹⁰ *The Jakarta Post.com* (20 March 2000) above n822 at 2

⁹¹¹ "Pelanggaran HAKI Akan Pengaruhi Ekspor" [Violation of IPR will Affect Export] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=109524 (11 January 2000) at 2
Bisnis Indonesia (26 November 1999) above n799 at 2

⁹¹² "Paten Kehidupan tidak Berdasar" [Patenting Living Organism is Baseless] *KOMPAS Online*, <http://www.kompas.com/9707/03/IPTEK/pate.htm> (3 July 1997)

and biotechnology. In a country with a strong religious life like Indonesia, to determine whether or not a patent protection would violate *ordre public* or morality, the government must refer to religious norms, not to criteria set by Western developed countries. Mr. Maulana gave examples of the Article 9 of the Saudi Arabian and Article 2(1) of the Oman *Patent Acts*, which exclude from patentability all inventions that could violate religious norms.⁹¹³

Another organisation, Forkom Pangan, demanded the government not to provide patent protection for inventions of food and beverages, as food technology is still underdeveloped in Indonesia. They warned of a loss of state income because of the flow of royalties to foreign patent owners of patented foods and beverages.⁹¹⁴

Many economists claim that in fact the economy of Indonesia has suffered by the adoption of the WTO Agreement that also includes the TRIPs Agreement. The World Bank suggests that the adoption of the TRIPs Agreement costs Indonesia US\$15 million per year,⁹¹⁵ not including the loss of its bio-diversity taken by multinational companies.⁹¹⁶ In return for the adoption of the WTO Agreement, including the TRIPs Agreement as demanded by developed countries, Indonesia has received very little from developed countries in international trade. Thus far, developed countries have not delivered on their promises given in the Uruguay Round, to liberalise their markets for textiles, agricultural products, and

⁹¹³ “Moralitas dan “Ordre Public” dalam UU Paten No 13 Tahun 1997 [Morality and “Ordre Public” in the Patent Act No 13 Year 1997] *KOMPAS Online*, <http://kompas.com/9706/02/EKONOMI/mora.htm> (2 June 1997) at 2

⁹¹⁴ “Forkom Minta Pasal 7 UU Paten Tak Direvisi” [The Forkom Demands Article 7 of the Patent Act not be Amended] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=11577 (3 January 1997)

⁹¹⁵ Jhamtani, Hira, above n897 at 2

services coming from developing countries, including Indonesia. The US only increases their imports of textile products by 1.30%, while the rate of increase in the EC is 3.15% and in Canada 0.70%.⁹¹⁷ Rather, they have aggressively increased the use of anti-dumping measures⁹¹⁸ and transitional safeguards on imported textile products and other commodities in an attempt to protect their markets. Agricultural products from Third World countries also face difficulties to enter the markets of developed countries because their agricultural products cannot compete with agricultural products from developed countries that are supported by government subsidies and better agricultural technologies.⁹¹⁹ Developed countries also do not provide significant market access for developing countries' service industries because such service industries are less qualified and professional than those existing in developed countries.⁹²⁰ Even after the adoption of the WTO Agreement, developing countries still face the threat of unilateral trade sanctions from developed countries,⁹²¹ especially the US, something that should not happen after the establishment of the WTO. Studies conducted by Goldin, *et. al.* in 1993 on behalf of the Organisation of Economic Cooperation and Development (OECD) and the World Bank found that Indonesia will suffer an economic loss of US\$ 1.9 billion per year, in which US\$ 15 million is attributable to

⁹¹⁶ “WTO, TRIPs, Paten, dan Mahalnya Harga Obat” [The WTO, TRIPs, Patent, and Expensive Drugs] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0005/012/IPTEK/wto07.htm> (12 May 2000) at 3

⁹¹⁷ “WTO Cenderung Merugikan Negara-negara Berkembang” [The WTO Tends to Disadvantage Developing Countries] *KOMPAS Online* (5 January 1998) at 2
“RI Bakal Sulit Dapat Tambahan Kuota TPT” [Will be Difficult for the RI to Increase the Export of Textile and Textile Products] *Bisnis Indonesia, Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=121684 (12 June 2000)

⁹¹⁸ “Posisi RI Kuat dalam Kasus Dumping Baja di AS” [The RI's Position is Strong in the Case of Steel Anti-dumping in the US] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=121677 (12 June 2000)

“RI Lobi Eropa Agar Tuduhan Dumping PSF Dibatalkan” [The RI Lobbies European Countries to Drop the Anti-dumping Measure on Polyester Staple Fiber] *Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=121781 (13 June 2000)

⁹¹⁹ *KOMPAS Online* (5 January 1998) above n917 at 2-5

⁹²⁰ Usman, Marzuki, above n844 at 5

the implementation of the TRIPs Agreement, if the results of the Uruguay Round are fully implemented in 2002.⁹²² The price of medicine in developing countries will increase from 5% to 67% as a result of the implementation of the TRIPs Agreement.⁹²³ With Indonesia deriving no tangible benefits from the adoption of the TRIPs Agreement, some NGOs in Indonesia urge the government to delay the full implementation of the TRIPs Agreement, until the public are prepared for and understand the implications of the enforcement of the TRIPs Agreement.⁹²⁴ Hira Jhamtani even suggested that the government and parliament should seek better alternatives to the TRIPs Agreement for the protection of intellectual property rights.⁹²⁵

After the severe economic crisis that hit Indonesia in 1998, intellectual property laws become even more difficult to enforce. The violation of intellectual property laws tends to increase.⁹²⁶ Goods with counterfeit trademarks, mostly garments, are sold openly in shopping malls.⁹²⁷

