

INTELLECTUAL PROPERTY LAW IN INDONESIA AFTER 2001

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Abstract

This paper reviews the major changes of intellectual property condition in Indonesia after 2001. In that year, Indonesia, which has become a member of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) since 1994, was ready to meet its commitment under TRIPS. To do so, Indonesia has made changes in the areas of legislation, administration, court proceedings, and law enforcement. The paper also discusses problematic issues surrounded the implementation of such changes in Indonesia.

Keywords: *intellectual property reforms, TRIPS, Indonesia.*

Intisari

Tulisan ini melihat kembali perubahan-perubahan besar dalam bidang hak kekayaan intelektual di Indonesia setelah tahun 2001. Pada tahun tersebut, Indonesia, yang telah menjadi anggota *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)* sejak 1994, siap untuk memenuhi komitmennya dalam TRIPS. Untuk memenuhi komitmen tersebut, Indonesia telah membuat perubahan-perubahan dalam bidang legislatif, administratif, tata cara pengadilan dan penegakan hukum. Tulisan ini juga membahas permasalahan di seputar pelaksanaan perubahan-perubahan tersebut.

Kata Kunci: hak kekayaan intelektual, TRIPS, Indonesia.

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A. Introduction

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) has been controversial¹ since its first inception. As one agreement under the World Trade Organization (WTO), the members of such organization are required to be bound to TRIPS. The agreement sets forth the minimum standards of intellectual property (IP) rights protection. Although it provides privileges for developing and least developed country (LDC) members to delay the application of the agreement² and does not require all member countries to harmonize their IP laws, the agreement obliges them to apply the same standards regardless of their level of development.

The year 2001 is important for IP in Indonesia as the journey of TRIPS commenced in that year. Despite the fact that Indonesia has joined the WTO and become the party of TRIPS since 1994, as a developing country,³ Indonesia delayed the implementation of TRIPS for five years. TRIPS was supposed to be implemented fully in Indonesia in 2000, however, only a year later, did the government of Indonesia feel they were ready to do so.⁴ Since that year, despite many sceptical critics on the benefits of TRIPS in Indonesia, there have been many changes in the country's IP condition. Even though these changes still have not transformed the image of IP condition in Indonesia, however they are part of evolution for the better IP condition in Indonesia.

This paper is an attempt to review the major changes of IP condition in Indonesia after 2001. The areas that will be reviewed are legislative, administrative, court proceedings and enforcement.

It will also see the problem issues surrounded the implementation of such changes in Indonesia.

B. Discussion

1. After 2001: IP Law Reforms in Indonesia

a) Legislative Reforms

After Indonesia, through Law No. 7 of 1994 on the Ratification of the Establishment of World Trade Organization Agreement which came into force in 1995, became the member of TRIPS, the country reformed its IP legislations to comply with TRIPS standards. In the field of trademarks, the 1992 Trademarks Law was revised in 1997 and contained provisions which protect geographical indication and indication of origin and clarified the protection of well-known trademarks.⁵ Later, this revised Trademark Law was superseded by the new Trademark Law No. 15 of 2001. In the field of patent and copyright, Indonesia enacted two new legislations, namely Law No. 14 of 2001 on Patent and Law No. 19 of 2002 on Copyright. Besides these three IP legislations known in Indonesian legal history, the government introduced four legislations for new IP areas included in TRIPS, namely Law No. 29 of 2000 on Plant Variety Protection, Law No. 30 of 2000 on Trade Secret, Law No. 31 of 2000 on Industrial Design and Law No. 32 of 2000 on Integrated Circuit Layout Design.

Although the core IP legislations have been issued and finalized, however the implementation of these legislations has never been effective. Part of the problems is because

¹ The discussion of controversial aspects of TRIPS can be found, for instance, in Peter Drahos and Ruth Mayne (Eds.), 2002, *Global Intellectual Property Rights: Knowledge, Access and Development*, Palgrave Macmillan, Hampshire and New York and in Peter Drahos and John Braithwaite, 2002, *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan, London.

² A developing country member can delay the date of application of TRIPS for four years and LDC is entitled to delay for 10 years. See, Section 65 (2) and 66 (1) of the TRIPS Agreement.

³ The World Bank classifies countries based on the Gross National Income per capita, into the categories of low, lower middle, upper middle and high income. Developing countries are a group of countries which have low and lower middle-income economies. According to the World Bank, Indonesia has a lower middle-income economy; therefore it is within the category of developing countries. World Bank, "Data Country Classification", <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458-isCURL:Y-menuPK:1277382-pagePK:64133150-piPK:64133175-theSitePK:239419,00.html>, accessed on 2 April 2008.

⁴ Jakarta Post, "Indonesia Admits Failure in Implementing WTO Commitments", *Jakarta Post*, 22 December 1999.

⁵ Christoph Antons, 2000, *Intellectual Property Law in Indonesia*, Kluwer Law International, London, p. 206.

it takes years to issue one IP implementing decree.⁶ In fact, despite the fact the core legislation has already stated about the decree more than 10 years ago, some crucial IP issues, such as patent compulsory license⁷ and well-known trademark,⁸ do not have implementing decree yet. One possible explanation why the issuance of such implementing decree has been so slow is that the government needs to prioritise other issues which are more crucial than IPR. As the country has not recovered fully from the economic and political turmoil since the late 1990s, the government is overwhelmed with abundant complex issues. Apart from this, it also reflects that IPR has not been a prioritised issue in the perspectives of Indonesian government.

