

INTELLECTUAL PROPERTY ENFORCEMENT IN INDONESIA

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Abstract

TRIPs Agreement provides the only multilateral comprehensive set of minimum standards and flexibilities relating to the enforcement of IP rights. The enforcement of IPR's is the weakest aspect of IP systems in many developing countries including Indonesia.

The TRIPs Agreement obliges member countries concerning the border measures on goods infringing intellectual property rights. Because of elevation infringement IP rights in Indonesia, so, then the Government of Indonesia issues new law and regulation to decrease infringement of IP rights in Indonesia.

The protection and law enforcement of IPR aims to encourage the emergence of innovation, transfer, and dissemination of technology and obtained the mutual benefit of producers between users and knowledge of technology, by creating social and economic welfare as well as the balance between rights and obligations.

Based on the data result of IP cases from Commercial Court, Jakarta obtained the considerable amount of IPR disputes filed. The article explains that the application of the law of IPR not only from one side but also of all legal aspects related to IPR.

Keywords: Law Enforcement in Indonesia. New Law and Regulation issued from the Government of Infonesia, Legal Aspect of IP enforcement in Indonesia, the Role of Directorate of Investigation and Dispute Settlement, Intellectual Property Cases in Jakarta Commercial Court (Law No. 7 Year 1994 regarding Ratification of Agreement Establishing the World Trade Organization (TRIPs Agreement), Law No. 28 Year 2014 regarding Copyright, Law No. 13 Year 2016 regarding Patent, Law No. 20 Year 2016 regarding Trademark and Geographical Indication, Law No. 31 Year 2000 regarding Industrial Design, Law No. 30 Year 2000 regarding Trade Secrets, Law No. 17 Year 2006 regarding Customs, Law No. 2 Year 2002 regarding National Indonesian Police, Law No. 8 Year 1981 regarding Law of Criminal Procedure, Law No. 5 Year 1991 regarding the Public Prosecution of the Republic of Indonesia, Law No. 5 Year 1999 regarding Prohibition of Monopolistic Practices and Unfair Business Competition, Presidential Decree No. 86 of 1999 regarding Organizational Structure and Administration Procedures of the Public Prosecution Service, Law No. 14 Year 1970 regarding Principles of Judicial Power as amended by Law No. 35 Year 1999, Law No. 14 Year 1985 regarding Supreme Court, Law No. 2 Year 1986 regarding General Court, Regulation of Supreme Court No.4 Year 2012 regarding Temporary Suspension Command, Regulation of Supreme Court No.5 Year 2012 regarding Provisional Decision).

I. INTRODUCTION

The enforcement of IPRs is the weakest aspect of IP systems in many developing countries, including Indonesia. Enforcement of IPR is critical, and therefore, TRIPs Agreement provides the only multilateral comprehensive set of minimum standards and flexibilities relating to the enforcement of IP rights, to be implemented by the WTO member States.¹ Intellectual property has only a value if the owner of IP can enforce the rights.

The economic interest of rights holders is not the only one affected by counterfeiting and piracy, the public interest is also impacted. The losses sustained by industry are reflected in losses to the public revenue. Counterfeiting and piracy severely impact the IP rights owner. The most obvious impact is on revenues because the sale of counterfeit good often displaces the sale of a legitimate product. Criminalizing IP offences focuses on the harm to the IP rights holder as a result of the crime by the use of a counterfeit mark. In other words, the trademark holder is the victim in the case. Trade in counterfeit goods threatens innovation, destroys competitiveness, imperils international trade, endangers public safety, and can even jeopardize national security. On the governmental side, IP counterfeiting and piracy result in lost tax revenue, and cause tremendous expenditures, including funds for outreach and education; border enforcement and interdiction; criminal enforcement, including policing, prosecution, and storage and destruction costs for infringing goods.

¹ Please see Article 7 which sets out expressly the aim of a sound system of IP enforcement by providing that *“(the) protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”*

The protection and law enforcement of IPR aims to encourage the emergence of innovation, transfer and dissemination of technology and obtained mutual benefit of producers between users and knowledge of technology, by creating social and economic welfare as well as the balance between rights and obligations.

