

DYSFUNCTIONAL IP INFRINGEMENTS AND INEFFECTIVENESS OF ENFORCEMENT MECHANISMS UNDER INDONESIAN LAW

Megawati Barthos, Universitas Borobudur
Rineke Sara, Universitas Borobudur

ABSTRACT

Indonesia is a member of the World Trade Organization (WTO), and has sanctioned the Agreement on Trade-Related aspects of Intellectual Property (TRIPs Agreement). It has also signed numerous World Intellectual Property Organization (WIPO) treaties including the Paris Convention, the Hague Agreement, the WIPO Copyright Treaty (WCT) and the Trademark Law Treaty. This requires that Indonesia's Intellectual Property (IP) legislation should be fairly comprehensive to offer IP protection of international standards to its foreign investors, patent seekers and to all types of trademarks and copyrights. This study carried out a qualitative study of all types of IP elements like patent, copyright, trademark and industry designs with a view to find out the shortcomings in the IP enforcement mechanisms in Indonesia that have led to lack of confidence among business houses and other stakeholders; limited venture capital; weak networks between investors; reduced FDRs and like. Even the domestic law related to IP has failed to prepare a ground for such international laws like criminal enforcement or customs border protection system. The study also found out that neither domestic courts nor any international arbitral tribunal could discuss such cases under their jurisdiction. The implications of this study are relevant to both the Indonesian government as an institution and individual investors.

Keywords: Intellectual Property Legislations, Dysfunctional Elements Foreign Investors, Business Conflicts.

INTRODUCTION

A major problem worldwide to enforce any IP legal framework still lies with poor, ineffective and inconsistent implementation of the domestic law. Indonesia is a member of the World Trade Organization (WTO), and has ratified the Agreement on Trade-related Aspects of Intellectual Property (TRIPs Agreement). Indonesia has also ratified the Paris Convention. This means that Indonesia's IP legislation is now comprehensive covering all aspects of protection of IP in accordance with international standards (OECD, WTO and World Bank, 2014). The Indonesian IP legislation has substantially been revised in recent years to bring it in line with regional and international IPR standards. In 2000, laws concerning the protection of new plant varieties (Law No. 29), trade secrets (law no. 30), industrial designs (Law No. 31), and layout designs of integrated circuits (Law No. 32) have been enacted and promulgated. In 2001, new laws on trademarks (Law No. 15) and patents (Law No. 14) were also enacted. In 2002, the new copyright law (Law No. 19) was issued. With support from a development project called ECAP II, in 2005-2007, Indonesia's legal IP framework was further enhanced with a new customs act

and a regulation for a patent attorney profession. An enforcement regulation of the law on trademark introducing Geographical Indications protection and registration was also passed. In addition, Indonesia started to work on a legislation to protect genetic resources, traditional knowledge and expression of folklore. The Indonesian Government is currently reviewing all its IP laws, in consultation with all stakeholders (UNCTAD, 2004; World Bank, 2008; WIPO, 2009; Gupta, 2004; Lindsey, 2009; Lybecker, 2014; Tom & Barbra, 2015; Al-Azab, 2016; Njagi et al., 2018).

In 2015, the Indonesian President established an independent government agency called “*Badan Ekonomi Kreatif*” (Creative Economy Agency: “*BEKRAF*”). The agency overviews sixteen creative industry sectors, namely music, crafts, publishing, fashion, culinary, advertising, movies, application software, games performing arts, video animation, architecture and interior design, fine art, photography, visual communication design, TV and radio and product design.

Despite all these amendments and reviews, IP rights enforcement in Indonesia is problematic because individuals fail to register their rights in order to defend themselves. Indonesia operates under a “*first-to-file*” system, meaning that the first person to file an IP right in the Indonesian jurisdiction will own that right once the application is granted. Moreover, Intellectual Property Rights are territorial in nature, which means that registrations in one country’s jurisdiction are not automatically enforceable in others, and therefore registrations in multiple countries may be necessary, particularly to internationalize a business (Hazrat, 2015; Baba et al., 2016; Dike & Dike, 2017; Muma, 2018). Setiati & Darmawan (2018) carried out case studies for ASEAN countries and found that the IP protections for countries like Indonesia has remain stagnant and there is a great need to revive their patent and trademark frameworks and find measures to tackle counterfeiting and copyright piracy. This study recommends improving both administrative and legislative enforcement mechanisms through developing more cooperation between government agencies and the private sector.