Besides the core IP legislations, the government also enacted some legislations and regulations that contain IP provisions. One example of this is Law No. 18 of 2002 on the National System for Research, Development and the Application of Science and Technology. The Law encourages the use of IPRs in managing research findings that are potential to be commercialized and considered IP as an asset of university or research and development (R&D) institutions.⁹ Further, Article 13 (3) of this law requires every university and R&D institutions to establish Sentra HKI.¹⁰ The implementing

decree for this law, Government Regulation No. 20 of 2005 provides the details of the scheme on technology transfer of IP and the management of income resulted from the IP commercialization of research activities.

Since 2008, the Directorate General of Intellectual Property Rights (DGIP), as the government institution in charge for managing IPR issues in Indonesia, has planned to revise four current IP laws, namely Copyright Law, Trademark Law, Patent Law and Industrial Design Law.¹¹ The amendment of these four laws is already included in the Prolegnas¹² 2010-2014¹³ and they were planned to be discussed in the Parliament of Indonesia in 2011.¹⁴ However, since the drafts are not ready yet and they still do not have academic drafts, the amendment of these four laws is still not discussed in 2012.

Apart from the reforms in the areas covered by TRIPS, Indonesia is planning to regulate traditional knowledge (TK) and traditional cultural expressions (TCEs) in one *sui generis* law. Even though the 2002 Copyright Law already contains provisions that protect TCEs or folklores,¹⁵ they are considered not sufficient enough to protect Indonesian TCEs/folklores. In 2007, the government drafted a Bill on Protection and Use of Traditional Knowledge and Traditional Cultural Expressions. The Bill

⁶ Christoph Antons, "Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Developments", *Journal of Information, Law and Technology*, Vol. 1, Special Issue, 2007, p. 3.

⁷ Elvani Harifaningsih and Suwantin Oemar, "Lisensi Wajib Terbantur PP (Compulsory License is Hindered by Government Regulation)", *Bisnis Indonesia*, 12 June 2009.

⁸ Suwantin Oemar, "Jangan Gantung PP Merek Terkenal (Don't Delay Government Regulation on Well-Known Trademark)", *Bisnis Indonesia*, 24 June 2008.

⁹ Article 11 (1) of the Law No. 18 of 2002.

¹⁰ According to the Elucidation of that article, *Sentra HKI* is a working unit that has function not only to manage and utilize IP assets, but also to be information and service centre of IPRs.

¹¹ Suwantin Oemar, "Revisi UU HaKI Diharapkan Selesai 2012 (Revision of Intellectual Property Laws are Expected Finished by 2012)", *Bisnis Indonesia*, 16 September 2011.

¹² Prolegnas or National Legislation Program is an instrument to plan the making of well-planned, cohesive and systematic laws in Indonesia. Basically, bills included in the program in one particular year are prioritised to be discussed in the Parliament. See, Kementerian Riset dan Teknologi (Ministry of Research and Technology), "Mewujudkan Prolegnas 2012 yang Realistis dan Responsif (Realizing Realistic and Responsive Prolegnas 2012)", <http://jdih.ristek.go.id/?q=berita/mewujudkan-prolegnas-2012-yang-realistic-dan-responsif>, retrieved on 15 July 2012.

¹³ Kementerian Hukum dan Hak Asasi Manusia (Ministry of Law and Human Rights), "Prolegnas 2010-2014", <http://www.djpp.depkumham.go.id/prolegnas-2010-2014.html>, retrieved on 16 July 2012.

¹⁴ Scherazade Mulia Saraswati, "Inilah RUU dalam Prolegnas 2011 (These are Bills in the Prolegnas 2011)", *Media Indonesia*, 28 March 2011.

¹⁵ See Article 10 (2)-(3) of Law No. 19 of 2002 on Copyright.

includes provisions that oblige benefit sharing from TK/TCEs commercialization activities between the user and the holder or custodian of the TK/TCEs.¹⁶ This Bill also discriminates foreign users by requiring them to file application to the government before they can commercialize Indonesian TK/TCEs, while local Indonesian do not have to do so.¹⁷ Similar with the amendment of the four existing IP laws mentioned above, this Bill has also included in the Prolegnas 2010-2014.¹⁸ However, it is still not one of the laws to be prioritized discussed in 2012.¹⁹

b) Administrative Reforms

In the administrative sector, there is a progress after the power to receive application for IPR transferred to the branch agencies of the Department of Law and Human Rights in the provincial and district level.²⁰ Before 2001, the applications for IPR were only submitted to the central office of the DGIP in Tangerang-West Java.²¹ Consequently, this made the applicants who lived remotely from the central office was difficult to process their IP registration. Further implication was it made the cost of IP registration higher since there were extra costs to submit the application documents to the central office in Tangerang. Because sending the applications via postal service is unreliable, most of the applicants preferred to travel directly to Tangerang or used the service of other parties, such as

IP agent, to act on behalf them filing the IP application. Both options, certainly, need extra costs that were not small.