II. Government Efforts in Intellectual Property Law Enforcement

Indonesia has significantly improved its legal framework to combat pirating and IP violations. Government of Indonesia has made efforts for Intellectual Property law enforcement by the establishment of the National Team for Intellectual Property Violation Prevention,² and the Directorate of Investigation and Dispute Settlement at the Directorate General of Intellectual Property, Ministry of Justice and Human Rights of the Republic of Indonesia³. Moreover, the government of the Republic of Indonesia has revised the laws of Intellectual Property Law, namely the new Copyright Law No. 28 Year 2014 promulgated on October 17, 2014 to replace Law Number 19 of 2002 regarding Copyright,⁴ the new Patent Law Number 13 of 2016 promulgated on August 26, 2016 to replace Law Number 14 of 2001 regarding Patent⁵ and the new Trademark and Geographical Indication Law Number 20 of 2016 promulgated on November 25, 2016 to replace Law Number 15 of 2001 regarding Trademark.⁶ Other measures included a regulation regarding temporary suspension for trademarks and copyright, and a temporary injunction on all industrial property rights in July 2012.⁷ The IP owner could request a commercial court to issue an order to the local customs office to conduct temporary suspensions (maximum 10 days) or injunctions (maximum 30 days). As a result of the policy, 121 IP cases were processed during 2011 and 2551 784 VCDs/DVDs/CDs/MP3 were seized. DGIP also seized 64 954 VCDs/DVDs for two copyright infringement cases and 6 224 types of counterfeited goods, and confiscated 44 examples of industrial design infringement. The seizures and confiscations were followed by investigations.⁸

The government of Indonesia has also issued new law and regulations, namely as follow:

1. Law No. 19 of 2016 regarding Amendment to Law No. 11 Year 2008 regarding Information and Electronic Transactions.
2. Circular Letter of the Minister of Communication and Informatics of the Republic of Indonesia No. 5 Year 2016 regarding Limits and Responsibilities of Platform Provider and Merchant trading through electronic system (Electronic Commerce) in the Form of User Generated Content.
3. Exclamation Provincial Governor of the Special Capital Region of Jakarta No. 9 Year 2013 regarding the Protection of IPRs on Traded Goods in Mall/Supermall/Plaza or Trade Center.

III. Legal Aspects of Intellectual Property Enforcement in Indonesia

Some important provisions in the IPR laws in Indonesia have been specifically implemented. Where the defendant is domiciled outside Indonesia, the claim is submitted to the Commercial Court in Central Jakarta. Some specific characteristics which are different from general procedural law in Indonesia, are as follows:

1. All of civil IPR cases are under the jurisdiction of Commercial Court;⁹

² Presidential Decree Number 4 of 2006 concerning the Establishment of the National Team for Intellectual Property Violation Prevention which became effective on March 27, 2006. This ministry-level task force coordinated the enforcement of IP rights among customs authorities and police, while increasing the number of qualified judges, prosecutors and IP lawyers. The Task Force has also conducted public campaigns to raising awareness of IP protection.

³ The Directorate of Investigation and Dispute Settlement was established on December 31, 2010. The enforcement in the field of IP can be assisted by Civil Servant Investigators of the Directorate General of Intellectual Property.

⁴ Law Number 28 of 2014 concerning Copyright became effective on October 17, 2014 (State Gazette of the Republic of Indonesia Number 266 of 2014, Supplement to the State Gazette of the Republic of Indonesia Number 1699 of 2014).

⁵ Law Number 13 of 2016 concerning Patents became effective on August 26, 2016 (State Gazette of the Republic of Indonesia Number 176 of 2016, Supplement to the State Gazette of the Republic of Indonesia Number 5922 of 2016).

⁶ Law Number 20 of 2016 concerning Trademark and Geographical Indication became effective on November 25, 2016 (State Gazette of the Republic of Indonesia Number 252 of 2016, Supplement to the State Gazette of the Republic of Indonesia Number 5953 of 2016).

