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Integrated Penal Law Enforcement to Intellectual Property Right in Indonesia as a Response to USTR Releases Annual Special 301 Report on Intellectual Property Rights

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Abstract: In 2015, Indonesia is still regarded as one of the weakest countries in providing legal custody. It is continuously featured. Based on the standpoint of USTR, it is mainly caused by the high rate of intellectual property right, especially, CD-formatted songs, movies and software. As of software, Business Software Alliance (BSA) report shows that software piracy rate in Indonesia stood at 88% with US$157 million potential loss in 2013. This ranked Indonesia in the 4th position worldwide and the 3rd position in Asia Pacific of the country with high piracy rate. Since, 1999 Indonesia has been among the top four countries with the highest piracy rate. In response, Indonesia has passed new Intellectual Right Law (UUHC). The penal stipulations are stated in 8 Articles of Law Chapter 12. It runs from 112-119. Article 120 confirms that complaint-filing principle applies. It means that law only has its power when there is a report requesting to charge perpetrator by disadvantaged party. It is obvious that the law has provided sound legal protection to inventor, intellectual right holder and related-right holder. It resorts to a effective dispute resolution by means of mediation and arbitrage. It contributes to some significant improvements of positive atmosphere for continuous inventions.

Key words: Law enforcement, integrated penal, intellectual property right, stipulations, intellectual, Indonesia

INTRODUCTION

Since, 2009 United States Trade Representative (USTR) has issued priority watch list. The list has featured Indonesia among other countries to be supervised for its low performance in protecting intellectual rights. Other countries which are also supervised are China, Russia, Al-Jazzier, Argentina, Canada, Chili, India, Israel, Pakistan, Thailand and Venezuela. This was an alarming reduction, since, a year earlier Indonesia was listed only in watch list. Every April per annum, USTR issues a list of countries to be supervised for their intellectual right protection performance. It consists of three different levels. The first is priority Foreign country. Those covered in this list are countries with serious infringement rate that they are subjected to trading penalty. The second is priority watch list. Those covered in this list are countries with high infringement rate that makes special oversight from US is considered necessary. The third is watch list, covering those committing milder intellectual property right violation and piracy and casual oversight is deemed enough. Indonesia becomes one of those countries under American supervision is the suggestion of International Intellectual Property Alliance (IIPA) proposed to USTR in February. IIPA considers that legal protection of intellectual property right and its enforcement in Indonesia are low.

In 2015, the report publicized by USTR continued registering Indonesia in its list. Significant elements of the 2015 special 301 Report include these following issues (Anonymous, 2015).

China remains in the priority watch list. The report draws attention to China's wide ranging intellectual property law reform effort and certain positive enforcement initiatives but also, to new and longstanding concerns about IPR protection and enforcement, including with respect to trade secret misappropriation and technology localization. Such new measures include conditioning market access on use of Chinese indigenous IPR, R&D being conducted in China and the provision of source code to the Chinese government.

The Report draws attention to the increased bilateral engagement in 2015 between the United States and India on IPR concerns, following the 2014 out-of-cycle review of India on this issue. India will remain on the priority watch list in 2015 but with the full expectation that the new channels for engagement created in the past year will bring about substantive and measurable improvements in India's IPR regime for the benefit of a broad range of

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innovative and creative industries. The United States has offered to work with India to achieve these goals. We are not announcing another OCR at this time but will monitor progress over the coming months and are prepared to take further action, if necessary.

USTR also highlights serious and ongoing concerns with respect to the environment for IPR protection and enforcement in Turkey, Indonesia, Russia, Argentina and other markets.

USTR announces that it will conduct out-of-cycle reviews to promote engagement and progress on IPR challenges identified in this year's reviews of Honduras, Ecuador, Paraguay, Tajikistan, Turkmenistan and Spain. The report also highlights any progress made by our trading partners in resolving and addressing IPR issues of concern to the United States.

Italy implemented new regulations in 2014 to combat copyright piracy over the internet including by providing notice-and-takedown procedures that incorporate due process safeguards and establish a mechanism for addressing large-scale piracy.