Although the initiative to give the Regional IP Offices authority to receive IP application is positive, however it is doubtful whether this initiative has been worked well so far. It may make the process of IP registration is easier for the applicants living far from the Central Office. However, it is still not effective to make IP registration process is faster and low costs. Lack of technology assistance and skilled human resources makes many distant applicants still prefer to submit directly their applications to the central office. For instance, of 33 branch offices in the provincial level, only 17 offices which have access to Intellectual Property Digital Library (IPDL)²² which created to help the process of IP registration by searching the existing registered IPRs. To date, the number of applications comes from the regional offices are still low. In 2008, the total applications for trademarks, copyrights, patents and industrial designs which submitted to the regional offices were only less than 5% of the whole year applications in each area mentioned.²³

Besides that the Regional Office only has function to forward IP applications to the Central Office which remains as a government agency which grants final approval of IPRs. It means the burden of the central office to

¹⁶ M. Hawin, "New Issues in Intellectual Property Law in Indonesia", *Mimbar Hukum*, Special Issue, November 2011, p. 21.

¹⁷ *Ibid.*

¹⁸ Affifah Kusumadara, "Pemeliharaan dan Pelestarian Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Indonesia: Perlindungan Hak Kekayaan Intelektual dan Non-Hak Kekayaan Intelektual" (Maintenance and Preservation of Indonesian Traditional Knowledge and Traditional Cultural Expressions: Protection of Intellectual Property and non-Intellectual Property Rights), *Jurnal Hukum*, Vol 1, No. 18, January 2011, p 22.

¹⁹ Berita Satu, "64 RUU Lolos dalam Prolegnas 2012" (64 Bills Included in the Prolegnas 2012), <http://www.beritasatu.com/nasional/21776-64-ruu-lolos-prolegnas-2012.html>, retrieved on 19 July 2012.

²⁰ Minister of Justice and Human Rights Decree No. M.11.PR.07.06 of 2003 of 4 November 2003 on The Assignment of the Regional Office of Department of Justice and Human Rights to Receive IPR Application.

²¹ Christoph Antons, 2007, *Op.cit.*, p. 4.

²² Directorate General of Intellectual Property Rights – Department of Justice and Human Rights of Republic of Indonesia, 2009, "Laporan Tahunan Direktorat Jenderal Hak Kekayaan Intelektual Tahun 2008 (Annual Report of the Directorate General of Intellectual Property Rights: Year 2008)", Directorate General of Intellectual Property Rights – Department of Justice and Human Rights of Republic of Indonesia), Tangerang, p. 3.

²³ According to the statistics on the website of the Directorate General of Intellectual Property Rights. See, Directorate General of Intellectual Property Rights – Department of Justice and Human Rights of Republic of Indonesia, "Statistik Permohonan Pendaftaran Merek Baru dan Perpanjangan Tahun 2001-November 2009 (Statistic of New and Renewal Trademark Registration Applications: 2001- November 2009)", <http://www.dgip.go.id>, accessed on 13 July 2009.

process IP registrations in all over Indonesia is still huge. For example, the Directorate of Trademark of DGIP is overloaded with 45,000 applications on average each year.²⁴ This makes the total process of application takes more than the time required in the legislation. To illustrate, the Law No. 15 of 2001 on Trademark provides that the time required to process trademark application, starting from the application submission until the issuance of certificate, is 14 months 10 days. However, in practice, the process is minimum on average is two years²⁵ and the delay usually is worse if the application is not assisted by IP agents.²⁶

The ineffective function of the Regional Office has effect also on the cost of IP application process. As mentioned previously, since many Regional Offices cannot provide complete IP registration processes, applicants living far from the Central Office choose to submit application directly to the Central Office. Like the prior situation, the applicants need to spend extra costs either for travel expenses to Tangerang or for using the service of IP agents. Of these two options, using the service of IP agents is more convenient because it is less time and energy consuming. For this service, IP agents will charge them a service fee which is normally higher by twofold²⁷ than the official registration fee charged by DGIP. However, this service fee is sometimes unrealistic. As an illustration, one small enterprise owner living and running business in Semarang – Central Java said that he was asked to pay Rp. 5 millions by his IP agent²⁸ for a trademark registration. This

amount is almost five fold higher than the official fee. No wonder there is assumption living among Indonesians that the process of IP registrations is expensive, complicated and lengthy.

For the applicants coming from small and medium business sector, three central and regional government agencies, namely State Ministry of Cooperatives and Small and Medium Enterprises (SMCSMEs), Department of Industry and State Ministry of Research and Technology, provide programs that assist them dealing with IP issues. The programs include providing small and medium enterprise owners' consultation and training on IP matters, helping them to prepare the documents needed for IP registration and most importantly funding their application costs. For example, SMCSMEs in 2006 funded all the costs of trademarks registration for 200 products of SMEs in 10 provinces²⁹ and industrial design registration for 100 products of SMEs in 5 provinces in 2007.³⁰ However, these programs are sporadic and depend mainly on annual budget of these government agencies supplied by the Finance Ministry. If the annual budgets of these government agencies are cut, these programs have low priority to be run in that year.³¹ It means only limited number of SMEs in Indonesia which could get the benefits of these programs. Therefore, these programs could not resolve the problems of IP registration encountered by the regional IP applicants, particularly applicants from small medium business sector.