⁷ Please see Supreme Court Regulation Number 4 of 2012 regarding Temporary Suspension and Supreme Court Regulation Number 5 of 2012 regarding Temporary Injunction.

⁸ Chapter 3: "Study of Indonesia's National Intellectual Property System", in *National Intellectual Property Systems, Innovations and Economic Development: With perspectives on Colombia and Indonesia*, (OECD Publishing 2014), p. 156-157.

⁹ Except for trade secret civil cases is under the jurisdiction of District Court.

2. The time period of the adjudication in the first instance court and in the higher level is to be limited in a certain time;
3. If the parties are dissatisfied with the decision of the court in the first instance, they are not allowed to request for appeal but should proceed with a cassation directly to the Supreme Court;¹⁰
4. There are possibilities to proceed with provisional measures by the court order that can be submitted before the case is filed to the Commercial Court, especially to collect the evidence and to stop the violated goods entering the market;¹¹
5. The parties may settle their dispute by means of arbitration or alternative dispute resolution.

As Indonesia is a member of WTO-TRIPs Agreement and ratifying the TRIPs Agreement by Law No. 7 Year 1994 regarding Ratification of Agreement Establishing the World Trade Organization (TRIPs Agreement), these below provisions are relevant articles of the TRIPs with regard to enforcement issue:

1. Civil enforcement is regulated under Articles 42-48 and 50 TRIPs

Like the other IPR types, the typical civil lawsuit for IP disputes involve lawsuit for cancellation, invalidation, lawsuit for compensation of damages and lawsuit deriving from IP Appeal Commission.

The IP holder or the heirs may file the lawsuit for compensation to the Commercial Court. The TRIPs Agreement under Article 45 paragraph 1 stipulates that the judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees.

Provisional Decision¹² is mandate of TRIPs agreement in Article 44 TRIPs (injunction) and Article 50 TRIPs (provisional measures). Article 44 TRIPs (injunction) establish a court order to prevent the entry of imported goods which is allegedly an infringement of Intellectual Property Rights. This action shall be implemented immediately and effectively after these goods are allowed to out from customs. Article 50 paragraph 1 TRIPs declare the member of institution State's judicial to issue provisional measures to order prompt and effective provisional measures in the form of actions, as follows:

- 1) Prevention of infringement intellectual property into the trade route in the territory of member countries.
- 2) Securing evidence related to Intellectual Property Rights which is being infringed.

To be in line with Article of the TRIPs Agreement, the Laws for Copyright, Trademark, Industrial design and patent give authority to the courts about provisional measures to prevent greater damages to the right holder.

Provisional measures is regulated in Article 49 to Article 52 Law Number 31 of 2000 regarding Industrial Design, Article 106 to 109 Law Number 28 of 2014 regarding Copyright, Article 155 to 158 Law Number 13 of 2016 regarding Patent and Article 94 to 98 Law Number 20 of 2016 regarding Trademark and Geographical Indication.

According to Article 49 of the Industrial Design Law,¹³ based on sufficient evidence, the party whose right has been infringed may request to the judge at the Commercial Court to issue a provisional decision regarding: a) prevention of entry of products related to the infringement of the right to Industrial Design; b) keeping of evidence related to the infringement of the right to Industrial Design; c) judges of the Commercial Court shall make a decision within period 30 days at the latest as the date of issuance of the relevant provisional decision.

Article 106 of the new Copyrights Law,¹⁴ stipulates at the request of those who feel aggrieved because the implementation of the Copyright or related rights, the Commercial Court may issue a provisional decision for: a) prevent the entry of goods suspected of infringing the Copyright or related rights are; b) recalled and seized and save as evidence relating to the infringement of Copyright or related rights are; c) securing evidence and prevent the omission by the offender, and/or; d) stop the violation in order to prevent greater losses.

¹⁰ The aim is to avoid unnecessary delay by the loser

¹¹ Provisional Measure is a decision, which is requested before a case is brought before the court. So a provisional decision is made before a dispute takes place.