⁹²¹ *KOMPAS Online* (5 January 1998) above n917 at 2

⁹²² Goldin, et. al., *Trade Liberalisation: Global Economic Implications* (Paris: OECD/World Bank, 1993) as cited in “Kesepakatan Putaran Uruguay: RI Dirugikan Sekitar 1,9 Milyar Dollar/Tahun” [The Final Act of the Uruguay Round: The RI Loses Around 1.9 Billion Dollar/Year] *KOMPAS* (21 September 1994) at 1 and in “Putaran Uruguay dan Kita” [The Uruguay Round and Us] *KOMPAS* (26 September 1994) at 4

Goldin’s studies also found that trade liberalisation which reduces tariff and subsidies up to 30%, will benefit the US, EC and Japan together for US\$ 141.8 billion per year, China for US\$ 37 billion per year, and Singapore, Hongkong, Taiwan, South Korea together for US\$ 21 billion per year. At the same time, African countries will lose around US\$ 2.6 billion per year and Mediterranean countries will lose around US\$ 1.6 billion per year

Jhamtani, Hira, above n897 at 2

⁹²³ Jhamtani, Hira, above n897 at 2

⁹²⁴ *The Jakarta Post.com* (20 March 2000) above n822 at 1
KOMPAS Cyber Media (12 May 2000) above n916 at 5
KOMPAS Online (7 June 1997) above n903 at 1

⁹²⁵ Jhamtani, Hira, above n897 at 3

⁹²⁶ “Ekonomi, Motif Pelanggaran HAKI” [Economy, the Reason for Violation of IPR] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0006/04/UTAMA/ekon11.htm> (4 June 2000)
KOMPAS Online (13 February 1998) above n668 at 1

⁹²⁷ “Govt Told to Step Up Fight Against Copyright Infringement” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/iscp_render?/menu_name=hitlist_details&id=659231 (22 February 2000)

Pirated video and audio compact discs, and books are sold everywhere and openly.⁹²⁸ The Association of the Indonesian Sound Recording Industry (Asirevi) stated that pirated video compact discs (VCD) in Indonesia comprise 80% of the VCD market in 2000.⁹²⁹ Meanwhile, the Business Software Alliance in their report of 13 April 2000 stated that 97% of computer software sold in Indonesia is pirated. Indonesia has the highest piracy rate of computer software in South East Asia together with Vietnam.⁹³⁰ The economic crisis, in addition to weak law enforcement, has been blamed for the increasing incidence of piracy and counterfeit. Royalties on foreign works, which have to be paid in US dollar, have sharply increased the price of foreign works up to fourfold, because of the fall in the value of the Indonesian currency, the rupiah. An Indonesian collecting society, YKCI, admitted that some users, such as, private radio and television stations, have postponed the payment of royalties of the works they use because they cannot afford it after the economic crisis.⁹³¹

With the increasingly high prices of authorised products, consumers with diminished buying power prefer to buy cheaper pirated products,

“Potret Persepsi HAKI di Kawasan Blok M” [The Portrait of the IPR Perception in the Blok M Area] *KOMPAS Online*, <http://www.kompas.com/9709/12/HUKUM/potr.htm> (12 September 1997)

⁹²⁸ “Price the Selling Point for VCDs” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/iscp_render?/menu_name=hitlist_details&id=657747 (21 January 2000) at 1

“Trade in Pirated VCDs, CDs Unchecked by Laws” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/iscp_render?/menu_name=hitlist_details&id=657746 (21 January 2000) at 1

“Recording Industry still Tenuous in the Year 2000” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/iscp_render?/menu_name=hitlist_details&id=658135 (30 January 2000) at 2

“New Body Earnest in Their Fight to Stop Piracy” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/iscp_render?/menu_name=hitlist_details&id=658115 (30 January 2000) at 1

“Should RI Celebrate Copyright Day” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/iscp_render?/menu_name=hitlist_details&id=740432 (26 April 2000) at 2

⁹²⁹ “VCD Legal Hanya 20 Persen: Pembajakan di Indonesia Seperti Mafia, Mereka Rapi dalam Melakukan Kegiatannya” [Legal VCDs are Only 20 Percent: The Piracy in Indonesia is Like Mafia, Organised in Their Activities] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/2000/05/06/Ekonomi/ek01/ek01.html> (6 May 2000) at 1

⁹³⁰ “Indonesia Terparah Dalam Pembajakan Perangkat Lunak” [Indonesia is the Worst in Software Piracy] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0004/14/EKONOMI/indo14.htm> (14 April 2000)

irrespective of the inferior quality.⁹³² More people also engage in the trade of pirated goods. In Jakarta, there is a growing number of street vendors who sell cheaper pirated products.⁹³³ One of them said to a newspaper reporter that “[t]he economic crisis forces me to do this. I’d rather do this than steal . . .”.⁹³⁴ Other street vendors said that “. . . selling VCDs is the only job we can do to support our families.”⁹³⁵ The recent police raid to confiscate illegal VCDs, including pirated and pornographic VCDs,⁹³⁶ at Glodok shopping area, in West Jakarta on 13 May 2000 caused severe rioting, that reminded people of the mass unrest in Jakarta that brought down President Suharto in May 1998.⁹³⁷ Street vendors whose illegal VCDs were confiscated, together with street vendors of other goods, ran amok and pelted the police with stones. Thousands of other people then joined the street vendors, burning and looting several shopping malls and buildings in Glodok area, and damaged city facilities, including a number of traffic lights and flower boxes. The street vendors were upset because the police only targeted them, not the producers, wholesalers or distributors of pirated VCDs. They also did not want to lose their job as