²⁴ *Ibid.*

²⁵ Interview with an IP agent in Jakarta on 20 March 2010 via e-mail.

²⁶ Suwantin Oemar, "Memangkas Proses dan Prosedur Pendaftaran Merek (Cutting Out the Process and Procedure of Trademark Registration)", *Bisnis Indonesia*, 13 October 2008.

²⁷ Interview with several IP agents in Jakarta and surrounded area between March-April 2009 in Jakarta-Indonesia.

²⁸ It is not clear whether the IP agent in this case is a registered IP consultant or merely a person who provides service without qualification as a registered IP consultant.

²⁹ Banjarmasin Post, "UMKM Berebut Daftarkan Merek (Micro and SMEs Race to Register Trademark)", *Banjarmasin Post*, 6 November 2006.

³⁰ Kementerian Koperasi dan Usaha Kecil Menengah (State Ministry of Cooperatives and Small Medium Enterprises), 2007, *Revitalisasi Koperasi dan UKM sebagai Solusi Mengatasi Pengangguran dan Kemiskinan (Revitalization of Cooperatives and SMEs as Solution to Overcome Unemployment and Poverty)*, Kementerian Koperasi dan Usaha Kecil Menengah, Jakarta, p. 69.

³¹ Interview with an officer of DGIP which is in charge with IP and SME issues in Tangerang-Banten on 21 February 2009.

If the role of the Regional Offices is given more consideration, they are potential to resolve the problems. To have a better function, the Regional Offices should be provided with better information technology infrastructure and access, such as internet access and IPDL,³² to assist IP applicants who wish to submit their application through a Regional Office. Besides that, the Regional Offices should be given more authorities to decide IP applications. Without this authority, the role of the Regional Offices are just like a post office which forwards IP applications submitted to them to the Central Office. To start with, the Regional Offices should be authorized to decide copyright application which does not require substantive examination in the process.

Another development in the administrative sector is the issuance of Government Regulation No. 2 of 2005 on IP Consultant. This government regulation requires the registration of IP consultants in Indonesia to DGIP. Previously, this requirement only applies to patent agents which could re-register until June 2005 under this new registration system.³³ To be registered in DGIP as an IP consultant, all applicants must be Indonesian citizens with permanent residency in Indonesia, hold bachelor degree from any field, be proficient in English, not have public servant status, and follow the training course for IP consultants.³⁴ The registration requirement is important to control the quality of service provided by IP agents or consultants. Besides that, it could help to narrow the operation of

*calo*³⁵ that provides service to take care of IP registration with unreasonable charges and illegitimate practices. However, in 2008, at the third year after the new registration system was introduced, a magazine reported that the number of *calo* that represents IP applicants was still substantial.³⁶ The today situation is probably not really different with two years ago.

2. Court Proceeding Reforms

Since the enactment of the new IP legislations in 2000-2002, IP disputes, including copyright, patents, trademarks, industrial designs and the layout design of integrated circuit, were no longer settled at first instance by the District Courts and the Commercial Courts is now decided these kinds of IP disputes. However, the District Courts are still responsible to settle criminal, trade secrets and plant varieties disputes.³⁷ For border control measures which were previously settled in the District Court, it becomes the responsibility of the Commercial Courts now.³⁸

In terms of procedural law, the current IP legislations on copyright, patents, trademarks, industrial designs and the layout design of integrated circuit also introduce simpler procedural laws than the previous one. Prior to the enactment of those legislations, the appeals of an IP case must be submitted, first, to the High Court and, last, to the Supreme Court. Now, the appeal request can be submitted directly to the Supreme Court. It has an effect to shorten the time required to settle the disputes. Besides that, the current copyright, trademark, patents and industrial designs legislations also include interlocutory injunction

³² IPDL is powered by internet system and has a function to do research whether the product in question already registered before an IP application is filled. IPDL is necessary for IP applicants, particularly SMEs, to prevent them filling an IP application which only has little chance to be approved.

³³ Christoph Antons, 2007, *Op.cit.*, p. 5.

³⁴ Article 3 of Government Regulation No. 2 of 2005.

³⁵ *Calo* is common term for a profession that provides service to take care various matters, like a broker, through illegitimate practices. For example, a *calo* bribes DGIP officers to accelerate the normal process of IP registration of his or her clients.

³⁶ Asnil Bambani Amri, "Banyak Calo di Pengurusan Hak Kekayaan Intelektual" (Many Scalpers in IP Registration Process), *Kontan*, 24 October 2008, p. 36.

³⁷ Christoph Antons, 2007, *Op.cit.*, p. 4.

