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Indonesia-Australia FTA Feasibility Study
Department of Foreign Affairs & Trade
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By email: Indonesia.ftastudy@dfat.gov.au

Dear Sirs

Indonesia – Australia FTA Feasibility Study

Thank you for the opportunity to comment on whether Australia should engage in a bi-lateral free trade agreement with Indonesia (the *Indonesian FTA*).

1. Who are we?

The Australian Recording Industry Association (**ARIA**) is the peak trade body for the recorded music industry in Australia. We have over 100 members ranging from the local affiliates of the four major international record companies through to significant Australian independent record labels and a substantial number of smaller Australian record labels.

Music Industry Piracy Investigations Pty Limited (**MIPI**) is the anti-piracy organization for the Australian music industry. It is a joint venture between the Australian recorded music sector (represented by ARIA) and the Australian music publishers (represented by the Australasian Mechanical Copyright Owners' Society Limited, **AMCOS**).

2. Support for the Indonesian FTA

We understand that on 27 July 2007, Australia and Indonesia agreed to commence a joint feasibility study to examine the merits of the Indonesian FTA. The feasibility study is to consider the prospects of the Indonesian FTA improving trade for both countries.

ARIA and MIPI strongly support the Indonesian FTA for the reasons set out in this submission. Given the nature of our organizations, we have addressed the issues of intellectual property (**IP**) protection and enforcement which are raised in the Department of Foreign Affairs and Trade *Indonesia-Australia FTA Feasibility Study, Background Paper for Industry Consultations* of 17 October 2007 (the **DFAT Paper**) that was circulated to us on 28 November 2007.

3. Music piracy rates in Indonesia

We believe that the Indonesian FTA presents a unique opportunity for Australia and Indonesia to address issues of IP protection and enforcement. IP is a critical issue given that Indonesia is considered a “priority country” by the International Federation of the Phonographic Industry (*IFPI*) in light of its music piracy rates and the exportation of Indonesian pirate discs to Australia.¹ Priority country status is based on three criteria, namely: the importance of Indonesia’s legitimate music market, local trends in piracy and the degree of action that the Indonesian government is taking to counter the problem. In 2006, the value of the legal music market in Indonesia was estimated at \$US 70 million and the number of pirate discs sold exceeded 170 million. Physical piracy rates in Indonesia are approximately 88 per cent and the physical piracy value was estimated at \$US 70 million.²

In particular, the IFPI Piracy Report states:³

Physical music piracy is endemic in Indonesia with rates at nearly 90 per cent. There are more than 40 CD plants in the country and nearly half of them are not even registered with the Ministry of Industry as required. At the same time, large numbers of illegally imported discs from Taiwan are in circulation in the country.

The government has shown it understands the problem at a conceptual level and is showing some promising signs of stepping-up enforcement. However, this has yet to translate into real changes on the ground...

Unfortunately, central government has barely begun to get a grip on the problem. Many of the agencies and departments that deal with the piracy problem fail to coordinate on their operations and initiatives.

The Ministry of Industry has been slow at monitoring pirate CD plants on the grounds and seems content to simply register and licence them – and only 24 plants are currently licensed.

The police however are stepping-up their anti-piracy activity in many areas. In late 2005 Jakarta police undertook raids against high-profile targets, such as the most notorious shopping malls and markets. In one day 800,000 discs were seized from two major malls.

In a concerted raid on street vendors in February 2006, the Polda Metro Jaya Police arrested more than 200 people on various copyright infringement charges and seized in excess of a quarter of a million discs of all formats.....

There is no doubt that Indonesia is a country wrestling with big problems... but there are signs that the authorities realize they need to clean up their act on IP.

As a result IFPI lists its key priorities in Indonesia as:⁴

- a. Improving the coordination between the various ministries and agencies involved in the fight against piracy;
- b. Increasing the role of the Ministry of Industry from mere registration to the enforcement of IP laws; and
- c. Working in conjunction with the industry when conducting raids on pirate optical disc plants to help secure evidence.

¹ IFPI, *The Recording Industry 2006 Piracy Report*, 2006, page 11 (the *IFPI Piracy Report*).

² *Ibid*, page 13.

³ *Ibid*, page 14.

⁴ *Ibid*, page 14.

Earlier this year, the International IP Alliance (*IIPA*) recommended that Indonesia remain on the United States “301 Watch List”, noting that US industry lost more than US\$ 205.2 million due to copyright piracy in Indonesia. They also stated that piracy rates in Indonesia remained among the highest in Asia and the world and noted significant exports of pirate discs to Australia, New Zealand, the United Kingdom and Europe. Piracy rates for 2006 were estimated to be 91 per cent.⁵

The 2007 Special 301 Report notes the following key concerns with Indonesia:

1. **Manufacturing over capacity** - There are 28 registered optical disc manufacturing plants and approximately 145 production lines in Indonesia. Total annual disc manufacturing capacity is conservatively estimated at 10,000 discs per machine, which equates to approximately 500 million discs per annum and up to 1 billion discs manufactured in Indonesia per annum. The legitimate Indonesian market is thought to be less than 15 million discs per year.
2. **Unauthorised preloading of mobile devices** – Music is being directly loaded onto handheld devices such as phones, memory sticks and recordable media particularly in retail malls in Indonesia. For example, in one retail mall, 80 stalls were offering such services.

4. Consequences for Australian trade and commercial interests

The exceedingly high levels of music piracy in Indonesia have real and dire consequences for the Australian music industry both in respect to the physical market for CDs and the legitimate digital music market.