⁹³¹ *KOMPAS Online* (13 February 1998) above n668 at 1-2

⁹³² *The Jakarta Post.com* (21 January 2000) above n928 at 2

“Glodok Rusuh: Kapendam, Nachrowi: Pasukan Kodam Jaya Siap Diterjunkan” [Glodok Unrest: Infantry Lieutenant Colonel Nachrowi: The Military District Army of Jakarta is Ready] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/2000/05/13/Utama/ut01/ut01.html> (13 May 2000) at 3

The Jakarta Post.com (26 April 2000) above n928 at 3

“VCD di Indonesia Termurah di Dunia” [VCDs in Indonesia are the Cheapest in the World], *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/2000/05/21/Jabotabe/ja02/ja02.html> (21 May 2000) at 1

⁹³³ *The Jakarta Post.com* (21 January 2000) above n928 at 1

“Pasar Terbesar VCD Bajakan” [The Biggest Market of Pirated VCDs] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0005/14/UTAMA/pasa01.htm> (14 May 2000) at 2

“Mungkinkah Menghilangkan VCD/CD Bajakan? [Is It Possible to Eradicate Pirated VCDs/CDs?] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0005/21/hiburan/mung19.htm> (21 May 2000) at 2

⁹³⁴ *The Jakarta Post.com* (21 January 2000) above n928 at 3

⁹³⁵ “Vendors of Pirated VCDs Say Police Raid was Unjust” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/isep_render?menu_name=hitlist_details&id=988787 (19 May 2000) at 2
KOMPAS Cyber Media (4 June 2000) above n926

⁹³⁶ Pornography is a crime in Indonesia, under Article 533 of the *Criminal Act*

vendors of pirated VCDs because it was the only job they could find during the severe economic crisis.⁹³⁸ One week after the riot that shocked the nation, on 21 May 2000, the street vendors of illegal VCDs had returned to the same location. With the police around them to prevent another unrest, the street vendors sold cheap pirated VCDs again, openly.⁹³⁹ Police Lieutenant Colonel Zainuri Lubis, the Head of the Information Division of the Local Policy of Jakarta City, said that in certain circumstances, the protection of the public interest must take priority over law enforcement.⁹⁴⁰ However, the availability of pirated pornographic VCDs has changed since the raid. Since the raid, the street vendors have drastically reduced their stock of pornographic VCDs and sold them only secretly.⁹⁴¹ It has been more difficult to obtain pornographic VCDs, largely due to public condemnation of pornography.⁹⁴²

⁹³⁷ “Police Shift Blame for Glodok Raid” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/myrend...article_details&id+815397&category_code=j (15 May 2000) at 1

⁹³⁸ *The Jakarta Post.com* (15 May 2000) above n937 at 2

“Kerusuhan Mei 1998 Nyaris Terulang” [The May 1998 Riot is Almost Repeated] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0005/14/utama/keru01.htm> (14 May 2000) at 4

Suara Pembaruan Daily (13 May 2000) above n932 at 3

The Jakarta Post.com (19 May 2000) above n935 at 1-2

“Pirated VCD producers should be tried: Judge” *The Jakarta Post.com*, http://www.thejakartapost.com:8890/isep_render?menu_name=hitlist_details&id=988789 (19 May 2000) at 2

“Polisi Tahan Delapan Orang setelah Glodok Rusuh: Reaksi Massa Harus Dipertimbangkan” [The Police Arrest Eight People after the Riot in Glodok: The Mass Reaction must be Considered] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/2000/05/14/Utama/ut01/ut01.html> (14 May 2000)

“Razia di Glodok Dilakukan Tanpa Koordinasi” [The Glodok Raid was without Coordination] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0005/14/UTAMA/razi01.htm> (15 May 2000)

⁹³⁹ “Dijaga Polisi, Pedagang VCD Beroperasi” [Surrounded by the Police, the VCD Street Vendors are back to Business] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0005/21/UTAMA/dija02.htm> (21 May 2000)

“Pedagang VCD Diizinkan Kembali Berjualan di Harco-Glodok” [VCD Street Vendors are Allowed to Do Trading in Harco-Glodok] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/2000/05/23/Jabotabe/jb06/jb06.html>

⁹⁴⁰ *KOMPAS Cyber Media* (21 May 2000) above n939

⁹⁴¹ *Ibid*

⁹⁴² *The Jakarta Post.com* (21 January 2000) above n928 at 3

The enforcement of intellectual property laws has always been weak before and after the Glodok riot. Both the police and the courts fail to implement the intellectual property laws strictly. The police occasionally raid trade centers of pirated and counterfeit products but this might only be a demonstration designed to quell the outcry of foreign intellectual property owners.⁹⁴³ There is rarely further action conducted by the police to take suspects, either individuals or institutions, to the courts.⁹⁴⁴ In fact, the police never arrest producers and distributors of pirated and counterfeit products, partly because some of the police have been bribed by the producers and distributors. The spokesman of the West Jakarta District Court, Mr. Sri Handoyo, explained that the district court had tried many cases involving pirated VCDs, but the court only tried and prosecuted street vendors selling pirated VCDs, never the producers or key distributors. The court itself did not impose stiff sentences on the convicted street vendors of pirated VCDs.⁹⁴⁵ It is clear that both the court and the police have been reluctant to enforce intellectual property laws strictly.

