

CHAPTER TWELVE

COPYRIGHT LAW REFORM AND THE INFORMATION SOCIETY IN INDONESIA

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HISTORY OF COPYRIGHT LAW AND ITS EXPANSION IN INDONESIA AFTER INDEPENDENCE

When Indonesia introduced a new Copyright Act in 2002,¹ copyright law in the country had an official history of 90 years, starting with the Dutch colonial *Auteurswet* of 1912 that was shortly after its enactment in the Netherlands extended to what was then the Netherlands East Indies.² However, unlike trade mark law, copyright law did not play a major role in the colony, dominated as it was by publishing houses domiciled in the Netherlands. After World War II, copyright law survived the transition to independence in 1949. It was translated into the new national language *Bahasa Indonesia* as *Undang-Undang Hak Tjipta* (literally: 'law on the right to a creation'). The terminology remained in spite of proposals from time to time to use the more literal translation of *hak pengarang* ('right of the author').³ However, the spirit of the time was not conducive to the realisation of the potential of the Dutch derived law. Indonesia was a poor developing country struggling to establish its

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¹ Law No 19 of 2002 Concerning Copyright.

² C Antons, 'The Development of Intellectual Property Law in Indonesia: From Colonial to National Law', IIC Vol 22 No 3/1991, 363.

³ JCT Simorangkir, *Hak Tjipta*, PT Gunung Agung, Jakarta, 1961, 27.

national identity and to reduce the remaining Dutch influence in economic and political life. Antagonism towards Dutch interests during a period of tensions over West Papua as the last territory still under Dutch control led in 1958 to a withdrawal from the Berne Convention. Indonesia resented the fact that it had not been invited as an independent nation to the Brussels revision of the Berne Convention during the ongoing independence struggle between declaration of independence in 1945 and recognition of independence by the Dutch in 1949.⁴ The government cited as reasons for the withdrawal from Berne the need to copy foreign books freely in the interest of education, the inappropriateness of membership in an international convention before the country even had a national copyright law, and the fear of recognising acts of the previous Dutch colonial government in connection with the West Papua conflict.⁵

However, Indonesian was a newly promoted national language based on what had been called *Bazaar Malay* during the colonial period,⁶ a language that had been used as *lingua franca* throughout the archipelago for the dealings of indigenous traders, whereas the language of law and the colonial businesses had been Dutch. The evolving nature of the Indonesian language, the lack of skilled translators and the turbulent political times all meant that, in spite of the intentions of the government, the absence of international copyright protection did not lead to a widespread translation and distribution of foreign works. This situation remained unchanged after the military took charge of the country's affairs in 1965 and former General Suharto became President in 1967. For fear of Communist, Islamic and separatist forces within Indonesian society, the so-called 'New Order' government of Suharto throughout its reign retained tight censorship rules that were scarcely conducive to the free exchange of ideas and the fostering of creativity that is the concern and official justification of copyright law. A leftover from this period is Art 17 of the current Copyright Act, which allows the

⁴ Ibid, 53.

⁵ Ibid, 56.

⁶ It was originally adopted at a youth congress of the independence movement in 1928 using the slogan "Indonesia, satu bangsa, satu bahasa, satu tanah-air" ("Indonesia, one people, one language, one mother land"), see B Dahm, *History of Indonesia in the Twentieth Century*, Praeger Publishers, London 1971, 66.

government after hearing the Copyright Council's opinion to prohibit the publication of works that it regards as being in conflict with government policies in the fields of religion, defence and state security, morals and public order.

Interest in copyright protection during the 1960s and 1970s remained within a limited group of individuals and lobby groups such as the Indonesian Publishers Association (*Ikatan Penerbit Indonesia - IKAPI*).⁷ During the 1980s, the situation began to change. In 1982, Indonesia replaced the colonial *Auteurswet* with a new national Copyright Act. The Act was largely concerned with the material classically afforded copyright protection, although it also extended copyright protection to performances, broadcasts and cinematographic works. In his explanation of the bill to the Indonesian parliament, Justice Minister Ali Said stressed the social function of copyright and the need to limit its scope in the public interest. This explained a drastic reduction in the term of copyright protection from 50 years in the colonial legislation to only 25 years in the new law. He further mentioned the local music industry as a potential beneficiary of the new legislation.⁸ The Act was swiftly criticised at national and international level for its short period of protection, its failure to specifically include computer software and its weak protection for foreign right holders. Many provisions in the Act also reflect the centralising and developmental policies of the Suharto government. There was, for example, a provision in the Act allowing the government to publish a copyright protected work "in the national interest", while another provision declared the government as the copyright holder of folkloristic material vis-à-vis foreigners.

The first amendment of the Copyright Act in 1987 deleted the controversial appropriation provision and included batik art, computer programs, video and sound recordings in the list of protected works. For most of the material classically afforded copyright protection, the revised Act extended the protection period to the life of the author plus 50 years, while for performances, broadcasts, video and cinematographic

⁷ JCT Simorangkir, *Undang-Undang Hak Cipta 1982 (UHC 1982)*, Penerbit Djambatan, Jakarta 1982, 10-11.