¹² Regulation of Supreme Court Number 5 Year 2012 regarding Provisional Decision and became effective on July 30, 2012

¹³ Please see Article 49 Law No. 31 of 2000 regarding Industrial Design

¹⁴ Please see Article 106 Law No. 28 of 2014 regarding Copyright

To bring the Indonesia Patent Law to full compliance with the TRIPS Agreement, the current Patent Law also provides provisional measures according to Article 155¹⁵ stipulates at the request of those who fell aggrieved because the implementation of the Patent, the Commercial Court may issue a provisional decision letter for: a) prevent of the entry of goods that are suspected of infringing the Patent and/or rights relating to Patent; b) securing and prevent loss of evidence by the offender; and/or d) stop the violation in order to prevent greater losses.

According the Article 94 of the Trademark and Geographical Indications Law,¹⁶ based on sufficient preliminary evidences, registered mark owner whose right is injured may ask to the Commercial Court judge to issue a temporary decree regarding: a) prevention of entry of goods that are allegedly resulted from a rights of mark violation to the trade routes; b) confiscation of evidences that related to the relevant right of mark violation; c) safeguarding and preventing missing evidences by the violator; and d) closure of violation in order to prevent bigger damages.

2. Administrative measures - Cross Borders Measures under Article 51-61 TRIPs

The TRIPs Agreement obliges member countries concerning the border measures on goods infringing intellectual property rights, to adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place to lodge an application in writing with competent authorities, administrative or judicial, for suspension by the customs authorities of the release into free circulation of such goods.¹⁷

The Government of Indonesia has already Law No. 17 of 2006 regarding Customs.¹⁸ Temporary suspension is regulated under Article 54 - 64 of Law No. 17 of 2006 regarding Customs. Besides this Customs Law, there is a Regulation issued by Supreme Court, namely Regulation of Supreme Court No. 4 year 2012 regarding Temporary Suspension Command.¹⁹

The IPR enforcement is coordinated by the Directorate of Prevention and Investigation at the Customs Head Office. Daily activities is managed by Sub Directorate of Prohibited and Restricted Goods Control cq. IPR Section. At the operational level, IPR tasks are conducted by Prevention Sections of the Custom Offices in each port. Action that can be taken by Customs is the suspension of releasing imported or exported goods. Suspension is carried out by Customs based on a Court Order, issued by Local Court upon an application by the right owner.

The Government issued a Government Regulation of Republic Indonesia No. 20 Year 2017 regarding Controlling Import or Export of goods Suspected Origin or Derived from Violation of IPRs. Recordation system of IPR at the Directorate General of Customs and Excise requires a very high operational costs. Not yet of on-line communication between customs authorities and the authorities relating to Trademark and Copyright law enforcement. On-line system in Customs must be built so that law enforcement work effectively and coordinate with DGIP.

3. Criminal Procedure is under Article 61 TRIPs.

Since a criminal case on IPR always involves infringement on one's right related to IPR, then the preliminary steps of the pre-investigation to determine the existence of a criminal offense is directed to:

- a) The proving of validity of IPR ownership pf the reporter or the owner of right as the victim (the determination of right owner);
- b) The proving of existence of infringement of IPR of the reporter or victim by the suspect.

Following the promulgation of the new Trademark and Geographical Indication Law No. 20 Year 2017, there have been a number of significant changes in trademark enforcement. A new criminal provision is added in Law No. 13 of 2016 regarding Trademark and Geographical Indication which stipulates that“ Any person who without rights use a trademark which has basic similarity and/or having similarity in its entirely and the kind of goods cause the health disorders, environment, and/or may lead to death of human, shall be sentenced to imprisonment for a maximum period of 10 (ten) years and/or fine a maximum amount of IDR 5.000.000.000,- (five billion rupiahs).