Therefore, many legal experts are skeptical about the establishment of the Supreme Court's new special council on intellectual property rights. Mr. Luhut MP Panggaribuan said that the establishment of the council was only a reactive approach to the international pressure. He said that there were other more important matters for the Supreme Court to deal with than to establish the council. Mr. Bambang Widjojanto, the Chairman of the Indonesian Legal Aid Foundation (YLBHI) agreed with Mr.

⁹⁴³ *The Jakarta Post.com* (21 January 2000) above n928 at 1
“Penegakan Hukum di Bidang HAKI” [The Law Enforcement in IPR Law] *KOMPAS Cyber Media*,
<http://208.150.216.210/kompas-cetak/0005/22/OPINI/pene45.htm> (22 May 2000) at 5

⁹⁴⁴ *The Jakarta Post.com* (26 April 2000) above n928 at 3

⁹⁴⁵ *The Jakarta Post.com* (21 January 2000) above n928 at 1
The Jakarta Post.com (19 May 2000) above n932 at 1-2

Panggaribuan's opinion.⁹⁴⁶ In fact, after the extremely turbulent year both politically and socially in 1998 and after the formation of a new government under President Abdurrahman Wahid in 1999, intellectual property rights are no longer regarded as an important issue.⁹⁴⁷ Many non-essential law reforms, including intellectual property law reforms, have been deferred.⁹⁴⁸ The Indonesian people need other laws that represent their interests, but suppressed under the Suharto government, such as, the establishment of a human rights court, anti-monopoly laws and consumer protection laws. In December 1999, the Indonesian media largely did not report the presentation of the bills on industrial designs, integrated circuits and undisclosed information to the House of Representatives. Instead, the media gave attention to the presentation of the bill establishing a human rights court, which was presented to the House of Representatives at the same time as the presentation of the three intellectual property bills.⁹⁴⁹ In a country where human rights have often been violated, where corruption is rampant,⁹⁵⁰ where the population is rising out of control, where public health is under resourced, where education is backward, where public transportation does not function⁹⁵¹, and where welfare reform is in its infancy, intellectual property

⁹⁴⁶ Khouw, Ida Indawati, above n873

⁹⁴⁷ Holder, Sara, above n76 at 56

Hasugian, Maria, above n896 at 1

“Pemerintah Dinilai Lamban Mengantisipasi TRIPs” [The Government is Slow to Anticipate the TRIPs] *Bisnis Indonesia, Bisnis Indonesia*, http://www.bisnis.com/bisnis/owa/artikel.preview?cookie=2&inw_id=109206 (4 January 2000)

⁹⁴⁸ Holder, Sara, above n76 at 56

⁹⁴⁹ *The Jakarta Post.com* (22 December 1999) above n76 at 2

⁹⁵⁰ “Korupsi di Indonesia Paling Parah di Asia” [The Corruption in Indonesia is the Worst in Asia] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/0003/23/utama/koru01.htm> (23 March 2000) at 1

“Survei: Polisi dan Pengadilan RI Terburuk di Asia” [Survey: The Police and Indonesian Courts are the Worst in Asia] *Republika Online*, <http://www.republika.co.id/9708/06/06XINDO.01-.html> (6 August 1997)

⁹⁵¹ “Pertanggungjawaban Moral atas Kecelakaan KA: Dirjen Hubdar Mundur” [The Moral Responsibility on the Train Crash: The Director General of the Land Transportation is Resigned] *Suara Pembaruan Daily*, <http://www.suarapembaruan.com/News/2000/05/02/Utamaut01/ut01.html> (2 May 2000)

legislation is clearly not seen as a priority by the new government and parliament.⁹⁵²

In late December 1999, the Indonesian government notified the WTO that it would be unable to fully implement the provisions of the TRIPs Agreement by 1 January 2000, as they had committed to in 1994.⁹⁵³ The reason given by the government was that the government could not work to establish laws complying with the TRIPs Agreement in the current political, economic, and national security climate prevailing in Indonesia.⁹⁵⁴ They also said that many other developing countries had also failed to meet the deadline of 1 January 2000 to fully implement the TRIPs Agreement.⁹⁵⁵ The March 1999 market survey conducted by the *Managing Intellectual Property* journal found that “Chile, the Dominican Republic, Egypt, Malaysia, Nigeria and all five Andean Pact countries were sailing close to the wind on the TRIPs deadline”. Even the Venezuelan government has asked for an extension to the 1 January 2000 TRIPs deadline.⁹⁵⁶ Critics claim that because of the condition of those countries, forcing and penalising them for not implementing the TRIPs reform is worthless. Providing funding and education to raise the awareness of intellectual property rights in those countries would be more helpful than threatening them.⁹⁵⁷

⁹⁵² Nurton, James, “The WTO’s Millennium Bug” (1999) 92 *Managing Intellectual Property* at 3

⁹⁵³ *The Jakarta Post.com* (22 December 1999) above n76 at 1

⁹⁵⁴ *Suara Pembaruan Daily* (28 December 1999) above n75 at 1

“UU Hak Cipta, Paten, dan Merek Diperbaharui” [The Copyright, Patent, and Trademark Acts are Amended] *KOMPAS Cyber Media*, <http://208.150.216.210/kompas-cetak/9912/20/berita-terbaru/5964.html> (20 December 1999) at 1

The Jakarta Post.com (22 December 1999) above n76 at 1

⁹⁵⁵ *The Jakarta Post.com* (22 December 1999) above n76 at 1

⁹⁵⁶ Nurton, James, above n952 at 3

C. Conclusion

The TRIPs Agreement has failed and will continue to fail to be implemented in Indonesia, because it is not consistent with Indonesia's social, economic and cultural situation and does not confer any clear benefit to most Indonesian people.