⁸ 'Keterangan Pemerintah di Hadapan Sidang Paripurna Dewan Perwakilan Rakyat mengenai Rancangan Undang-Undang tentang Hak Cipta', in: JCT Simorangkir, (above note 9), 189-193.

works, orally presented works, maps, sound recordings and translations and commentaries the protection period was extended to 50 years since first publication. Photographic works, computer programs and compilations remained protected for only 25 years since first publication.

Indonesia ratified the TRIPS Agreement in 1994, re-entered the Berne Convention in 1997 and was the first nation to ratify the WIPO Copyright Treaty in the same year.⁹ The subsequent 1997 revision of the Copyright Act redefined the terms of “publication” and “reproduction”; it introduced rental rights for films, computer programs and sound recordings, included computer programs among the literary works, and expanded the notion of compilations to include generally “other works resulting from transformations”. In a rather confusing regulation of protection periods, several works were mentioned twice: once on the list of protected works as being protected for life of the author plus 50 years, and again on a separate list which indicated protection periods of 50 and 25 years since first publication. Listed here were computer programs, cinematographic works, sound recordings, performances and broadcasts (50 years) and photographs and compilations and similar works (25 years). To make matters worse, performances, sound recordings and broadcasts turned up once more under a new chapter on neighbouring rights, again with slightly different protection periods.

In 2002, Indonesia replaced its Copyright Act of 1982 with completely revised legislation consolidating the two previous amendments of the 1982 Act in 1987 and 1997. In the reference to relevant legislation following the preamble, the legislation refers to the WTO-TRIPS Agreement, but not to the WIPO Copyright Treaty (WCT). The simple reason for this is that the TRIPS Agreement was introduced by legislation,¹⁰ but the WCT only by Presidential Decree.¹¹ However, the preamble mentions among reasons for the legislation Indonesia’s membership of “several international conventions/agreements regarding intellectual property rights in general and copyright in particular which

⁹ See <http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1066C> at 16 September 2007.

¹⁰ Law No 7 of 1994 concerning the ratification of the Agreement Establishing the World Trade Organization.

¹¹ Presidential Decree No 19 of 1997.

require further manifestation within the national legal system". The preamble to the explanatory memorandum of the Indonesian Government to the legislation is even more specific and mentions the TRIPS Agreement and the ratification of the Berne Convention and the WCT.¹² The explanatory memorandum continues that the previous revisions of the 1982 Act had already brought various provisions into line with the TRIPS Agreement, but that the legislation needed further improvement "to foster the development of works that result from the diversity of art and culture" in Indonesia. There were further provisions in the conventions that should properly be applied. Apart from that, it was necessary to explain and distinguish more clearly the status of copyright on the one hand from that of neighbouring rights on the other hand. As was pointed out above, the previous legislation was rather confused in this regard, in particular when it came to the protection periods for various types of "works". As will be explained in detail below, the new Act has redefined the publication and reproduction right, prohibited parallel importation, clarified the protection of rental rights and databases and introduced provisions on electronic rights information management, anti-circumvention measures and government licences and conditions for works using so-called high technology production tools, such as optical disks.

The introduction of the new Copyright Act came at a time when Indonesia was preoccupied with solving its political problems. In publicising details of the new Act, the Indonesian media largely focused on piracy of computer software¹³ and optical disks, as this was at the forefront of international criticism of Indonesia's copyright law. Enforcement efforts were concentrated on optical disk piracy in particular. Government Regulation No 29 of 2004 regarding high technology production facilities for optical disks was promulgated. The

¹² For an Indonesian text of the Copyright Act that integrates the explanatory memorandum see Tim Redaksi Tatanusa (eds), *7 Undang-Undang: Rahasia Dagang, Desain Industri, Desain Tata Letak Sirkuit Terpadu, Paten, Merek, Hak Cipta, Perlindungan Varietas Tanaman*, PT Tatanusa, Jakarta 2005, 293-355. For English translations of the Copyright Act see Yasmon Rangkyo Sati, *Laws of the Republic of Indonesia on Intellectual Property Rights*, shortcut gagas imaji, Jakarta 2003, 147-177; Yasmon Rangkyo Sati, *Indonesian Intellectual Property Directory*, shortcut gagas imaji, Jakarta 2006, 43-83.

¹³ See for example 'New copyright law to boost local software industry', *Jakarta Post*, 20 September 2002.

International Intellectual Property Alliance has criticised the Regulation as deficient, but has noted progress in enforcement.¹⁴ Prospects for more efficient enforcement were further strengthened with the formation of an IP Task Force by President Susilo Bambang Yudhoyono in March 2006.¹⁵ In addition, the transfer of most of the jurisdiction in intellectual property matters to a Commercial Court specialising in bankruptcy and intellectual property matters has raised the quality of court decisions and the speed with which cases have been decided.¹⁶ A first volume of intellectual property decisions of the Commercial Court was published in 2005.¹⁷ A closer examination of this case material reveals, however, that most cases concern overlaps between copyright and industrial property protection. Therefore, isolated cases involving copyright issues are also published in compilations of trade mark cases.¹⁸ The implications of the new Act for the internet industries are as yet little discussed or tested in the courts. At the international level, Indonesia acceded to the 1996 WIPO Performances and Phonograms Treaty in 2004.¹⁹

INTERNET TRADE, DIGITAL WORKS AND PARALLEL IMPORTS

It is in the preamble to the explanatory memorandum, but not in the actual legislation, that we find the fundamental principle of copyright as restated in Article 2 WCT that copyright extends only to expressions and not to ideas. Earlier versions of the Indonesian copyright legislation

¹⁴ International Intellectual Property Alliance (IIPA), *2007 Special 301 Report: Indonesia*, 276, 279, 281-283, 288-289.