Objectives of the Study

There has been a lack of confidence among business houses and other stakeholders in Indonesia as reflected in issues such as limited venture capital; weak networks between investors and reduced FDRs. To a great extent, even the domestic IP law had failed to offer a strong regulatory support system for international IP laws.

Hence, the main objective of this study was to find out how Indonesian IP enforcement mechanism such as copyright, patents, industry designs and trademarks should be strengthened. It aimed at identifying any dysfunctional elements into these regulations that might create obstacles in their enforcement.

IP Mechanisms and Their Enforcement

Copyrights

Copyright means granting exclusive right to an author or the copyright holder to publish or reproduce their work. This right is granted immediately after the creation of the work. The kinds of works protected by copyrights law in Indonesia are in the field of science, arts and literature which principally includes books, computer programmes, pamphlets, visual aids made for educational and scientific purposes, typographical arrangements, lectures, addresses; songs

or music with or without lyrics, dramas, musical dramas, dances, choreographic works, puppet shows, pantomimes and all forms of art, such as paintings, drawings, engravings, calligraphy, carvings, sculptures, collage, and applied arts, as well as architecture and maps, including photography and cinematographic works, translations, interpretations, adaptations, anthologies, data-bases and other similar works (IIPA, 2017).

The Directorate of Intellectual Property ("*DGIP*") is responsible for the enforcement of Copyright Law which provides a wide range of provisions to improve copyright protection in the country including extension of duration of copyright protection and regulations of the activities of copyright use that shall be considered as infringement. In the case of litigation, the enforcement authorities still need to be satisfied that the IP right holder making the prosecution is in fact the rightful owner. However it can be problematic if the IP rights holder had not recorded copyright in Indonesia.

Patents

A patent is a right granted to the owner of an invention to prevent others from making, using, importing or selling the invention without his permission. A patent may be obtained for a product or a process that gives a new technical solution to a problem or a new method of doing things, the composition of a new product, or a technical improvement on how certain objects work. A new Patent Act in Indonesia was enforced on 28 August 2016 under which there is now a requirement to submit a "*Statement of Ownership*" of an invention, signed by the applicant, when filing a patent application. This requirement was already in place for trademarks and industrial designs, and so this amendment brings patent registration procedures in line with Indonesia standard practice (IIPA, 2017).

The Authority of Patent Appeal Commission was responsible to enforce the law and also examine appeal petitions of all types of patent related issues including correction of patent specification, claims, and/or drawings after the application has been granted. The Commission is also responsible for foreign grants, mainly because local examiners are still not equipped to undertake independent full search and examination. Such foreign grants should be from patent offices that are known to conduct independent examination, as this is rare practice in Indonesia.

Industrial designs

An industrial design means a creation on the shape, configuration, or the composition of lines or colors, or the combination thereof in a three or two dimensional form to give an aesthetic appearance or a pattern used to produce a product, good or an industrial commodity and handicraft. Industrial Designs need to be new when the application is filed. Where a design has already been disclosed to the market through production and sales, some IP owners try to protect their designs as copyright. In order to enforce the law related to industrial design, it is not clear whether using copyright is entirely defensible in this case, but a copyright recordal could strengthen the legitimacy to the IP owner's claim to rights in the design and could be considered as a possible strategy. An applicant must identify the design as strategic for the business and consider registering them under industrial design laws at the outset (IIPA, 2017).