The TRIPs Agreement is difficult to implement in a country like Indonesia, where its people do not have a culture of intellectual property protection and are too poor to pay the high price of products protected by intellectual property rights. The TRIPs Agreement has been seen as a burden for the development of the Indonesian economy. Even the government has considered that the intellectual property law reform demanded by the TRIPs Agreement to be less important than the reforms in anti-corruption and anti-monopoly laws, human rights protection, and the political, economic and judicial system.

The First World governments and bodies, such as, the WTO, should take account of cultural, social, legal and economic differences between countries in the world, which affect the understanding of the necessity of intellectual property protection for each country. It is important to link intellectual property laws to the social realities and cultural values of societies in developing countries. The social realities and cultural values in developing countries could determine how and what kind of intellectual property laws the societies will enact. This linking approach could be more effective to secure the enforcement of intellectual property rights in developing countries like Indonesia, than a threatening or punitive approach. It could also boost the possibility that intellectual property laws may have some real impact on innovative and creative activities in

⁹⁵⁷ *Ibid*

developing countries, thus contributing to the economic welfare of the Third World.⁹⁵⁸

Finally, Indonesia needs understanding and education in intellectual property rights enforcement from developed countries, not the threats of trade sanctions. At the same time, Western developed countries should let the Indonesian government determine by itself, how and what kind of intellectual property laws are appropriate for the Indonesian people, based on the social realities, cultural values and economic objectives of Indonesian society.

⁹⁵⁸ Gana, Ruth L, above n467 at 115-116

CHAPTER VII

CONCLUSION

A. Introduction

This dissertation aims to analyse the reasons for the failure of intellectual property laws in Indonesia and to understand the problems underlying the difficulties of the implementation of these laws in Indonesia and finally, to recommend policies that are more appropriate for Indonesia in the implementation of intellectual property laws.

It is argued that intellectual property laws fail to be enforced in Indonesia because the laws do not suit Indonesia's culture and stage of development and are unable to benefit and fulfil the interests of the Indonesian people. To sustain the hypothesis, this dissertation has analysed the cultural, and socio-economic issues that underlie the failure of intellectual property laws in Indonesia.

B. Findings

Under the Suharto government (1966-1998), many law reforms were undertaken to promote economic development and political stability that could attract foreign investment and support export-oriented industrialisation. However, those law reforms often ignored the real interests and needs of the Indonesian people, and were made only to meet demands of foreign investors and countries that became Indonesia's major trading partners. One of those law reforms was intellectual property law reform.

Historically and culturally, most Indonesians still subscribe to *Adat* that does not recognise private ownership in intellectual works and regards community interests as more important than individual interests. The origin of intellectual property regime in Indonesia is not Indonesian society, but rather Western countries that have a different culture and different interests to Indonesia. Before independence, the Dutch colonial government enacted intellectual property laws, which were unenforceable for native Indonesians, because they already had their own customary law, called *Adat*. After independence, the Dutch intellectual property laws were automatically adopted by the new Indonesian government because of the transitional provisions of the Indonesian Constitution 1945 and the enforcement of intellectual property laws has continued until the present government, mainly because of the economic pressure from Western developed countries, Indonesia's major trading partners, and from international financial organisations, such as, the World Bank and the IMF, that require law reform conducive to foreign investment and international trade.

The first Indonesian patent law, the *Patent Act* No. 6/1989, was enacted not to fulfil the economic needs and objectives of the Indonesian people, but to meet the demands of foreign companies and economic pressures from Western countries, the US particularly. Even the Indonesian government admitted that the enactment of the *Patent Act* 1989 was not to promote innovation and technological development in Indonesia. A member of the Indonesian Parliament, Mr. Aberson Marle Sihalolo, who was involved in drafting the *Patent Act* said that the Act was urgently needed to accommodate foreign investors' requirements and to give business security to them. The Head Deputy of the Indonesian Academy of Sciences (LIPI), Mr. Kayatmo, admitted in a parliamentary hearing that the *Patent Act* was not needed in Indonesia for innovation purposes, but was needed to attract foreign investors who wanted protection for their works. This statement was similar

to what the Minister for Justice, Mr. Ismail Saleh said, namely that the new *Patent Act* would encourage foreign investment in Indonesia, as in the past foreign investors had complained about the lack of patent protection. Mr. Bambang Kesowo, from the State Secretary, argued that the enactment of the *Patent Act* in Indonesia was not concerned with the function of patents for technological development or patent protection, but with the politics of law.⁹⁵⁹

With this background, the *Patent Act* 1989, which resulted from Western countries' pressure, could not suit Indonesia's culture and stage of development. The Act, which was modeled after the patent laws in developed countries, was also not suitable for the poor judicial infrastructure and the understaffed as well as under-funded patent office in Indonesia. This caused the ineffectiveness in the enforcement of the *Patent Act* 1989.

The people's ignorance toward the *Patent Act* 1989 was also caused by the failure of the Act to address the needs of the Indonesian people for technological development and innovation incentives. Since the *Patent Act* 1989 came into force, patent ownership has been very predominantly foreign-based and technology transfer has been negligible. 95.38% of patent applications have been lodged by foreigners and only 1.61% of patent applications are lodged by Indonesian applicants.⁹⁶⁰ The *Patent Act* 1989 also failed to encourage multinational companies to transfer their technologies to their Indonesian counterparts, although the multinational companies had benefited from the *Patent Act* that granted patent protection to them. The minimal degree of transfer of technology means that individuals and corporations in Indonesia have been and remain strongly dependent upon

⁹⁵⁹ See Chapter III above at 65

⁹⁶⁰ Data 6 June 1997, above n165

foreign technologies with the accompanying need to pay high prices to get technological products.