¹⁵ Presidential Decree No.4 of 2006 on the Establishment of the National Task Force for Intellectual Property Rights Infraction Prevention, see IIPA, above note 16, 283-284.

¹⁶ See C Antons, 'Specialised Intellectual Property Courts in Southeast Asia', in: A Kur, S Luginbühl and E Waage (eds), *"...und sie bewegt sich doch!" – Patent Law on the Move*, Berlin 2005, 287-299.

¹⁷ Tim Redaksi Tatanusa, *Himpunan Putusan-putusan Pengadilan Niaga dalam Perkara Hak Cipta*, PT. Tatanusa, Jakarta 2005.

¹⁸ For details see footnote 28.

¹⁹ Presidential Decision No 74 of 2004, published in *Lembaran Negara Republik Indonesia* 2004 Mo 93.

conveyed the impression that there was less emphasis than in Anglo-American jurisdictions²⁰ on the requirement that a work must have found a permanent form and that Indonesia was, in this regard, following Continental tradition.²¹ Art 12(3) of the current Act, however, requires that the work already appears in a unified form that can be perceived and that allows the reproduction of the work. Art 2 of the Copyright Act grants the author or copyright holder the exclusive right to publish or reproduce the work. Publication is further defined in Art 1 No 5 as the “reading, broadcasting, exhibition, sale, distribution or dissemination of a work, by utilising whatever means including the internet, or by any manner so that such work is capable of being read, heard or seen by another person”. That this definition is meant to include the right of communication to the public required by Article 8 of the WCT can be collected from the explanatory memorandum of the Indonesian Government to Art 2(1) of the Copyright Act. According to the memorandum, the terms “to publish and to reproduce” have to be understood as including the activities of “translating, adapting, arranging, transforming, selling, renting, borrowing, importing, exhibiting, showing to the public, broadcasting, recording and communicating the work to the public by using any means”. That reproduction of a work can also occur in transient form can be concluded from the definition of “reproduction” in Art 1 No 6. According to the definition, reproduction is the “increase in the number of works, either as a whole or in substantial parts by using either the same or different material, including its permanent or temporary transformation”.

As can be seen from the explanatory memorandum to Art 2(1) of the Copyright Act, although not covered in the Copyright Act itself, parallel importation of copyrighted works into Indonesia is prohibited, as it is included in the exclusive publication and distribution right of the copyright owner. When the new Copyright Act was discussed in the Indonesian Parliament, the issue of parallel importation did not become an issue. Indonesian commentators have attributed this to a widespread understanding among members of Parliament that parallel importation

²⁰ See W Cornish & D Llewelyn, *Intellectual Property: Patents, Copyright, Trade Mark and Allied Rights*, Sweet & Maxwell, London 2003, 404-406.

²¹ See L Wichers Hoeth, *Kort begrip van het intellectuele eigendomsrecht*, WEJ Tjeenk Willink, Zwolle 1993, 255-256; M Reh binder, *Urheberrecht*, 12th ed, CH Beck, Munich 2002, 78-79.

was equal to illegal importation.²² Pressure by US industry associations and a mistaken interpretation of the TRIPS Agreement with regards to the exclusive rights of the copyright owner are further reasons cited for the inclusion of parallel importation.²³ Equally important is perhaps that the issue is hidden in the explanatory memorandum to Art 2(1) of the Copyright Act and is not visible on the face of the legislation. Because the issue has so far not been raised in court and it is not quite clear how Art 2(1) of the Copyright Act will be interpreted by the courts, there is very little public awareness of the matter. Therefore, the situation in relation to copyright is very different from the question of parallel importation in patent law, which was much more intensively debated because of its impact on the price of pharmaceuticals and on public health.

Art 2(2) of the Copyright Act further grants the author and/or copyright holder rental rights for cinematographic works and computer programs. The explanatory memorandum of the government to Art 12(1)k further defines the category of “cinematographic works” and notes that despite the use of ‘old fashioned’ terminology,²⁴ this category of works is not confined to celluloid material. It includes cinematographic works on celluloid tape, videotape, videodisk, optical disk and/or other media that enable the material to be shown in a cinema, on broad screen, or its presentation on television or another medium. Works of this kind may be produced by film producing enterprises, television stations or by individuals. Rental rights for sound recordings were previously provided together with those for cinematographic works and computer programs (Art 2(3) of the amended Copyright Act of 1982), but are now protected separately in Art 49(2) in the chapter on neighbouring rights in accordance with the clear separation of neighbouring rights and copyright proper in the new Act.

Under the amended Copyright Act of 1982, the protection of databases remained somewhat insecure, although it was easy to argue that it was

²² M Hawin, *Parallel Importation in Selected Asian Countries: A Suggested Solution for Indonesia*, PhD thesis, TC Beirne School of Law, University of Queensland 2003 (on file with the author), 108.