³⁸ This transfer is based on Law No. 17 of 2006 concerning amendments to Law No. 10 of 1995 on Customs Matters. Christoph Antons, "Indonesia" in Goldstein, Paul and Joseph Straus, 2009, *Intellectual Property in Asia: Law, Economics, History and Politics*, Springer, Berlin, p. 167.

mechanism, which is known as Anton Pillar order. This mechanism was originally from common law system and introduced here as an effort to design Indonesian IP legislations which is in line with Article 50 of the TRIPS Agreement.³⁹

Injunction is an immediate and effective order issued by a Commercial Court to prevent further infringements, particularly to stop items in question entering market, and to avoid the disappearance of evidence. It is given to plaintiffs who can demonstrate evidences to the Court that they are IPR holders of the relevant items.⁴⁰ Injunctions could be issued before the process of trial begins. The Indonesian Civil Procedural Code⁴¹ contains similar provision with injunction which is known as provisional decision (*uitvoerbaar bij voorraad - putusan serta merta*). However, provisional decision is slightly different since it could only be granted after the hearing of main case had started and it usually takes for months.⁴² Apart from that, provisional provision could not be granted with *inauditu altera parte* measures as required in Article 50 (2) of the TRIPS Agreement.⁴³ Therefore, as provisional decision does not provide an immediate remedy to plaintiff, is not really useful for IP infringement cases.

Although the Anton Pillar injunction is a very useful tool for plaintiff in IPR infringement cases, however its application is rare in Indonesia. Indonesian judges are reluctant to apply it because they are not familiar with injunction which is originally from common law system.

As a country belongs to civil legal tradition, not much details provided in the Indonesian Civil Code, implementing regulations or judicial decisions on that matter. In this situation, judges are expected to be progressive and proactive to fill in the gaps. However, most of senior judges are not convenient to do so without clear direction on how to deal with injunctions. If they apply an Anton Pillar injunction, there is no guarantee that the decision would be followed by other judges in later decision on similar cases since in civil law system, precedents do not play important role to determine the content of court decision.⁴⁴ If pressured, the judges would simply apply the existing regulations and practice on *putusan serta merta* to injunction.⁴⁵ *Putusan serta merta*, according to the Supreme Court Circular Letters No. 3 of 2000 and No. 4 of 2001, needs to fulfil some requirements⁴⁶ before it is granted. To satisfy these requirements, it takes considerable time and therefore the aim of Article 50 of the TRIPS would not be achieved with *putusan serta merta*.⁴⁷

Regarding injunction, there is Indonesian government initiative to utilize injunction in IP infringement cases. In Workshop on Developing Common Perception on Practical Legal Enforcement in IP Cases which organized in 15 December 2009, there was a statement which confirmed the issuance of regulation on how to implement injunction in IP infringement cases by the Supreme Court soon.⁴⁸ The issuance of the regulation is a progressive step that makes the management of

³⁹ Simon Butt and Timothy Lindsey, "TRIPS and Intellectual Property Law Reform in Indonesia: Why Injunctions Aren't Stopping Piracy", *Harvard Asia Pacific Review*, Winter 2005, p. 15.

⁴⁰ Article 125 of the Law No. 14 of 2001 on Patents, Article 85 of the Trademark Law 2001 on Trademarks, Article 67 of the Law No. 19 of 2002 on Copyrights and Article 49 of the Law No. 31 of 2000 on Industrial Designs.

⁴¹ The Civil Procedural Code which apply currently in Indonesia are derived from two colonial regulations, namely the Indonesian Renewed Procedural Law (*Het Herziene Indonesische Reglement - HIR*) and the Procedural Law for the Areas beyond Java and Madura (*Het Rechtsplemen Buitengewesten - RBg*). Provisional provision is contained in Articles 180 of HIR and 191 (1) of RBg.

⁴² Simon Butt and Timothy Lindsey, *Loc.cit.*

⁴³ Article 50 (2) of the TRIPS Agreement provides that injunction action can be taken by the judicial authorities without informing the alleged infringer or defendant. See, Daniel Gervais, 2003, *The TRIPS Agreement: Drafting History and Analysis*, Sweet and Maxwell, London, p. 308.

⁴⁴ Simon Butt and Timothy Lindsey, *Loc.cit.*

⁴⁵ *Ibid.*

⁴⁶ The requirements include permission from the Chief Justice of the High Court in the Province, evidence of both parties and collateral with the same value with the confiscated goods.

⁴⁷ Simon Butt and Timothy Lindsey, *Loc.cit.*

⁴⁸ Elvani Harifaningsih, "MA Atur Injunction Kasus HaKI: Peraturan itu Berdampak pada Penegakan Hukum (The Supreme Court Regulate Injunction on Intellectual Property Case: This Regulation Will Affect on Law Enforcement)", *Bisnis Indonesia*, 17 December 2009.

IP infringement cases in Indonesia more effective and efficient. However, the regulation had not yet been issued as at the end of 2011.⁴⁹

3. IP Enforcement Reforms

Related to IP enforcement, the establishment of National Team on the Tackling of Infringements of IPRs (Tim Nasional Penanggulangan Pelanggaran Hak Kekayaan Intelektual – Timnas PPHKI) in 2006 is a positive development. Timnas PPHKI was a task force established based on Presidential Decree No. 4 of 2006 on 27 March 2006. The task force has five duties: 1) to formulate national policies on tackling IPR infringements, 2) to establish necessary steps for the tackling IPR infringements, 3) to determine and evaluate dispute resolutions and strategic issues to tackle IPR infringement, including the prevention and the legal enforcement undertaken, inline with the respective main duties and functions of the related institutions, 4) to provide guidance and direction as well as priorities of IPR socialization and education to the related institution and organization, as well as to the public through various activities in order to eliminate IPR infringement, and 5) to perform and enhance bilateral, regional and multilateral co-operations in order to combat IPR infringement.⁵⁰

Timnas PPHKI was lead by the Coordinating Minister for Political, Security and Legal Affairs (Menteri Koordinator Bidang Politik, Hukum dan Keamanan – Menkopolkukham) and the Coordinating Minister for Economic Affairs as Deputy Chairman. Acting as its Chief Executive is the Minister of Law and Human Rights and the Minister of Trade as Chief Executive Deputy.⁵¹ The team members are minister level officials in a number of relevant government agencies in Indonesia. They work under and are responsible

to the President of Indonesia.