The exception to this bleak picture of intellectual property protection in Indonesia is found in the area of trademark law. Trademark law is the only intellectual property law, which is relatively well established and accepted in Indonesia. Indonesian courts have developed case law in the field of trademark law that remains valid today. It is found that the first *Trademark Act 1961* was enacted in line with Indonesian culture and *Adat* that were based on the principle of communalism, namely, the protection of the public interest. According to the Preamble to the Act, the enactment of the *Trademark Act 1961* was designed to protect the Indonesian public from being misled by counterfeit goods. The Indonesian courts had also accepted and implemented this principle by developing case law that aimed to protect Indonesian consumers from misleading counterfeit goods and to protect owners of trademarks who acted in good faith. Under the *Trademark Act 1961*, trademark law became relatively well developed in Indonesia as it accommodated Indonesian culture and fulfilled the interests of the Indonesian people, namely, the interests of Indonesian consumers and trademark owners who acted in good faith.

Despite its good performance, the *Trademark Act 1961* could not satisfy foreign owners of well-known trademarks. They considered that the Act could not give protection to their well-known trademarks in Indonesia. As a result of economic pressures and the threats of trade sanctions from Western governments, lobbied by owners of well-known trademarks, the Indonesian government replaced the *Trademark Act 1961* with the *Trademark Act 1992*. Different from its predecessor Act, the *Trademark Act No. 19/1992* did not take account of Indonesian culture. The *Trademark Act No. 19/1992* no longer emphasised the protection of the public or consumer interest. To

accommodate pressure from Western countries that produced many well-known trademarks, the Preamble to the *Trademark Act* No. 19/1992 promulgated that the Act was enacted to protect trademarks. It meant that the rationale for trademark protection had shifted from the protection of the public interest to the protection of the interests of individual trademark owners.

It is found that the enforcement of the *Trademark Act* 1992 was ineffective. The Indonesian people ignored the Act. The police, even the courts were reluctant to enforce the Act strictly. They were hindered by their culture and the lack of Indonesia's interests in the *Trademark Act* 1992. Indonesian courts rarely imposed Article 6bis (3) of the *Paris Convention* that gave protection to well-known trademarks, which were always owned by foreigners. It seemed that they viewed it as not being in the interests of Indonesian consumers and entrepreneurs to give trademark protection to foreign owners of well-known trademarks. The courts never imposed the maximum penalties against counterfeiters unless their conduct clearly injured consumers. In the majority of cases, judges gave only probationary sentences to counterfeiters. The court's reluctance to strictly enforce the *Trademark Act* 1992 was underpinned by the fact that the Indonesian people were not benefited by trademark protection given to foreign owners of well-known trademarks. For example, every year at least 1.27 trillions rupiah (US\$ 18 million) was spent by Indonesians to pay the royalties of food franchise restaurants located in Indonesia. The owners of well-known trademarks often took advantage by charging high royalties from Indonesians who used their trademarks. They also commonly abused licensing agreements on trademark, made between them and Indonesian entrepreneurs. Moreover, owners of well-known trademarks, like "Nike", often ignored the welfare of their Indonesian

workers by paying them low wages, even at a rate below the standard set by the Indonesian government.⁹⁶¹

Unlike the previous *Trademark Act* 1961, the *Trademark Act* 1992 failed to be enforced in Indonesia because its original purpose was to serve the interests of foreign owners of well-known trademarks, not the interests of the Indonesian public.

In the case of copyright law, it had been a neglected area of Indonesian law until 1987. In 1958, the Indonesian government, under President Sukarno, withdrew Indonesia's membership in the *Berne Convention* that left Indonesians free to use foreign works, especially books that were greatly needed to improve the level of education in Indonesia. The Indonesian government argued that the poor situation of the Indonesian economy and education after independence from the Dutch colonialism, made Indonesia unable to fulfil its obligations under the *Berne Convention*.

In 1982, the Indonesian government replaced the *Auteurswet* 1912 with the *Copyright Act* 1982. The Act was deemed to represent the Indonesian culture, which balanced the community interests and author interests. However, during its enforcement, the *Copyright Act* 1982 did not have any importance in changing the copyright environment in Indonesia. Most Indonesian people, including artists, authors and law enforcement authorities were unfamiliar with the concept of copyright, as they were still influenced by *Adat* that did not recognise intellectual property rights. The courts considered piracy a crime and sentenced it with criminal penalties only if the piracy injured the public interest, rather than the author's interest.⁹⁶² Intellectual

⁹⁶¹ See Chapter IV above at 128-129

⁹⁶² Unreported decision of the District Court of North Jakarta, 11 April 1984 in the piracy case of the song "Apanya Dong". The decision was later upheld by the Appellate Court and Supreme Court.

works so far had not played an important role in developing Indonesia's economy, because Indonesia's economy relied more on sales of natural and manufactured products than intellectual works. Having no role in Indonesian development, copyright law became a neglected area in Indonesian law.