²³ *Ibid*, 106-107.

²⁴ See W Cornish and D Llewellyn (above note 22), 400-401 on the shift in the UK from “cinematographic films” to simply “film”.

included in anthologies or compilations that were listed specifically as copyright protected.²⁵ The new legislation has now clarified the situation and indeed included databases in the same provision (now Art 12(1)l) among the translations, commentaries, adaptations “and other works resulting from transformations”. In the same provision, it is further explained that the compilation or database work is of course protected separately from its components, which may themselves attract copyright protection (Art 12(2)). While Indonesian copyright law requires originality in its definition of what constitutes a “work” (Art 1 No 3), the standard for this is low. The explanatory memorandum to the equivalent provision in the 1982 legislation (Art 1(a)) explained that “the creator must create something original in the sense that this creation does not constitute an imitation”, which is a faithful expression of the Anglo-American standard of originality. The low originality requirement is confirmed by the registration practices of the Copyright Directorate of the Directorate General of Intellectual Property Rights, which has also registered such things as wallpaper, wrappers, packaging designs and technical drawings,²⁶ leading to the famous copyright/design overlap problems with which lawyers in the common law world are all too familiar.²⁷ As for the “skill, judgment and labour” to be employed, what remains to be seen is whether Indonesian courts will follow the stricter views taken in cases such as *Feist Publications Inc v Rural Telephone Service*

²⁵ C Antons, ‘Indonesia’, in: C Heath (ed), *Intellectual Property Law in Asia*, Kluwer Law International, London 2003, 415-416.

²⁶ See in general on the question of originality in Indonesian copyright law C Antons, *Intellectual Property Law in Indonesia*, Kluwer Law International, London 2000, 58-61.

²⁷ See W Cornish and D Llewelyn (above note 22), 536, 538-540. For an example of a case concerning a technical drawing that crossed an entire range of intellectual property laws, see Commercial Court Central Jakarta No. 07/Merek/2002/PN.NIAGA.JKT.PST of 8 May 2002, ‘Eskade’, in: Tim Redaksi Tatanusa (eds), *Himpunan Putusan-putusan Pengadilan Niaga dalam Perkara Merek*, Volume 2, PT Tatanusa, Jakarta 2002, 177-211. The decision was later overturned by the Supreme Court, No 011K/N/HaKI/2002 of 30 September 2002, in: Tim Redaksi Tatanusa (eds), *Himpunan Putusan-putusan Mahkamah Agung dalam Perkara HaKI*, PT Tatanusa, Jakarta 2003, pp. 109-151 and the appeal decision was upheld after further review, Supreme Court No 02PK/N/HaKI/2003, in: Tim Redaksi Tatanusa (eds), *Himpunan Putusan-putusan Mahkamah Agung dalam Perkara HaKI*, Vol. 3, PT Tatanusa, Jakarta 2004, 285-308.

Co.,²⁸ in the US and Canada or the more liberal interpretation of the Australian Federal Court.²⁹

Statistics of the Association of Indonesian Internet Service Providers (*Asosiasi Penyelenggara Jasa Internet Indonesia - APJII*) indicate a steep increase in both internet subscription and internet use in Indonesia since 1998, though starting from a very low base. Subscriptions to the internet increased from 134 000 subscribers in 1998 to 1 087 428 in 2004 and an estimated 1.5 million in 2005. Over the same period, internet user numbers went up from 512 000 in 1998 to 11 226 143 in 2004 and an estimated 16 million users in 2005. Domain name registrations went up from 1 479 in 1998 to 21 762 in 2004. APJII further reported that 232 internet service providers were active in Indonesia in 2005.³⁰ Distribution of internet services, however, is very uneven. In 2003, more than 86% of telecommunication infrastructures were located on the three most densely populated islands of Java, Sumatra and Bali.³¹ Internet cafés have long been the most popular way to access the internet, but here again the distribution is highly uneven and about 50% of them are to be found in Jakarta.³²

The government has long been working on a draft bill on electronic information and electronic transactions and on a draft law covering criminal acts in the field of information technology. The draft law on criminal acts³³ in the field of information technology penalises a large number of activities that either make use of information technology

²⁸ 499 US 340 (1991).

²⁹ As to this distinction and the current situation in the UK, see W Cornish and D Llewelyn (above note 22), 392.

³⁰ See the statistics on <<http://www.apjii.or.id/dokumentasi/statistik.php?lang=ind>> at 30 August 2007.

³¹ The European Union's Asia IT&C Programme for Indonesia, *Promoting Internet Policy and Regulatory Reform in Indonesia – Assessment Report, February 2003: Status of Information and Communication Technology Development in Indonesia*, at <<http://www.internetpolicy.net/about/indonesia-assessment.pdf>> at 7 August 2007.

³² Onno W Purbo, *An Indonesian Digital Review – Internet Infrastructures and Initiatives*, UN Online Network in Public Administration and Finance, at <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN007779.pdf>> at 13 August 2007.

³³ A first version of the draft law was available at the following website: <<http://www.gipi.or.id/download/RUU-TiPITI-V.014.htm>> at 27 May 2004.