Trade marks

A trade mark is a sign in the form of a picture, name, word, letters, figures, composition of colours, or a combination of these elements, used in trade to distinguish the goods and services of one trader from those of another. It is important to note that in Indonesia three-dimensional signs (shapes) were till date not recognized as trademarks under the law and were supposed to be registered under the Industrial Design Law if protection was required. Trade marks based on sound and smell were also not recognized. The new Trade Mark Law (2016) however contains such provisions on protection of non-traditional trademarks such as three-dimensional signs, hologram, sounds and smell. In addition, the new Trade mark Law also introduced provisions on the Madrid Protocol, allowing Indonesia to become party of the trade mark international registration system. The new law also accepted registrations for Geographical Indications (GIs) where such marks served to indicate the origin of goods from a certain location to enter into Indonesia. The party however entitled to register should have an institution representing the community in the area that would require those goods (Alqahtani, 2016; Fakunmoju & Bammeke, 2017; Basazinewu, 2018).

Dysfunctional Elements

There are several problems found in the enforcement of IP regulations in Indonesia. The first and foremost obstacle emerges when domestic judges are found not familiar with patent matters and relying heavily on the Patent Office for opinion on matters of infringement and invalidation (Sundaryani, 2015). This could be the reason why foreign patent holders are usually reluctant to litigate in Indonesia, particularly in cases where the patent owner faces the same adversary in several countries. Secondly, patent specifications must be translated into the local Indonesian language, but owing to translation errors and too literal translations the problem only compounds. Thirdly, there is an absence of procedures to correct errors once a patent is granted. Fourthly, patent records are not fully computerized and therefore full searches are never possible whenever an application is received. Searches can only be made into basic bibliographic data and abstracts of inventions, but not the complete specification. Last, but not the least, applicants do bother whether their new products infringed upon any valid and existing patents.

The dysfunctional elements may be classified under 4 heads: (1) Internet Piracy and Mobile Network Piracy (2) Book Piracy (3) Signal Theft (4) Retail piracy (Budidjaja, 2013; Djaic, 2000)

Internet piracy and mobile network piracy

There are numerous cases reported of cyberlocking and direct downloading sites with pirated harmful content into the Indonesian market, inhibiting the rights of legitimate IPR owners. Internet piracy ranges from gambling services, malware providers to sex and pornography sites, and offering pirated content to gullible users at a very low price. With the rise of broadband Internet access and WiFi services sharply rising, the situation has worsened. The Indonesian Government has so far failed to make any strong administrative enforcement against such infringing websites. The film and music industry alone reported that in 2015, approximately 34,705 infringing links were sent to Indonesia with a takedown rate of 86.73%. This Internet Piracy and Mobile Network Piracy can be stopped only by a strong implementation of law.

Book piracy

The piracy of published materials is one of the worst scenarios in Asian markets. To cite an example, piracy of academic textbooks is committed through unauthorized photocopying at retail shops near universities. While many of the shops often refuse to photocopy text books, a number of shops still continue to engage in unauthorized photocopying activities. The publication Industry has engaged with directors and deans of campuses to stop this piracy and not to allow photocopied books to be brought into the classroom. The Ministries of Education and Culture has also appealed to help stop the unauthorized photocopying and protect the rights of the copyright holders. Similarly, online piracy of dictionaries and journal articles is also becoming a problem in Indonesia.

Signal theft

Signal Theft or pay-TV piracy remains a problem throughout the Indonesian archipelago. Local industry reports that illegal television channels host up to 100 pirated films at a time. The increased online networks and improved digital technology has further aggravated this issue. The government has however failed to take actions against those engaged in the unauthorized trafficking, dissemination, decryption, or receipt of pay-TV or related devices/technologies. There also does not exist any separate law to support legitimate pay-TV services.

Retail piracy

Retail piracy in markets, kiosks, and malls remains a problem in the major cities across Indonesia. There are numerous retail distribution points engaged in a complex piracy and counterfeiting network. Unauthorized CDs and DVDs pervade the market for music, movies including those pirated movies in or claiming to be in Blu-ray format, and video games. Retail pirates also offer to load illegal copyrighted files on various mobile devices or carriers. In 2013, the Governor of Jakarta issued a decree that malls prohibit the sale of counterfeit and pirated materials on their premises (which was sent to the mayors of five municipalities of Jakarta), but the decree is not being enforced strictly and there are no consequences for non-compliance.