In 1998, the Australian *Copyright Act 1968* (Cth) was amended to allow for the importation of CDs from other jurisdictions, on the condition that those CDs had been legitimately manufactured in the country of origin. Over the last ten years, the Australian Bureau of Statistics suggests that close to 150 million CDs have been imported into Australia.⁶ Of these approximately three million have originated directly from Indonesia. However, MIPI is of the view that this severely underestimates the total number of discs imported into Australia from Indonesia. This is because a large proportion of discs from Indonesia and other suspect territories are transshipped through other jurisdictions such as Singapore and even New Zealand in an effort to mask their origin.

MIPI is aware of increasing numbers of counterfeit Indonesia CDs being imported into Australia. However, due to the high quality counterfeit nature of these discs, it is extremely difficult for importers, retailers and consumers to detect pirate Indonesian discs. Indonesian counterfeit discs are being sold in Australian retail stores and by individuals including on online auction sites such as eBay. For example in early 2006, MIPI assisted one of its record company stakeholders with investigations into a large scale of importation of pirate Indonesian CDs by an Australian importer. The high quality CDs were being distributed through a discount Australian music retailer.

While it is inherently difficult to estimate the financial impact of any black market, IP theft in Indonesia is of great concern and has a large financial impact on the Australian music industry.

⁵ IIPA, *2007 Special 301 Report*, 12 February 2007, (the **2007 Special 301 Report**) pages 276-289.

⁶ This does not however include shipments of value less than \$1,000.

5. Advantages of the Indonesian FTA

The Indonesian FTA will enable Australia and Indonesia to address a number of key IP issues in Indonesia so as to enhance trade and investment opportunities for Australian businesses and corporations. Ideally, this could encompass a number of areas to address the piracy issues raised above, including improvements to:

- a. Indonesian Copyright laws;
- b. Border protection measures; and
- c. Optical disc regulations.

These are discussed further below.

A. Indonesian Copyright laws

The Copyright Law of Indonesia⁷ incorporates several core elements for the protection of sound recordings and musical works, including in digital formats. However there are a number of shortcomings that still need to be addressed to ensure that an effective level of IP protection is established in Indonesia.

In particular, amendments are essential to bring the Copyright Law of Indonesia in line with the WIPO Performances and Phonograms Treaty to which Indonesia became party in 2005. The lack of broadcasting and public performance rights in Indonesia practically means that Australian artists and songwriters lose revenue due to an inability to collect royalties for these important activities. We understand that a significant percentage of CD sales in Indonesia relate to foreign repertoire, suggesting that similarly there would be significant broadcast and public performance of foreign repertoire.

In order to achieve further compliance with treaty requirements and ensure that the Copyright Law of Indonesia implements modern copyright standards and effective enforcement of IP, the following amendments could be recommended as part of the Indonesian FTA negotiations:

- a. The catalogue of rights granted to owners should be updated to include a communication to the public right and a right to control distribution of copies;
- b. Protection for technological measures should be updated to include a prohibition against the making or dealing in circumvention devices;
- c. Protection for rights management information should be clarified;
- d. The potential liability for Internet Service Providers for infringements occurring over their networks should be clarified and a “notice and take-down” mechanism for removal of infringing content hosted on networks should be introduced; and
- e. The exception from liability for “own needs” should be narrowed.

Finally in terms of enforcement, one key issue that could be raised in the context of the Indonesian FTA negotiations is landlord liability for copyright infringement carried out by tenants. This issue remains unclear in Indonesia and is growing concern for IP enforcement given the degree to which copyright infringers are operating in complexes such as large shopping malls.⁸

⁷ Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (Copyright Law) effective 29 July, 2003.

⁸ Ridwan Max Sijabat, *Govt Revising Law on IP Rights*, Jakarta Post, 23 November 2006, page 9 as referred to in the 2007 Special 301 Report at page 287, footnote 26.

B. Border protections measures

Indonesia is currently without customs regulations, despite having amended the relevant legislation in 2006.⁹ The Indonesian FTA may provide a platform for Australia to assist Indonesia in the determining appropriate standards for customs and border protection for IP.

C. Optical disc regulations

As noted above, evidence suggests that Indonesia is an exporter of pirate music discs including to countries like Australia. While the Indonesian government has signed optical disc regulations which allow for the government to inspect, seize suspected pirate goods and tools and implements used to produce them, and to prosecute plant owners,¹⁰ they could ideally be augmented to:

- a. Incorporate a centralized licensing of blank media;
- b. Address illegal activity relating solely to stampers and masters;
- c. Prohibit the export of pirate discs, equipment or raw material;
- d. Expressly prohibit unlawful uses or manipulation of source identification codes for discs;
- e. Allow for forcible entry into optical disc manufacturing premises where appropriate;
- f. Require the government to maintain records of permits or raids conducted;
- g. Expressly provide for plant closures in appropriate circumstances; and
- h. Impose corporate liability on individuals.

6. Conclusion

Indonesia is a jurisdiction with music piracy rates above 90 per cent and large manufacturing over capacity for optical discs. There are also disturbing trends with respect to unauthorized pre-loading of mobile devices with illegal music files. In this context, the Indonesian FTA provides a unique opportunity for Australia to assist Indonesia in addressing some of the challenges it faces in respect of IP protection and enforcement, including in areas of copyright legislation, border protection measures and optical disc regulation. Augmented protection of IP in Indonesia will afford greater business confidence and consequently improve trade for both Australia and Indonesia companies and organisations.

If you need further information, please contact Stephen Peach of ARIA or Sabiene Heindl of MIPI.

Yours sincerely



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⁹ Law No. 17 of 2006 which amended Law No. 10 of 1995 on border and customs regulations.

¹⁰ *Government Regulation Number 29 of 2004 Concerning High Technology Protection Facilities for Optical Discs*, signed by outgoing President Megawati Soekarnoputri on 5 October 2004.