(chapter V) or that are targeted at information technology (chapter VI). Into the first category fall activities such as intercepting, hacking, distribution of pornographic material, identity fraud, and terrorist activities. The second category covers activities such as the damaging or destruction of encryption systems, the misuse of domain names and privacy violations. This part of the draft also contains a further provision penalising the violation of copyright by using information technology. The act must be an intentional violation of the law, which will attract penalties at least in accordance with the Copyright Act or, alternatively, the much higher penalties of at least five and a maximum of ten years in jail. The status of this draft is currently unclear.³⁴ If the draft is enacted, it will be interesting to see from the government memorandum what kind of cases the provision intends to cover and how precisely it will relate to similar provisions in the Copyright Act. The same is true for the draft law on electronic information and transactions,³⁵ an essential part of the Five Year Action Plan for the Development and Implementation of Information and Communications Technologies (ICT) in Indonesia, the Government of Indonesia's Action Plan to Overcome the Digital Divide.³⁶ It covers areas such as electronic transactions, domain names, privacy protection, bank and credit card fraud, but it again contains a few provisions that could partly overlap with provisions in the Copyright Act. A first version of the draft law, for example, included a prohibition against intentional and unauthorised acts that cause damage to state protected program transmissions, information, code or commands, computer and/or electronic systems. It foresaw private claims in the Commercial Court as well as criminal penalties of up to ten years jail and/or fines of up to 2 billion Rupiah. Apparently, the new government amended the draft further³⁷ and it was finally submitted to the

³⁴ IIPA, above note 16, 288.

³⁵ A first version of this draft law was obtained from the following websites: <<http://www.gipi.or.id/page.php/Halaman%20Depan/Rancangan%20Kebijakan/53.html>> at 27 May 2004) and <<http://www.kimpraswil.go.id/itjen/hukum/ruuite.htm>> at 3 June 2004.

³⁶ IIPA, above note 16. See also Instruksi Presiden Republik Indonesia Nomor 6 Tahun 2001 tentang Pengembangan dan Pendayagunaan Telematika di Indonesia, at <http://dikti.org/inpres_no_6_2001_telematika.htm> at 10 September 2007).

³⁷ IIPA, above note 16.

Indonesian House of Representatives (DPR) in July 2005³⁸ and had reached the Special Committee of the House by July 2006.³⁹

COLLECTIVE EXERCISE OF COPYRIGHT

Karya Cipta Indonesia (KCI) is the collecting society for musical works and performances in Indonesia. To date, there are no other collecting societies. KCI developed out of the Indonesian Recording Music Arrangers and Composers Association (PAPPRI), which decided to set up a collecting society in 1987. The society was set up in 1988 originally under the name INCOS (Indonesian Collecting Society), which was later changed to Yayasan Karya Cipta Indonesia (YKCI – Foundation for Indonesian Works) and finally simply to KCI. KCI became operative at an international level with the signing of a reciprocal agreement with the Dutch collecting society BUMA/STEMRA for the managing of each other's repertoire in early 1991.⁴⁰ Since then, KCI has signed similar agreements with collecting societies in 86 countries representing a very large number of foreign composers. Approximately 1500 Indonesian composers have registered their songs with KCI.⁴¹ KCI collects the rights for public performances and broadcasts, for the the mechanical reproduction by record companies, the so-called synchronization rights of visuals or graphics combined with music (as in video clips, movie soundtracks and Karaoke LDs) and for the printing of musical works, for example in books.⁴²

KCI approaches television and radio broadcasters, airlines and other transport companies, businesses such as shopping malls and offices, and entertainment venues such as hotels, bars, pubs, cafes, restaurants, karaoke bars, cinemas etc. KCI pursues a number of methods to

³⁸ See <<http://www.cybercrimelaw.net>> at 31 August 2007.

³⁹ See <http://i-policy.typepad.com/informationpolicy/legal_/index.html> at 31 August 2007.

⁴⁰ As to the history of KCI, see its website at <<http://www.kci.or.id/profile.html>> at 11 September 2007.

⁴¹ See <<http://www.kci.or.id/copy.html>> at 11 September 2007.

⁴² See <<http://www.kci.or.id/task.html>> at 11 September 2007.

calculate appropriate royalties and these methods may be based on the number of rooms in a hotel, a percentage of income from concerts, and a set percentage of royalties from businesses such as ring-tone providers. Following payment of fees, users are issued with a Music Usage License Certificate. The royalties are deposited in a trust account for further distribution to the copyright holders. KCI faces various difficulties, such as a lack of knowledge among users about obligations with regards to copyright. Users have difficulties understanding, for example, why they have to pay a further amount of royalties after they have bought a legal copy of a CD or a tape. Furthermore, the standard upon which the calculation of royalties is based is often disputed.⁴³ A tribunal similar to the Copyright Tribunal in Australia, Singapore or the UK seems to be needed. Such a mediating institution is also required by the licensing provisions of the Copyright Act. Art 45(4) states that the royalty that the licensee has to pay to the copyright holder will be agreed upon by the parties with the “guidance of a professional organisation”. Neither the Act nor the explanatory memorandum gives any indication as to what kind of organisation is meant. However, there is some hope that the Copyright Council, provided for in art. 48 of the Copyright Act and established originally by Government Regulation No 14 of 1986, could fulfil this role. The Copyright Council is a council of experts, whose main tasks under the legislation is to be heard in cases involving either compulsory licences for the translation and/or reproduction of works in the interest of education, science and research and development (Art 16), or the prohibition of works that contradict government policies in the field of religion, defence and state security, morals and public order (Art 17). Government Regulation No 14/1986, however, gives the Council general advisory and promotional tasks with regards to copyright, including to present “its thoughts and viewpoints for the purpose of settling a dispute upon request of the disputing parties” (Art 3 e of the Government Regulation No 14/1986).⁴⁴ Therefore, it is possible that the Copyright Council will be approached in the future for recommendations about royalties fixed by collecting societies such as KCI. Finally, it is important to note that according to KCI’s website, the