The establishment of Timnas PPHKI was a positive initiative of the government of Indonesia, particularly President Susilo Bambang Yudhoyono, in response to the allegations by foreign countries, particularly the US, that the government is not sufficiently committed to combating IPR infringements and to its enforcement of the country's obligations under TRIPS. The selection of important figures from relevant government agencies to work in the team demonstrates the seriousness of Indonesian government to comply with the TRIPS Agreement and the demands of its trading partner. It is also anticipated that the establishment of Timnas PPHKI could resolve the entrenched poor coordination problem among the Indonesian government agencies tackling IPR legal enforcement issues. The most important thing is that Timnas PPHKI could raise the image of Indonesia as a country which is very concerned with IPR issues.

In the first three years, the performance of the team was considered good by domestic and foreign stakeholders. Because of its good performance and other improvements in IP sectors, such as the implementation of Ministerial of Trade Decree No. 05/M-/DAG/PER/4/2005 on the Regulation of Imports Of Machinery, Machine Accessories, Raw Material And Optical Discs which was intended to stop the production of pirated CDs and DVDs by controlling the licensing of factories and the conducting of raids against the facilities used to produce pirated optical disc and against retail outlets,⁵² in November 2006, the USTR altered the position of Indonesia from being on the Watch List from the Priority Watch List (where Indonesia had languished since 1999) to being on the Watch List, a far more favourable position.⁵³

⁴⁹ Halo Jepang, "Capacity Building Jadi Tujuan Utama Kerjasama JICA dengan Dirjen HaKI" (Capacity Building Becomes the Focus of JICA and Directorate General of Intellectual Property Rights Cooperation), <http://www.halojepang.com/berita-utama/3818-kasi-kerjasama-bilateral-dirjen-haki-qindonesia-a-jepang-patut-tingkatkan-kemampuan-a-pemahaman-hakiq-2012-1800>, accessed on 20 July 2012.

⁵⁰ Directorate General of Intellectual Property Right, 2007, *2006 Annual Report*, Ministry of Law and Human Rights, Tangerang, p. 1.

⁵¹ Article 3 of the Presidential Decree No. 4 of 2006.

⁵² Directorate General of Intellectual Property Rights - Department of Law and Human Rights, 2007, *Loc.cit.*

⁵³ International Intellectual Property Alliance (IIPA), "Appendix D: Chart of Countries' Special 301 Placement (1989-2005) and IIPA 2006 Special 301 Recommendations", <http://www.iipa.com/pdf/HISTORY%20OF%20USTR%20DECISIONS%202006%20Sp%20301%20021106.pdf>, accessed on 12 April 2010.

After that, however, the performance of the team deteriorated. On 30 April 2009, the USTR was released its 2009 Special 301 Report which elevated Indonesia into the Priority Watch List once again.⁵⁴ In the Report, the USTR acknowledged that there had been some slight improvement, yet the performance of Indonesia on IPR protection and enforcement was still assessed negatively. One indicator of the USTR assessment is optical disc regulation. Here the USTR evaluated that the regulation had not been implemented effectively as the government of Indonesia still issued licenses for suspect production lines. Moreover, the USTR observed that the government of Indonesia had failed to revoke permanently licences of factories that had already been convicted of committing piracy activities nor had the authorities confiscates their equipment and materials which were used to produce pirated optical discs.⁵⁵ In the 2010,⁵⁶ 2011⁵⁷ and 2012⁵⁸ Special 301 Report, Indonesia still remains on the Priority Watch List.

In regard to the performance of Timnas PPHKI, there was a significant difference in perception between the USTR and the government of Indonesia. In 2009, Timnas PPHKI formulated the National Policy on Intellectual Property (*Kebijakan Nasional Kekayaan Intelektual – KNKI*),⁵⁹ which had as a target a recommendation that the USTR remove Indonesia from the the Watch List in 2008 to the Off List in 2009. The recommenda-

tion was based on the government evaluation of IP infringement cases that had occurred in Indonesia over the previous three years. The percentage of IP infringement cases in Indonesia had dropped from 87 per cent in 2005 to 85 per cent and 84 per cent⁶⁰ in 2006 and 2007 respectively.⁶¹ However, the USTR assessed the performance of the team as ineffective.⁶² The USTR in its assessment noted that Timnas PPHKI had undertaken little concrete action to improve the IPR system in Indonesia over the period. In 2008, the USTR had seen IP infringement cases being decided slowly and only small number of cases successfully convicted, and with sanctions limited to light fines which could not have a deterrent effect on frequent infringers.⁶³

Despite the government's self-confidence, in reality, the development of IP enforcement in Indonesia had not been significant. The number/percentage of IP infringements that had been reduced by the efforts of Timnas PPHKI for the past three years had been small. The large-scale police raids that had been highly publicised are mainly aimed at end-user piracy of software and optical disc pirate production,⁶⁴ whereas large corporations which produce the pirated software or optical discs are rarely touched by these raids.⁶⁵ Moreover, according to the 2009 International Intellectual Property Alliance (IIPA) Special 301 Report, the enforcement process in Indonesia in

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* See also, The Office of the United States Trade Representative, "2009 National Trade Estimate Report on Foreign Trade Barriers", http://www.ustr.gov/sites/default/files/uploads/reports/2009/NTE/asset_upload_file255_15479.pdf, retrieved on 12 April 2010.