In 1987, the Indonesian government enacted the *Copyright Act 1987* to respond to the US threats of trade sanctions if Indonesia did not improve its copyright protection. To accommodate the demands of the US and EU countries, the *Copyright Act 1987* increased the duration of copyright protection to be in line with the common practice in Western countries. The scope of copyright protection was also extended to include products in which US industries mostly dominated the market. The enactment of the Act which was followed by ratification of several bilateral agreements improved copyright protection especially for US and EU works, like sound recordings, films, and computer software. In practice, the crack-down against copyright piracy was often only carried out after Indonesia was listed in the USTR priority foreign countries that were targeted for US trade sanctions. There was little or no genuine intention on the part of the Indonesian government to provide copyright protection, except to avoid trade sanctions which might be imposed by Western countries, especially the US

With this background, copyright law was difficult to enforce in Indonesia because of the profound incompatibility of the law with Indonesian culture, and with Indonesia's stage of economic and scientific development. There were also no sufficient copyright administration and law enforcement mechanisms to support the copyright law. Furthermore, the copyright law was found not to have significant effect on improving creativity, or research and development in Indonesia. In fact, many Indonesian works were decimated in the market by big budget and powerful products of the US and Western developed countries that were the main beneficiaries of the

Indonesian copyright law. For example, in the field of film, the threat of trade sanctions from the US has forced the Indonesian government to open the Indonesian market for US films and provide copyright protection to US films. In exchange for this, the Indonesian film industry is overwhelmed by the competition from Hollywood big budget movies. Since the early 1990s, the film industry in Indonesia has collapsed as it loses market shares to Hollywood movies. They are now only capable of producing less than five movies per year.

The ratification of the TRIPs Agreement in 1994 that culminated the intellectual property law reform in Indonesia also failed to improve the enforcement of intellectual property laws.

It is found that historically, the TRIPs Agreement was dominated by the interests of developed countries, the US particularly, in order to protect their intellectual property based industries and to correct their losses in international trade. To achieve this, developed countries tried to regulate the protection of intellectual property rights within the GATT rules. They believed that by linking the international trade regime with the enforcement of intellectual property standards, they could effectively force developing countries to provide better protection for their intellectual property based products that played a dominant role in their economic growth. In the Uruguay Round (1986-1994) they tabled their proposal for the TRIPs Agreement that would regulate the protection of intellectual property rights within the GATT rules.

Developing countries opposed the proposal and argued that the GATT's jurisdiction was limited to tangible goods only, and therefore, the GATT was not competent to regulate intellectual property protection. They also argued

that originally, intellectual property protection was a matter of public policy for each sovereign nation, and therefore, every country had their sovereign right to determine the level and scope of intellectual property protection.

However, developing countries, including Indonesia had a weaker position than developed countries during the TRIPs negotiations, because the US and the EC held an important bargaining chip, which was the liberalisation of their market for textiles, apparel and agricultural products imported from developing countries if they agreed on the TRIPs Agreement. Developing countries were also continuously threatened with unilateral trade sanctions if they refused to cooperate in the TRIPs negotiations. Therefore, at the end of the Uruguay Round, they agreed to the TRIPs Agreement as a bargained for exchange -for fairer trade rules in international trade and for protection from unilateral trade sanctions imposed by the US and other powerful industrialised Western countries.

The acceptance of the TRIPs Agreement, which was not based on a genuine commitment to give better intellectual property protection, could explain why the TRIPs Agreement fails to improve intellectual property protection in Indonesia. Other reasons for the failure of the TRIPs Agreement in Indonesia are the Indonesian culture and socio-economic condition that do not support the implementation of TRIPs. Besides that, many Indonesians are unfamiliar with the intellectual property idea and cannot see the benefit of the TRIPs Agreement for economic development.

Some economists claim that in fact Indonesia suffers significant losses by adopting the WTO Agreement, of which the TRIPs Agreement forms a part. Studies conducted by Goldin, *et. al.* in 1993 for the Organisation of Economic Cooperation and Development (OECD) and the World Bank found that Indonesia will suffer economic losses of US\$ 1.9 billion per year, of which

US\$ 15 million is directly attributable to the implementation of the TRIPs Agreement, if the results of the Uruguay Round are fully implemented in 2002.⁹⁶³ The price of medicine in developing countries, including Indonesia will increase from 5% to 67% because of the implementation of the TRIPs Agreement.⁹⁶⁴ Indonesia will also lose its bio-diversity heritage taken by multinational companies. But in return for their adoption of the WTO Agreement, including the TRIPs Agreement, Indonesia has received very little from developed countries in the international trade. So far, developed countries have not delivered on their promises given in the Uruguay Round to liberalise their markets for textiles, agricultural products, and services from developing countries, including Indonesia. On the contrary, they have aggressively increased the use of anti-dumping measures and transitional safeguards on imported textile products and other commodities in an attempt to protect their markets. Indonesia and other developing countries also still face threats of unilateral trade sanctions imposed by developed countries, especially the US, which should not be occurring following the establishment of the WTO.

When Indonesia was hard hit by political and economic crisis in late 1997, the implementation of the TRIPs Agreement becomes a real burden for the Indonesian people. Expensive medicine because of high royalties has made millions of Indonesians unable to receive proper medical treatment. The plunge of the value of the Indonesian currency because of the economic crisis has diminished the buying power of the Indonesian people to buy authorised but expensive works. They cannot help buying pirated and counterfeit products, like books, cassettes, compact discs, VCDs, garments, sold in the street by people who lose their job because of economic crisis and consider selling pirated products as the only job they can have after the crisis.

⁹⁶³ Goldin, et. al., above n922

⁹⁶⁴ Jhamtani, Hira, above n897 at 2

Facing reality, the new government that replaced the Suharto regime gives intellectual property law reform a low priority on their social and economic development policy agenda. They consider the establishment of a human rights court, the enactment of anti-corruption, anti-monopoly, and consumer protection laws, the improvement of public health, transportation, and education system as more urgent and important for the Indonesian people than intellectual property law reform. In December 1999, one month before the deadline for full implementation of the TRIPs Agreement, the new Indonesian government notified the WTO that they could not implement the TRIPs Agreement because of the political, security and economic crises that Indonesia is experiencing.