⁴³ Observations of KCI staff in communication with the author, November 2003.

⁴⁴ On the various roles and tasks of the Copyright Council in general see C Antons, (above note 28), 107-108.

earlier change of name from a collecting society for musical works to Karya Cipta Indonesia was undertaken with the vision that the society might one day also collect the royalties for other categories of works, with music, therefore, acting as a pilot project in this area.⁴⁵

THE LAW ON ANTI-CIRCUMVENTION AND DIGITAL RIGHTS MANAGEMENT

With an eye on Articles 11 and 12 of the WCT, the new legislation contains provisions regarding technological measures and rights management information. The unauthorised removal of electronic rights management information is prohibited by Art 25(1) as part of Chapter II, Part 7 of the Copyright Act, which deals with moral rights. The provision is brief and, as often in Indonesia, for further details refers to a yet to be issued Government Regulation (Art 25(2)). The International Intellectual Property Alliance (IIPA) reports in its 2007 Special 301 Report on Indonesia that the implementing Regulation was finalised in 2005,⁴⁶ but it is not yet available from the usually up-to-date website of the Directorate General of Intellectual Property Rights, indicating that it still has not been issued. If one scrutinises Chapters X and XI of the Copyright Act dealing with dispute settlements and provisional remedies, one finds claims for damages involving infringement of moral rights, but the infringement of electronic rights management information is not covered in this section. Civil remedies are, therefore, currently unavailable. However, criminal sanctions against the intentional removal of electronic rights management information are provided by Art 72(7). The penalties are a jail term of two years maximum and/or a fine of up to 150 million Rupiah.

Article 25 of the Copyright Act mentions with the actual removal or alteration of electronic rights management information, only the first of the prohibitions required by Art 12(1) (i) of the WCT and for which the WCT requires 'active and effective legal remedies'. Article 25(2) of the Copyright Act anticipates the issue of a Government Regulation in

⁴⁵ See <<http://www.kci.or.id/profile.html>> at 11 September 2007.

⁴⁶ IIPA, above note 16, 286-287.

regard to matters under Art 25(1). However, Art 12(1)(ii) of the WCT further requires remedies against the unauthorised distribution, importation for distribution, broadcast or communication to the public of works or copies of works with the knowledge (or in relation to civil remedies the reasonable grounds for knowledge) that electronic rights management information has been removed or altered. Interestingly, the matter contained in this second alternative of Art 12(1) of the WCT is not actually regulated in the Copyright Act, but is described as prohibited in the explanatory memorandum of the Indonesian Government to Art 25. Such matters as those listed in Art 12(1)ii of the WCT are apparently regarded as a variant of the removal of rights that is included in the activity prohibited by Art 25(1) and their regulation is also anticipated in 25(2). Quite clearly, however, the two alternatives deal with very different circumstances: on the one hand active removal of electronic information relating to right ownership (Art 12(1)(i) of the WCT), and on the other hand, the mere distribution etc. of material where such information has been removed by another (Art 12(1)(ii) of the WCT). While the explanatory memorandum to a piece of legislation fulfils an important role in Indonesian law and is regarded by judges almost as law in itself, this only holds true as far as it provides missing details or helps to explain the terminology of the provisions of the Act. Therefore, it cannot provide original regulations that are not contained in the Act itself. The confusion of the two alternatives in the explanatory memorandum to Art 25 of the Copyright Act is clearly a mistake and it means that the alternative contained in Art 12(1)(ii) of the WCT is currently unregulated in Indonesia. However, the draft Government Regulation reviewed by the IIPA for its 2007 Special 301 Report⁴⁷ includes the alternative of Art 12(1)(ii) of the WCT and this will settle the matter, once it is enacted.