⁵⁶ The Office of the United States Trade Representative, "USTR Releases 2010 Special 301 Report on Intellectual Property Rights", <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/ustr-releases-2010-special-301-report-intellectual-p>, retrieved on 10 May 2010

⁵⁷ The Office of the United States Trade Representative, "2011 Special 301 Report", http://www.ustr.gov/webfm_send/2841, retrieved on 10 July 2012.

⁵⁸ The Office of the United States Trade Representative, "2012 Special 301 Report", <http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report.pdf>, retrieved on 10 July 2012.

⁵⁹ Andi Mattalatta, "Pidato Menteri Hukum dan HAM RI Awal Tahun 2009 (Speech of Minister of Law and Human Rights of the Republic of Indonesia in the Early 2009)", <http://www.dgip.go.id/ebscript/publicportal.cgi?ucid=376&ctid=25&id=2064&type=0>, retrieved on 13 April 2010.

⁶⁰ There is no explanation whether the percentage of IP infringement cases here is a percentage of the total number of court cases or of the number of cases instigated in Indonesia. *Ibid.*

⁶¹ Andi Mattalatta, *Loc.cit.*

⁶² *Ibid.*

⁶³ The Office of the United States Trade Representative, *Loc.cit.*

⁶⁴ International Intellectual Property Alliance, "Indonesia: IIPA 2009 Special 301 Report on Copyright Protection and Enforcement", <http://www.iipa.com/rbc/2009/2009SPEC301INDONESIA.pdf>, accessed on 13 April 2010, p. 1.

⁶⁵ M.A. Maulidin, "Pemerintah Kecewa Masuk Priority Watch List (Government Disappointed Joined Priority Watch List)", *Warta Ekonomi*, 5 May 2009 .

2008 was lack of transparency and surrounded corruption problems.⁶⁶

C. Conclusion

Despite many changes and efforts made in Indonesia during the past eleven years, the future of IP law in Indonesia is not really clear. Reforms that have been done so far have not transformed the negative image of IP condition in Indonesia. IP

problematic enforcement is hard to resolve since it also involves the improvement of other aspects of legal system in Indonesia, such as the court system and the legal education. To ensure that IP law system works well, all relevant government agencies in Indonesia need to cooperate. The central government must also have serious commitments to improve the IP condition in Indonesia.

REFERENCES

A. Books

- Antons, Christoph, 2000, *Intellectual Property Law in Indonesia*, Kluwer Law International, London.
- _____, 2009, *Intellectual Property in Asia: Law, Economics, History and Politics*, Springer, Berlin.
- Directorate General of Intellectual Property Right, 2007, *2006 Annual Report*, Ministry of Law and Human Rights, Tangerang
- Drahos, Peter and John Braithwaite, 2002, *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan, London.
- Drahos, Peter and Mayne, Ruth (eds), 2002, *Global Intellectual Property Rights: Knowledge, Access and Development* Palgrave Macmillan, Hampshire and New York.
- Gervais, Daniel, 2003, *The TRIPS Agreement: Drafting History and Analysis*, Sweet and Maxwell, London.
- Kementerian Koperasi dan Usaha Kecil Menengah (State Ministry of Cooperatives and Small Medium Enterprises), 2007, *Revitalisasi Koperasi dan UKM sebagai Solusi Mengatasi Pengangguran dan Kemiskinan (Revitalization of Cooperatives and SMEs as Solution to Overcome Unemployment and Poverty*, Kementerian Koperasi dan Usaha Kecil Menengah, Jakarta.

B. Journal Articles

- Antons, Christoph, "Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Developments", *Journal of Information, Law and Technology*, Vol. 1, Special Issue, 2007.
- Butt, Simon and Timothy Lindsey, "TRIPS and Intellectual Property Law Reform in Indonesia: Why Injunctions Aren't Stopping Piracy", *Harvard Asia Pacific Review*, Winter 2005.
- Hawin, M., "New Issues in Intellectual Property Law in Indonesia", *Mimbar Hukum*, Special Issue, November 2011.
- Kusumadara, Affifah, "Pemeliharaan dan Pelestarian Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Indonesia: Perlindungan Hak Kekayaan intelektual dan non-Hak Kekayaan Intelektual" (Maintenance and Preservation of Indonesian Traditional Knowledge and Traditional Cultural Expressions: Protection of Intellectual Property and non-Intellectual Property Rights), *Jurnal Hukum*, Vol 1, No. 18, January 2011.

C. Newspapers and Magazines

- Amri, Asnil Bambang, "Banyak Calo di Pengurusan Hak Kekayaan Intelektual (Many Scalpers in IP Registration Process)", *Kontan*, 24 October 2008.