IP Enforcement and Legislation

IIPA (2017) has congratulated the Indonesian Government for passage of the Law Concerning Copyright (2014), which replaced the prior 2002 law and went into force in October 2014, and for Regulations Nos. 14 and 26 of 2015, which implemented key provisions of the law regarding online and digital forms of infringement, including provisions in line with Indonesia's international obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). However, some provisions raise serious concerns, while other provisions require further clarification in implementing regulations.

The IP Law and its enforcement in Indonesia also work under certain set guidelines and principles. Once an IP mechanism, a patent, copyright of a trademark has been registered, the enforcement mechanism automatically functions (Indonesian Law Reporter, 2009). For instance, in case of infringement, it ensures a continued enforcement of the Copyright Law under

Regulations Nos. 14 and 26 of 2015, such that there are effective actions against primarily infringing websites or individuals. The Enforcement Directorate ought to take step to combat the unauthorized trafficking, dissemination, decryption, or any other kind of misuse. It is supposed to have established resources, benchmarks, and specialized forces, where necessary, such as the National Police, the “*Penyidik Pegawai Negeri Sipil*” team, the Directorate of Special Crimes “(*Ditreskrimsus*)” and “*Type A*” Police Commands, prosecutors’ offices, and National IP Task Force. All cases are subject to judicial actions in Jakarta and other commercial centers where special IP criminal courts have been established. The enforcement environment in Indonesia was however improved in 2015 with implementation of the new copyright law and implementing regulations, leading to the shutdown of 25 major piracy sites, and the blocking of 22 pirate music sites in November of 2015. To ensure that there is a significant positive impact on online infringement, and to give legitimate online distributors the opportunity to increase their market share, the government successfully concluded additional enforcement rounds in 2016. Still, there is a need for the government agencies to establish regular and newer channels of communications for offering a remedy to all the affected industries (IIPA, 2017).

On the Legislative front, various regulations exist to curb infringement of IP mechanisms (Harding, 2002; Sriro, 2006; Laiman, 2009; Johnson, 2015; Sundaryani, 2015). For instance, Copyright Law Article 43(d) offers immediate repeal of copyright infringements. The Law ensures that copyright infringement is considered a predicate criminal offense (Indonesian Law Reporter, 2009). In 2015, a Joint Regulation of the Ministry of Law and Human Rights and the Ministry of Communications and Information Technology “(*Kominfo*)” was passed to implement the provisions of the Copyright Law, particularly addressing websites infringement. Under this new regulation, copyright holders can now report complaints electronically and/or by writing to “*Kominfo*,” for review by a verification team formed by the Director General of Intellectual Property. The verification team makes recommendations to the Director General of Informatics Applications for the partial or full shutdown of infringing content. “*Kominfo*” maintains a public database of all such targeted websites and till date has taken actions to shut down 25 illegal websites offering free movie-download services. Also, based on evidence collected from the music industry associations, “*Kominfo*” blocked 22 other infringing websites including “*laguhit.com*, *mp3days.com*, *weblagu.com*, *wapkalagu.com* and *iozmusik.com*” in Indonesia.

Additionally, the National IP Task Force, due to a voluntary efforts of Creative Economy Agency, film and music associations, Film Producer Association (APROFI), Indonesia’s Sound Recording Industry Association (ASIRI) and PAPPRI announced the formation of a Public-private anti-piracy taskforce with the support of the National Police’s detective division on anti-piracy actions. This Task Force assisted in filing reports with the police, monitoring actions, and conducting a public awareness campaign on the importance of copyright for the creation of original works. IIPA, Indonesia (IIPA, 2017) also encouraged this Task Force and urged to include other affected industries, such as book publishers, which are damaged by piracy but to date have not received as much attention as other industries.