The Philippines carried out administrative enforcement reforms that have resulted in streamlined procedures, enhanced inter-agency cooperation and more enforcement action including increased seizures of pirated and counterfeit goods.

Denmark established a unit to be housed under the Danish Patent and Trademark Office that will assist in enforcement efforts by serving those consumers and businesses that have allegedly been the victims of patent, design and trademark infringement.

Paraguay and the Philippines have committed to a whole-of-government approach to IPR enforcement that has been critical to enhancing the effectiveness of IPR enforcement and resulted in positive reports from a number of affected stakeholder groups.

Indonesia is appreciated for its effort in maintaining intellectual property right. However, its enforcement is still unsatisfactory. It is clarified in this following statement.

Indonesia remains on the Priority Watch List in 2015. The United States welcomes the new administration's recent focus on IPR with respect to Indonesia's copyright law and trademark legislation. The United States also applauds continued educational outreach to the Indonesian public to advance IPR awareness. Nevertheless, the United States remains concerned about the gaps of Indonesia's laws concerning the legal custody and enforcement of IPR. The US urges Indonesia to address these issues. The United States is concerned about rampant piracy and counterfeiting emerging in Indonesia with regard to the lack of enforcement against precarious products. In 2014, 43 officials of Indonesian National Polices (INP) could only investigate 97 IPR cases and the Attorney General's Office (AGO) could only bring twelve IPR cases to trial. It is essential that Indonesia fully fund and support a robust IPR enforcement effort. The United States encourages Indonesia to address this problem through greater cooperation between the National Inter-Ministerial IPR task force and Creative Economy Agency in order to create a specialized IPR unit under the INP which focuses on investigating the Indonesian criminal syndicates behind the incidences of counterfeiting and piracy and to initiate larger and more significant cases. Enforced cooperation between Directorate General for Intellectual Property (DGIP) and National Agency of Drug and Food Control of Indonesia (a regulatory agency which focuses on supervising the distribution of substandard food and drug) is essential. Furthermore, it is suggested that the cooperation between INP and AGO be intensified, so that, specialized IPR inspectors and prosecutors can enhance the effectiveness and efficiency of their investigations. Finally, the United States encourages deterrent-level penalties for IPR infringement in physical markets and on the Internet. The United States continues to encourage Indonesia to provide an effective protection system against unfair commercial use as well as unauthorized disclosure of undisclosed test or other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products. The United States also remains concerned about market access barriers in Indonesia. The United States remains concerned about the lack of clarity surrounding legal procedures under the Indonesian patent law in connection with the grant of compulsory licenses. The United States encourages Indonesia to provide judicial or other independent review of any compulsory license authorizations. The United States welcomes increased engagement with the Government of Indonesia through IPR Working Group of the United States-Indonesia Trade and Investment Framework in order to substantively resolve these important issues (Michael, 2015).

From those reports, it is obvious that penal law enforcement for intellectual property still stutters. It is even staggering, since, Indonesia has ratified 5 international conventions in intellectual property sector: Paris Convention for the Protection of Industrial Property and Convention Establishing the World Intellectual Property Organization (Presidential Decree Number 15 year of 1997 concerning the amendment of Presidential Decree Numer 24 year of 1979). Patent Cooperation Treaty (PCT) and Regulation under the PCT (Presidential Decree Number 16 Year of 1997).

Trademark Law Treaty (Presidential Decree Number 17 year of 1997). Berne Convention for the Protection of Literary and Artisctic Works (Presidential Decree Number 18 year of 1997).