⁶⁶ International Intellectual Property Alliance, *Op.cit.*, p. 71.

- _____, “Indonesia Admits Failure in Implementing WTO Commitments”, *Jakarta Post*, 22 December 1999.
- Harifaningsih, Elvani and Suwantin Oemar, “Lisensi Wajib Terbantur PP (Compulsory License is Hindered by Government Regulation)”, *Bisnis Indonesia*, 12 June 2009.
- Harifaningsih, Elvani, “MA Atur Injunction Kasus HaKI: Peraturan itu Berdampak pada Penegakan Hukum (The Supreme Court Regulate Injunction on Intellectual Property Case: This Regulation will Affect on Law Enforcement)”, *Bisnis Indonesia*, 17 December 2009
- Maulidin, M A, “Pemerintah Kecewa Masuk Priority Watch List (Government Disappointed Joined Priority Watch List)”, *Warta Ekonomi*, 5 May 2009 .
- Oemar, Suwantin, “Jangan Gantung PP Merek Terkenal (Don’t Delay Government Regulation on Well-Known Trademark)”, *Bisnis Indonesia*, 24 June 2008.
- _____, “Memangkas Proses dan Prosedur Pendaftaran Merek (Cutting Out the Process and Procedure of Trademark Registration (Cutting Out the Process and Procedure of Trademark Registration)”, *Bisnis Indonesia*, 13 October 2008.
- _____, “Revisi UU HaKI Diharapkan Selesai 2012 (Revision of Intellectual Property Laws are Expected Finished by 2012)”, *Bisnis Indonesia*, 16 September 2011.
- Saraswati, Scherazade Mulia, “Inilah RUU dalam Prolegnas 2011 (These are Bills in the Prolegnas 2011)”, *Media Indonesia*, 28 March 2011.
- “UMKM Berebut Daftarkan Merek (Micro and SMEs Race to Register Trademark)”, *Banjarmasin Post*, 6 November 2006.
- Pendaftaran Merek Baru dan Perpanjangan Tahun 2001-November 2009 (Statistic of New and Renewal Trademark Registration Applications: 2001- November 2009”, <http://www.dgip.go.id>, accessed on 13 July 2009.
- International Intellectual Property Alliance (IIPA), “Appendix D: Chart of Countries’ Special 301 Placement (1989-2005) and IIPA 2006 Special 301 Recommendations”, <http://www.iipa.com/pdf/HISTORY%20OF%20USTR%20DECISIONS%202006%20Sp%20301%2021106.pdf>, accessed on 12 April 2010.
- International Intellectual Property Alliance, “Indonesia: IIPA 2009 Special 301 Report on Copyright Protection and Enforcement”, <http://www.iipa.com/rbc/2009/2009SPEC301INDONESIA.pdf>, accessed on 13 April 2010
- Ministry of Law and Human Rights, “Prolegnas 2010-2014”, <http://www.djpp.depukumham.go.id/prolegnas-2010-2014.html>, accessed on 16 July 2012.
- Kementerian Riset dan Teknologi (Ministry of Research and Technology), “Mewujudkan Prolegnas 2012 yang Realistis dan Responsif (Realizing Realistic and Responsive Prolegnas 2012)”, <http://jdih.ristek.go.id/?q=berita/mewujudkan-prolegnas-2012-yang-realistic-dan-responsif>, accessed on 15 July 2012.
- Mattalatta, Andi, “Pidato Menteri Hukum dan HAM RI Awal Tahun 2009 (Speech of Minister of Law and Human Rights of the Republic of Indonesia in the Early 2009)”, <http://www.dgip.go.id/ebscript/publicportal.cgi?ucid=376&ctid=25&id=2064&type=0>, accessed on 13 April 2010.
- Halo Jepang, “Capacity Building Jadi Tujuan Utama Kerjasama JICA dengan Dirjen HaKI” (Capacity Building Becomes the Focus of JICA and Directorate General of Intellectual Property Rights Cooperation), <http://www.halojepang.com/berita-utama/3818-kasi-kerjasama-bilateral-dirjen-haki-qindonesia-a-jepang-patut-tingkatkan-kemampuan-a->

D. Internet Materials

Directorate General of Intellectual Property Rights – Department of Justice and Human Rights of Republic of Indonesia, “Statistik Permohonan

pemahaman-hakiq-2012-1800, accessed on 20 July 2012.

The Office of the United States Trade Representative, "2009 National Trade Estimate Report on Foreign Trade Barriers, http://www.ustr.gov/sites/default/files/uploads/reports/2009/NTE/asset_upload_file255_15479.pdf, accessed on 12 April 2010.

_____, "USTR Releases 2010 Special 301 Report on Intellectual Property Rights", <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/ustr-releases-2010-special-301-report-intellectual-p>, accessed on 10 May 2010.

_____, "2011 Special 301 Report", http://www.ustr.gov/webfm_send/2841, accessed on 10 July 2012.

_____, "2012 Special 301 Report", <http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report.pdf>, accessed on 10 July 2012.

World Bank, "Data Country Classification", <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~isCURL:Y~menuPK:1277382~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html>, accessed on 2 April 2008.