C. Recommended Policy in Implementing Intellectual Property Laws

A number of policy implications that flow from the findings of this dissertation could be recommended for the implementation of intellectual property laws in Indonesia.

Intellectual property laws must be drafted in accordance with Indonesia's culture, including *Adat*, and consistently with Indonesia's stage of economic and technological development. The laws must also be able to benefit and fulfil the interests of the Indonesian people. Otherwise, the people's ignorance toward intellectual property laws will continue, and the intellectual property laws will remain difficult to be enforced in Indonesia.

Regarding patent law, it will not benefit Indonesians unless Indonesia has reached a certain stage of development where it has the potential to develop internationally important innovations that have competitive value in the world market. In the early stages of its industrial growth, Indonesia wants to

be able to freely imitate imported technologies. It has been found that when the rate of imitation declines because of the global strengthening of patent system, the global rate of innovation slows as well. As Indonesia develops and patent protection becomes economically advantageous, they will develop their patent system and give protection to other countries' patents even without the need for economic pressure or trade sanctions. This situation also occurred in Western developed countries, where they used to infringe patents and gave patent protection only when they had been able to produce internationally important innovations.

Until Indonesia reaches that stage of development which is supported by a strong judicial infrastructure, patent law will actually have detrimental effect on Indonesia's technological and economic development, as the costs associated with patent law are too high for the Indonesian people to get important technological products and to develop technology in Indonesia. For example, patent protection for foods, plant and animal varieties, and pharmaceuticals might cause welfare losses to the Indonesian people. This will make patent law be regarded as contrary to Indonesia's cosmic and communal philosophy which emphasise the protection of the public interest rather than individual interest. The patent law will also have detrimental effect to Indonesians when the foreign companies in Indonesia, which are benefited by patent law, abuse the law to prevent transfer of technology to Indonesian industries and make them dependent on foreign technology.

With different cultural background and different levels of economic as well as technological development to those of Western countries, Indonesia and other developing countries should be given the freedom to draft patent laws that suit their conditions and needs. This is the way to make patent law benefit the people.

Regarding trademark law, under the *Trademark Act* 1961, it became the only intellectual property law in Indonesia that was relatively well established and could be accepted by Indonesians. This was because the trademark law was consistent with the communal culture of Indonesia that emphasised the need to serve the public interest, namely to protect consumers from misleading counterfeit goods.

However, the situation was different for the *Trademark Act* 1992 that replaced the Act 1961. The *Trademark Act* 1992 was relatively unenforceable. Some reasons for this were because the *Trademark Act* 1992 was designed more to serve foreign interests than to serve Indonesian interests. Therefore, the Act brought greater benefits to foreigners who were owners of well-known trademarks, than to the Indonesian people. The *Trademark Act* 1992 was also not in line with Indonesian communal culture. Finally, the administration of the *Trademark Act* 1992 was hampered by an inefficient and poorly equipped Trademark Office.

It is recommended that trademark law be drafted in accordance with the interests of the Indonesian people and bring clear benefits to the majority of Indonesians. Otherwise, the law could impede the development of Indonesia's economy and exhaust Indonesia's capital. Sufficient judicial and administrative infrastructures in Indonesia are also needed to support the enforcement of trademark law.

Regarding copyright law, it does not have practical importance in Indonesia, as copyright law does not fit Indonesia's culture and level of development. Moreover, it is not consonant with the interests of Indonesians. Culturally, *Adat* does not recognise the concept of copyright as Western culture does. However, *Adat* does recognise the protection of works based on the ritual

sacredness and the precious value of the works, often due to an association with members of the royal family.

Copyright law becomes a neglected area of law in Indonesia because Indonesia has been unable to produce significant intellectual works worthy of international trade and copyright protection. Moreover, many Indonesian people, including authors, artists, and law enforcement authorities, are unfamiliar with the concept of copyright. Besides that, most Indonesians, because of the low standard of living, do not have economic capabilities to buy authorised but expensive works. The lack of a developed and efficient judicial infrastructure also hinders the implementation of copyright law in Indonesia.

Therefore, to be enforceable, copyright law must be drafted in accordance with Indonesia's own concept of copyright which is based on Indonesian culture. The law has to support Indonesian interests, not foreign interests. Besides that, copyright law must fit the level of economic and scientific development in Indonesia. An efficient and less bureaucratic judicial infrastructure will be essential for the enforcement of copyright law.

The failure of the implementation of the TRIPs Agreement in Indonesia should serve as a lesson for First World governments and bodies, such as, the WTO, to respect cultural, social, legal and economic differences between countries in the world which affect the understanding of the necessity of intellectual property protection for each country. It is important to link intellectual property laws to the social realities and cultural values of societies in developing countries. The social realities and cultural values in developing countries could determine how and what kind of intellectual property laws the societies will enact. This linking approach could be more effective to secure the enforcement of intellectual property rights in

developing countries, like Indonesia, than a threatening or punitive approach. It could also increase the likelihood that intellectual property laws may have a real impact on innovative and creative activities in developing countries, thus contributing to the economic welfare of the Third World.

Indonesia needs understanding and education from developed countries in relation to the enforcement of intellectual property rights, not threats of trade sanctions. But in the same time, Western developed countries should let the Indonesian government determine by themselves, how and what kind of intellectual property laws appropriate for its nation, based on the social realities and cultural values of Indonesian society.

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