WIPO Copyright Treaty (Presidential Decree Number 19 year of 1997); to date, Indonesia has had several laws on intellectual property sector which are adequate and complementary as required in TRIPS agreement. They are as follows:

- Law Number 19 year of 2000 concerning copyright
- Law Number 29 year of 2000 concerning plant varieties protection
- Law Number 30 year of 2000 concerning Trade Secret Law
- Law Number 31 year of 2000 concerning Industrial Design Law
- Law Number 32 year of 2000 concerning Integrated Circuit Lay-out Design Law
- Law Number 14 year of 2001 concerning Patent Law
- Law Number 15 year of 2001 concerning trademark

The production of CD is regulated within a Governmental Regulation Number 29 year of 2004. However, these arsenal intended to inhibit crimes and piracy on intellectual property right are ineffective. It explains why Indonesia stays in Priority Watch List. According to USTR, high violation rate on intellectual property right, especially on CD-formed songs, movies and software. As of software, Business Software Alliance (BSA) report shows that Indonesia's piracy rate in 2003 was 88% with US$157 millions of potential loss. This ranked Indonesia in the fourth position worldwide and the third position in Asia Pacific of the country with high piracy rate. Since, 1999 Indonesia has always been the top four countries with the highest piracy rate.

Violations of 76 Intellectual Property Right have dented the image of Indonesia in stage of trade and global investment. Trade activity and global investment are instrumental for any countries to boost their economy. Priority Watch List status has psychological effect in international trade, although, the effect is less profound compared to the effect of priority Foreign country. America and other developed countries apply intellectual right protection as a requirement to be met by partner countries. If the latter fail to do so, America will raise the status by putting them in Foreign Priority Watch List and imposing trade sanction. The practice has been exercised against Ukraina by calling off its US$75 million exports to America.

Intellectual property crime has undermined FDI and trade of Indonesia. High software piracy has deleterious effects towards domestic information technology. The studies conducted by BSA and IDC in 2003 estimate that IT industry of Indonesia can potentially make around US$2.4 billion to 2006 if piracy rate can be reduced from 88-78%.

THE LAW ON COPYRIGHT DISPUTE RESOLUTION IN INDONESIA

Copyright refers to exclusive rights that automatically belong to the creator after creating or producing potentially valuable works (Law of Copyright Number 28 year of 2014 Article 1 Verse 1). Law of Copyright Number 28 year of 2014 clarifies that creator is a person or a group of persons making a typical and personal research while creation is a research in science, art and literature made from inspiration, ability, thought, imagination or skill.

Law of Copyright Number 28 year of 2014 is the amendment of Law of Copyright Number 19 year of 2002. It represents some improvements providing better protection for the creator or inventor, copyright holder and related right-holder. The improvements reflect accommodation of issues related to the era of technology and information and comprehensive protection covering penal and civil matters.

Article 1 Verse 95 Chapter XIV on Dispute Resolution states that: "Copyright dispute resolution can be administered through alternative resolution, arbitrage or court hearing". This stipulation is a new breakthrough of Law of Copyright Number 28 year of 2014. For the case that one party stays in a Foreign country, the resolution arrangement is set out in Article 4 Verse 95, stipulating that: "As long as the domiciles of disputing parties are known living outside or inside Indonesia, the resolution managed by mediation should be taken first before exercising penal charge".

All inventors, copyright holders or related right-holders can also propose for any compensation to Commerce Court under the issue of violation of copyright or related products. The specification of compensation is stipulated in Law of Copyright Number 28 year of 2014 Article 1 Verse 99. It is stated that: "Compensation charge as stated in Article can be in the form of demand of acquiring partial or whole income earned from violating copyright or related products". Inventor, copyright holder and related right-holders can also file pause ruling to commerce court. Law of Copyright Number 28 year of 2014 Article 3 Verse 99 stipulates that the filing of pause ruling to commerce court can be administered to a request impounding over research, product, its copies or its copying means that violate copyright and related product right.

Beside dispute resolution through alternative resolution and arbitrage, inventor, copyright holder and related right holder can also file temporary ruling request to commerce court. Commerce court can issue temporary ruling in order to: prevent the product suspected of being made available by breaking copyright or related right from entering trade market, withdraw it from the market as well as impound and keep, it as a crime evidence; keep it in a safe place and prevent the suspect from making it disappear and/or d. stop the crime to avoid bigger losses.