The circumvention of technological measures for copyright protection that is the subject of Art 11 of the WCT is covered in Art 27 of the Indonesian Copyright Act. It is one of two provisions in a newly introduced Part 8 of Chapter II of the Act under the heading 'Technological Control Measures'. The provision states that, unless authorised by the author, technological control measures meant to safeguard his/her rights may not be damaged, removed or made to

⁴⁷ IIPA, above note 16, 287.

malfunction. As in the case of Art 25 of the Copyright Act, the sections of the Act covering civil remedies contain no reference to violations of Art 27 Civil remedies against the circumvention of technological measures for copyright protection remain, therefore, unavailable. Criminal sanctions are available under Art 72(8) of the Copyright Act. The penalty is the same as for the removal of electronic rights management information, namely imprisonment of up to two years and/or a maximum fine of 150 million Rupiah. The government memorandum to the provision gives as examples of such technological measures secret codes, passwords, bar codes, serial numbers and decryption and encryption technology. The memorandum continues that violating acts include the production, import or rental of any kind of equipment that is especially designed to remove measures for technological control or for the prevention and limitation of copying of a work. The IIPA believes that the provision needs to be more detailed and specific to fully comply with the WCT and the WPPT and has requested further implementing legislation.⁴⁸

The second provision under the heading of technological control measures relates to the problem of rampant optical disk piracy and is actually not primarily a technological but rather an administrative control mechanism. Article 28 of the Copyright Act states that works that use high technology production tools, in particular in the field of optical disks, must fulfil all regulations related to licences and conditions for the production, which will be issued by an authorised agency. The explanatory memorandum of the government to the provision explains further that conditional regulations for high technology production tools refers, for example, to permits related to the location of the production, the responsibility to keep record of the production, and to affix a sign recognising the producer on the product, and it refers further to taxes and tariffs and the fulfilment of conditions for inspections by the authorised agencies. As in the instance of Art 25 of the Copyright Act, Art 2(2) refers to a Government Regulation, which has been issued in the form of Government Regulation No of 2004. As in the case of the electronic rights management information and the anti-circumvention provision of the Act, only criminal remedies are available. The penalties,

⁴⁸ IIPA, 2002 *Special 301 Report: Indonesia*, 151; IIPA, above note 16, 287.

however, are much higher. Article 72(9) of the Copyright Act prescribes a maximum jail term of five years and/or a maximum fine of 1.5 billion Rupiah.

In summary, the new legislation provides criminal sanctions in cases of removal or destruction of technological devices and rights management information. Details will still have to be worked out via Government Regulations, at least with regards to the rights management information provision of Art 25. Neither the law nor the discussion so far has indicated how potential frictions concerning people seeking legitimate access will be resolved.

COPYRIGHT CONTRACTS AND PUBLIC POLICY

Contract law in Indonesia is still based on the Civil Code (*Burgerlijke Wetboek*) inherited from the Netherlands East Indies and it has changed little since independence. An assessment of shrink-wrap licences would, therefore, occur by applying similar principles as in Continental European jurisdictions. Accordingly, unless the licensing terms are clearly brought to the attention of the purchaser prior to the purchase, Indonesian courts are unlikely to find the coincidence of offer and acceptance that is necessary for the conclusion of a valid contract.⁴⁹ Click-wrap licences are in future likely to be covered also by the Electronic Information and Transaction Act, if this finally is enacted. The current draft law foresees detailed regulations on contracts concluded via the internet that complement general contract law, including provisions on offer and acceptance. The complementary character of the draft law finds its expression in a provision which states that commercial customs and practices not in conflict with the Act remain unaffected. Because of the ample time and opportunity given to licensees to read the conditions of click-wrap licences carefully before acceptance, it can be concluded that Indonesian courts will follow international practice and find no difficulties in accepting the validity of click-wrap licences from a contractual viewpoint.

⁴⁹ See S Gautama, *Indonesian Business Law*, Penerbit PT Citra Aditya Bakti, Bandung 1995, 81.

An additional requirement for licensing agreements in Indonesia is, however, that they must be recorded at the Directorate General for Intellectual Property Rights, where they shall be scrutinised for provisions that could be harmful to the Indonesian economy or lead to unfair business competition (Art 47(1) of the Copyright Act). Because the implementing Presidential Decree with details of the procedure is missing, this provision has been inoperative, although the Directorate General of Intellectual Property Rights has apparently accepted informal notifications, in particular in the context of joint venture agreements.⁵⁰ In any case, registration of the agreement is only required to make it effective vis-à-vis third parties (Art 47(2) of the Copyright Act). Under the principle of freedom of contract, the missing registration has no effect on the immediate contractual relationship between licensee and licensor, so that the typical home user of works downloaded after accepting a click-wrap licence would still be bound by the terms of the licence.

Since 1999, Indonesia has a Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.⁵¹ However, Art 50(b) of the Act expressly excludes from its scope “agreements connected with intellectual property rights such as licence, patent, trade mark, copyright, industrial product design, integrated electronic circuit, and trade secrets, and agreements related to franchising”.

⁵⁰ Winita E Kusnadar, ‘Post-Crisis Dilemma for Foreign Investors and Regulators’, *IP Review*, September 2004, at <<http://www.asialaw.com/default.asp?Page=20&PUB=68&ISSO=11138&SID=439665>> at 24 January 2005).

⁵¹ Law No 5 of 1999. For a detailed commentary drafted with assistance of the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) see K Hansen, P.W. Heermann, W Kartte, HW Micklitz, W Pfletschinger, FJ Säcker and H Sauter, *Undang-Undang Larangan Praktek Monopoli dan Persaingan Usaha tidak sehat – Law Concerning Prohibition of Monopolistic Practices and Unfair Business Competition*, GTZ/Penerbit Katalis, Jakarta 2002.