¹⁵ Please see Article 155 Law No. 13 of 2016 regarding Patent

¹⁶ Please see Article 94 Law No. 20 of 2016 regarding Trademark and Geographical Indication

¹⁷ Please see Article 51 of TRIPs Agreement

¹⁸ Law No. 17 of 2006 regarding Customs replacing the Law No. 10 of 1995 regarding Customs.

¹⁹ Regulation of Supreme Court Number 4 Year 2012 concerning Temporary Suspension Command and became effective on July 30, 2012

From the substantive prospective, the new law on Trademark and Geographical Indication is not yet regulating the protection for trademark against trademark infringement through e-commerce. Further regulation of Trademark protection is required in connection with the occurrence of Trademark infringement through e-commerce.

A new criminal provisions are added in the new Patent Law No. 13 of 2016 which stipulates that: "Any person who deliberately and without rights infringes a Patent and/or Simple Patent which cause human death, shall be sentenced to imprisonment of at most 10 (ten) years and/or a fine of at most IDR 3.500.000.000 (three billion and five hundred million rupiahs)." This criminal provision is a normal offense.

IV. The Role of Directorate of Investigation and Dispute Settlement

The government of the Republic Indonesia has formed the Directorate of Investigation and Dispute Settlement at the Directorate General of Intellectual Property, Ministry of Justice and Human Rights of the Republic of Indonesia.²⁰ The Directorate General of Intellectual Property has a Civil Servant Investigator (PPNS) authorized to act as investigator in the IPR criminal case.²¹ PPNS has the same authorities with POLRI investigators, namely: 1) to receive reports or complaints regarding an offense; 2) to take first steps at the place of occurrence; 3) to order a suspect to step and examine the suspect's identification; 4) to carry out arrests, detentions, searches and seizures; 5) to carry out examination and seizures of documents; 6) to take fingerprints and photographs of a person; 7) to summon a person to be heard or examined as a suspect or a witness; 8) to call in an expert required in connection with the examination of a case; 9) to terminate an investigation; and 10) to take other possible acts in accordance with the law.

Exhibit 1 below shows the Data of IP cases reported to the Directorate of Investigation & Dispute Settlement, Directorate General of Intellectual Property which shows that the number of the infringement in IP (Copyright, Patent, Trademark, and Industrial Design) in 2015 is 44 IP cases, in 2016 is 59 IP cases and 2017 is 18 IP cases.

Exhibit 1 - Data of IP Cases reported to the Directorate of Investigation & Dispute Settlement

No.	IP	Year		
		2015	2016	2017 s/d November
1.	Copyright	2	7	1
2.	Patent	12	6	2
3.	Trademark	27	37	15
4.	Industrial Design	3	9	-
Total		44	59	18

Source: Directorate of IP Investigation & Dispute Settlement, November, 2017

After the Government of the Republic of Indonesia issued a Joint Regulation of the Minister of Justice and Human Rights of the Republic Indonesia and the Minister of Communication and Informatics of the Republic of Indonesia No. 14 Year 2015 and No. 26 Year 2015 regarding the Implementation of Closure of Content and/or User Access Rights of Copyright Infringement and/or Related Rights in Electronic Systems,²² several actions have been taken by the Directorate of Investigation and Dispute Settlement, Directorate General of Intellectual property as seen as Exhibit 2 below which shows that the number of the closure of the film site

²⁰ The Directorate of Investigation and Disputes Settlement was established on December 31, 2010.

²¹ Please see Article 7 of Law No. 8 of 1981 regarding Civil Proceedings became effective on December 31, 1981.

²² Joint Regulation of the Minister of Justice and Human Rights of the Republic Indonesia and the Minister of Communication and Informatics of the Republic of Indonesia No. 14 of 2015 and No. 26 of 2015 regarding the Implementation of Closure of Content and/or User Access Rights of Copyright Infringement and/or Related Rights in Electronic Systems became effective on July 2, 2015.

in 2016 is 102 and the closure of the song site due to copyright piracy in 2016 is 47. In 2017, the number of the closure of the film site is 102, while there is no one the closure of the song site.