The Indonesian legal system however has faced a number of challenges to conduct IP enforcement. The presence of TRIPS compliant IP laws, for instance, has so far not been matched with the criminal enforcement or customs border protection system. As a result, piracy rates remain high that cannot be curbed unless a useable criminal enforcement system is implemented. On a few occasions, the police did attempt criminal raid actions but in practice criminal enforcement failed to succeed as it depended on various factors such as a transparency in police procedures and a strong will to action. The Directorate General for Intellectual Property

(DGIP's) Civil Service Investigation Office (PPNS) was set to supplement as a police unit and carry out enforcement against infringement but that too failed due to the lack of resources and equipment to address anti-piracy and anti-counterfeit, and remained ineffective. The DGIP also employed 20 investigators and conducted 58 investigations in 2016; but since DGIP investigators lacked the authority to make arrests, they relied on police cooperation for enforcement action.

Raids are generally more expensive in Indonesia compared to raids carried out in other countries such as Thailand (or China). This is because the process requires various interviews with witnesses, as well as formal consultation and statement taken from the legal expert at the IPR (Patent or Trade Mark Offices) to give official opinion on the infringement. Raids can cost between IDR 50,000,000 and IDR 200,000,000 (approximately EUR 3,252 to EUR 13,011). Moreover, trade mark, patent, design infringements and copyrights are “*complaint-based*” crimes, which means the IP owner must file a formal complaint with the Police before any action can be taken. A raid can be planned and executed only after receiving a formal complaint. After a raid, IP holders would have an occasion to reach settlements in the confiscation of the infringing goods from the defendant with either no further action or the destruction of the infringed goods recovered during the raid. Also required were a signed undertaking from the infringer not to repeat, a public apology by the infringer (cost borne by infringer, where possible) and damages and compensations.

Weaknesses of Indonesian Law

IIPA has also raised a few concerns with respect to the Indonesian Law to curb IP infringements and pointed out the following legal loopholes to be rectified:

1. The IIPA notices that the Copyright Law (IIPA, 2017) provides a broad exception under Article 43(d) for “*making and disseminating copyright content through information and communication technology media that is non-commercial and/or non-profit in its effect on the author or related parties, or in which the author has expressed no objection to such making or disseminating.*” But this provision sets a terrible precedent and can discourage and severely undermine the legitimate business models built by authors and IP right holders to control the manner and means in which they authorized the making and disseminating of content through information and communication technologies. IIPA (2017) also observed that this provision potentially collided with Indonesia’s international obligations under TRIPS, the Berne Convention, the WCT, and the WPPT and therefore must be deleted.
2. Secondly, under the criminal case structure if given to infringement cases, the penalties are weak and ineffective. Without a strong punitive action, or a fine, right holders do not feel properly compensated. For example, the maximum fine for TPM circumvention violations is US\$25,000, lower than that for many other offenses (and there is no multiplier if the violation is “*done in the form of piracy*” as for other offenses). Also, the landlord criminal liability provision is weak, with a maximum fine of only US \$8,260. Finally, Article 95 of the new Law created a highly unusual provision which appeared to mandate “*mediation*” (*mediasi*) before a piracy case (*pembajakan*) can be prosecuted (Indonesian Law Reporter, 2009). The purpose and operation of this provision in practice was highly unclear. Moreover, under the new Law, when criminal cases were now complaint-based, IP Right holders viewed this as an additional hurdle to effective enforcement. Criminal cases should be prosecuted on an *ex officio* basis. In addition, the criminal provisions also took steps backward from the previous law, in that they no longer provided minimum mandatory statutory criminal penalties (IIPA, 2017).
3. Thirdly, Exceptions and Limitations/Compulsory License (Article 44) of the new Law contained a broad exception exempting a number of different uses for a wide array of purposes, ranging from education to criticism to “*security and maintenance of government.*” On its face, the broad scope of the uses and purposes contained in this exception appears to go well beyond what is permissible under TRIPS, the Berne Convention, WCT, and WPPT, despite a well-intentioned, but ineffective, attempt to narrow the provision

through inclusion of part of the Berne three-step test. This must also be rectified or dissolved if not required (IIPA, 2017).