CONTRIBUTORY AND VICARIOUS LIABILITY FOR COPYRIGHT INFRINGEMENT

The only provision in the Indonesian Copyright Act of 2002 covering secondary liability is Art 72(2). This provision in the criminal part of the Act foresees penalties of up to five years jail and/or a maximum fine of 500 million Rupiah for anyone who “intentionally broadcasts, exhibits, distributes or sells to the public a work or goods resulting from an infringement of copyright or related rights”. It is difficult to conclude otherwise than that actual knowledge of the infringement is required here. This must be contrasted with Art 57, which specifically excludes civil remedies otherwise available in Art 56 of the Copyright Act, if the work is in the hands of a *bona fide* party that obtained the work exclusively for its own purposes and has no commercial interests.

COPYRIGHT LAW IN THE INDONESIAN COURTS

Most of Indonesia’s new intellectual property legislation, including the Copyright Act, has transferred responsibility for first instance cases from the general District Courts to the Commercial Court, a specialised subdivision of the District Court with exclusive responsibilities for intellectual property and bankruptcy cases.⁵² The transfer has increased the quality and speed of the decisions and the transparency of the decision-making process in intellectual property law, because a large number of cases have been published since the Court started to operate in 2002. However, most of these cases are related to trade marks.⁵³ If the

⁵² For details see C Antons, *Doing Business in Indonesia: enforcement of contracts in the general courts and the creation of a specialized commercial court for intellectual property and bankruptcy cases*, Attractivité Economique du Droit – Programme international de recherches, Working Paper AED-EAL-2007-4, available at <<http://www.gip-recherche-justice.fr/aed/publications/working-papers-sydney/04-Antons.pdf>> at 16 September 2007); C Antons, ‘Specialised Intellectual Property Courts in Southeast Asia’, in: A Kur, S. Lugnbühl and E Waage, above note 18.

⁵³ Tim Redaksi Tatanusa (ed), *Himpunan Putusan-Putusan Pengadilan Niaga dalam Perkara Merek*, PT Tatanusa, Jakarta, Vol 1 and 2 (2002), Vols 3 (2004), Vols 4, 5 and 6 (2005), Vols 7, 8 and 9 (2006) and Vol 10 (2007).

cases from the first volume of copyright decisions of 2005⁵⁴ are indicative of the use of copyright principles in Indonesia, then the Copyright Act seems frequently to be used to prevent the acquisition or enforcement of other intellectual property rights. Cases concerned the copyright ownership of logos,⁵⁵ a video licensing agreement,⁵⁶ the attempt to use the copyright registration of a technical description to protect a method of developing holograms for cigarette revenues stamps⁵⁷ or the copyright registration of a technical proposal submitted during a tender process.⁵⁸

CONCLUSION

In comparison with the previous legislation, the Copyright Act of 2002 is a significant step forward in the direction of the information society. It includes essential elements required by Indonesia's membership in the WCT and WPPT. However, as often is the case in Indonesia, further implementing decrees are necessary for some provisions to become operative. If Indonesia wants to move further in the direction of the information society, there are also many issues, other than copyright legislation, which must be addressed. Telecommunications infrastructure is still basic and unevenly distributed throughout the country, and it has proven difficult to overcome the monopolistic positions of the

⁵⁴ Tim Redaksi Tatanusa (ed), *Himpunan Putusan-Putusan Pengadilan Niaga dalam Perkara Hak Cipta*, above note 19.

⁵⁵ Decision of the Commercial Court of Central Jakarta of 3 February 2004, No.74/Hak Cipta/2003/PN.Niaga.Jkt.Pst., "Logo Trisakti", in: Tim Redaksi Tatanusa (ed), *Himpunan Putusan-putusan Pengadilan Niaga dalam Perkara Hak Cipta*, above note 19, 1-38; Commercial Court of Central Jakarta of 28 September 2004, No. 28/Hak Cipta/2004/PN.Niaga. Jkt.Pst., "Lambang/Logo Kesatuan Pelaut Indonesia (KPI)", *ibid*, 217-249.

⁵⁶ Decision of the Commercial Court of Central Jakarta of 15 March 2004, No. 81/Hak Cipta/2003/PN.Niaga.Jkt.Pst., "The Adventures of Tin Tin", in: Tim Redaksi Tatanusa (ed), above note 19, 39-109.

⁵⁷ Decision of the Commercial Court of Central Jakarta of 15 April 2004, No. 04/Hak Cipta/2004/PN.Niaga.Jkt.Pst., "Holgramisasi pada pita cukai tembakau/rokok", in: Tim Redaksi Tatanusa (ed), above note 19, 111-147.

⁵⁸ Decision of the Commercial Court of Central Jakarta of 7 July 2004, No. 05/Hak Cipta/2004/PN.Niaga.Jkt.Pst., "Deskripsi teknikal penggantian katalis (Catalyst Change Out) di kilang minyak Pertamina UP-IV Balongan", in: Tim Redaksi Tatanusa (ed), above note 19, 149-216.

traditional providers. Fundamental legislation necessary for electronic transactions is only slowly being developed. The frequent changes of governments have led to the redrafting of essential laws, so that Indonesia has yet to implement many of the measures foreseen in its 2001 Five-Year Action Plan.