Exhibit 2 - Data of Directorate of IP Investigation & Dispute Settlement

No.	IP	Year	
		2016	2017 s/d November
1.	Closure the Film Site	102	277
2.	Closure the Song Site	47	-
	Total	149	277

Source: Directorate of IP Investigation & Dispute Settlement, November, 2017

V. IP Cases in Jakarta Commercial Court

Exhibit 3 below shows the number of IP cases which consist of Trademark, Patent, Copyright, and Industrial Design cases filed before the Commercial Court from 2015 until 2017.

Exhibit 3
IP Cases in Jakarta Commercial Court
2015-2017

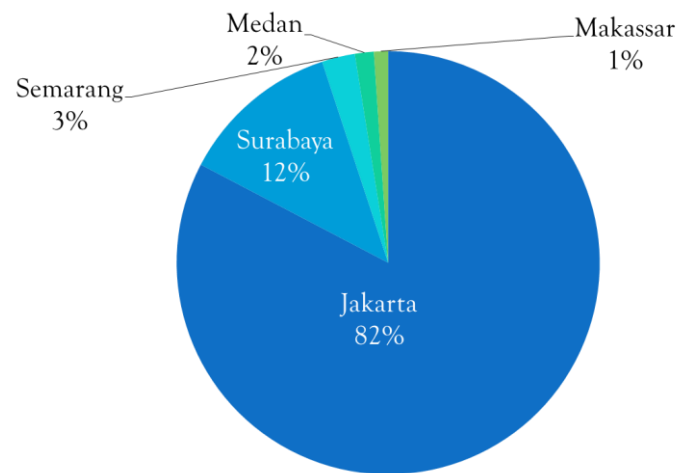
NO.	IP	YEAR		
		2015	2016	2017 s/d November
1.	Trademark	77	62	44
2.	Patent	2	4	10
3.	Copyright	4	5	4
4.	Industrial Design	9	2	6
	Total	92	73	64

Source: District Court Website, November, 2017

There are 5 (five) Commercial Courts in Indonesia, namely: 1) Central Jakarta (Provinces of Jakarta, West Java, South Sumatra, Lampung, West Kalimantan and those who are not Indonesian Citizen; 2) Surabaya (Provinces of East Java, South Kalimantan, Central Kalimantan, East Kalimantan, Bali, West Nusa Tenggara and East Nusa Tenggara); 3) Semarang (Provinces of Central Java and Jogjakarta); 4) Medan (Provinces of North Sumatera, Riau, West Sumatera, Bengkulu, Jambi and Aceh); and 5) Makassar (Provinces of South Sulawesi, Southeast Sulawesi, Central Sulawesi, North Sulawesi, Maluku and West Papua).

Exhibit 4 below shows the overall proportion of IP cases in 5 Commercial Courts in the territory of the Republic of Indonesia from 2015 until 2017. There is 82 % of IPR disputes filed at the Central Jakarta Commercial Court, Surabaya Commercial Court is 12 %, Semarang Commercial Court is 3 %, Medan Commercial Court is 2 % and Makassar Commercial Court is only 1 % IP case.

Exhibit 4
Overall Proportion of IP Cases
in All Commercial Courts - 2015-2017 (November)



VI. Summary

Implementation and enforcement are a major challenge. Assistance should be provided in creating and strengthening administrations and institutions which support the legal infrastructure, such as collective management societies, police and customs authorities, and professional organizations. Efficient enforcement of intellectual property rights, particularly against counterfeiting and digital piracy, requires also international cooperation.

Enforcement of IPR requires effective cooperation between and coordination of the various agencies involved. Enforcement mechanism should also be accompanied by preventive measures aimed at ensuring a sustainable environment of respect of intellectual property.

Indonesia has already complied with the TRIPs Agreement in terms of satisfying the minimum standards required for IP protection. Customs authorities should be empowered to suspend the clearance of infringing goods on the basis of the information appearing in an authority's data base and submitted by the right holder.

The implementation of the intellectual property rights system requires not only legislation in the field of intellectual property right, but also supported by the administration, law enforcement and optimal socialization program on IP.