4. Fourthly, Articles 18, 30 and 122 of the Copyright Law provide for a possible “*termination*” of transfers with respect to literary works (books), performances, and musical works, but the termination occurs at “25 years,” marks with a two-year transition period i.e., 27 years from the agreement. It is highly unclear how these provisions operate; for example, it is assumed that an author needs to invoke the termination in order for it to be effective. Similarly, regulations should ideally ensure that these termination provisions do not apply to foreign works (IIPA, 2017).
5. Fifthly, Article 50 of the Copyright Law contains a censorship provision which, while not necessarily denying copyright protection (as was the case in China and which was found to be in violation of China’s WTO obligations), is extremely open-ended and could be problematic (IIPA, 2017).
6. Sixthly, there remains considerable concern about abuse of the voluntary copyright registration process in Indonesia, since apparently, many invalid copyrights get registered, including by IP infringers. Also, nothing with respect to the registration or recordal system may create prohibited formalities (IIPA, 2017).

CONCLUSION: SUGGESTIONS AND REFORMS

IIPA has now mandated Indonesia to introduce all those reforms that have been longstanding related to IP infringements and curb all dysfunctional elements that have deeply penetrated into the system. These reforms would relate to direct distribution of authentic goods, and create more legitimate channels to distribute all types of authentic and other copyright materials. A few reforms suggested are given below:

1. Comprehensive enforcement reform: The National IP Task Force should take first steps toward the kind of multi-faceted enforcement reform process needed to make significant progress against piracy in Indonesia. For instance, a separate police team for IPR crimes should be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels. The IP Office’s civil service investigators (PPNS) team budget should also be expanded in order to increase the number of copyright piracy raids each year. A select group of IP prosecutors should also be established, with a mandate to handle piracy cases. Lastly, the National IP Task Force should create a website to track prosecutions, including identifying parties to the cases; legal bases for prosecutions; penalties assessed; and evidence found during raids (IIPA, 2017).
2. Judicial reform: IIPA encourages judicial reform in Indonesia, including a joint operation of Anti-Corruption Commission with the Supreme Court Ethics Committee to appropriately draft guidelines for the courts. Court decisions should also be published to improve transparency. Training should ensue on IPR cases, including damages calculations; issuing provisional orders; implementing injunctions; or conducting IPR border seizures. Training should not be limited to Jakarta, but extended to Commercial Courts outside Jakarta, especially in Medan, Semarang, Surabaya, and Makassar.
3. There have been many cases reported of crime such as trafficking in persons, illegal logging, and illegal gambling and copyright infringement. These crimes should be included as a predicate crime for remedies under its organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.
4. It is also suggested to remove the 2008 decree requirement of local replication of all theatrical prints and home video titles (e.g., DVDs). The decree has been suspended several times, but now it must be permanently eliminated. The decree threatens to have serious negative consequences on the long-term viability of Indonesia’s film industry, and continued development of local cinemas, and jeopardizes arrangements for local filmmakers to carry out post-production work overseas. If the decree is ever implemented, it would negatively affect foreign motion picture companies’ release and distribution schedule for the country, and would raise concerns over existing local facilities’ ability to handle the volume and quality output requirements, as well as lab and duplication facility security issues.
5. Customs valuation: In 2010, the Indonesian Government sought to impose a methodology for determining the customs duty on theatrical prints imported into Indonesia that would have sought to capture the royalties paid on the film content as opposed to the physical medium. Not only was this formulation inconsistent with the WTO Customs Valuation Agreement, but U.S. industry believed that the regime

which replaced this proposal may also being inconsistent. A new specific tariff that was based on the running time of the film has since been imposed, resulting in a new barrier to the Indonesian market in the form of a significant increase in the amount of customs duties paid for the importation of foreign films. The Indonesian Government should properly apply the computed methodology, in which the valuation of film imports was made on a per-meter basis against the physical carrier medium, as is the norm in most markets around the world.

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