The filing of temporary ruling request is proposed to the head of commerce court under jurisdiction of which is the place where the suspected product is found. Law of Copyright Number 28 year of 2014 Verse 105 also states that "Right to file civil charge does not reduce the right to file penal charge".

Any party, in case of knowing that the claim product right has been registered as belongs to other party can also file charge to cancel its registration to Commerce Court. The charge is directed to register inventor or property right holder.

PENAL STIPULATION TO COPYRIGHT IN INDONESIA

Penal stipulation is an arrangement designed to block wrongdoing repetition. It follows the Ultimum remedium. This principle means that penal law should be treated as the last resort in relying law to protect intellectual property right. Other ways (dialogue, negotiation, mediation, civil or administrative laws) should be the first alternatives to look up to.

Penal offense is a violence done in a certain circumstance which is assumed illegal by the law which consequences can be physical or moral sentences and even property or asset seizure.

Penal offense to copyright is a wrongdoing related to using and managing the research in science and technology or art belonging to other person's or institution's which is assumed illegal by the law. Copyright is exclusive right of the inventor after producing valuable research which application follows the stipulation of law. Inventor is an individual person or a group of people who produce personal and typical researches. Creation of works in science, art and literature produced by exploring inspiration, ability, thought, imagination or skill expressed in the concrete form. Copyright holder is the inventor, party to whom the right is legally given by copyright holder or the third party to whom the right is passed on.

On one hand, inventor has moral right to either put his/her name or not to the copies that are intended to be publicized publicly, apply alias or new name, change or modify the research, change the title or subtitle of the research and keep his/her right in case of distortion, mutilation or any deleterious events which plagues his/her reputation. On the other hand, inventor has Economical right to use, publish, copy or multiply the researches in any forms as well as translate, arrange, adapt, transform, distribute, perform and rent his/her research for economical advantage and other parties should get his/her approval before using the research and it can be deemed illegal if otherwise.

There are 8 Sections in Copyright Law No. 28 of 2014 setting out penal stipulations compared to only one section in Copyright Law No. 19 of 2002. Those sections are spread from 112-119 mentioning sentences of prison and fine. Prison sentence is made maximum 10 years compared to 7 years in the previous law. Fine sentence is made maximum Rp. 4,000,000,000.00 compared to only Rp. 1,500,000,000.00 in the previous law.

Section 120 of Copyright Law No. 28 of 2014 clearly stipulates that penal law follows complaining report principle (Klacht delict). It means that the law has a particular power only when there is a complaint report from disadvantaged party. The report gives ground to attorney to make some charges relating to the application of intellectual research. This stipulation is non-existent in the previous law.

From all those explanations above, it is obvious that the present law provides more detailed and complete protection in penal and civil terms to inventor, copyright holder and related right holder. The present law also allows a bigger room for resolution by resorting to mediation and arbitrage. These improvements should lead to more conducive atmosphere for inventor, copyright holder and related right holder to keep producing researches.

POLICY OF PENAL LAW ENFORCEMENT TO COPYRIGHT OFFENSE IN INDONESIA

Policy or penal politics is an attempt to administer prevention and overcome the crime by resorting to penal and non-penal mechanism. Penal mechanism begins with a formulation (legislative policy), application (judicative policy) and execution (executive/administrative policy) (Arief, 2001). Marc Ancle as quoted by Trisno Raharjo considers penal politics as political or penal policy a branch of science or art which intends to formulate positive regulation in a better way, enabling it to be the guidance to law maker, courts as law implementers and public or institutions which follow up court decisions (Raharjo, 2006). Sudharto asserted that penal policy can also be viewed from law politics, that is an attempt of governmental bodies to make rules in accordance with the situation at the moment expressing what is contained in society and the goals to pursue.

In brief, it can be concluded that penal law is related to the issue of how to make or formulate appropriate penal law with effective implementation. Trisno Raharjo quoting A. Mulder suggested that penal policy determines how far the present penal stipulations need to be modified; what further measures to be taken to prevent crimes from raging; how investigation, charge, justice and penal stipulations should be carried out. In a wider structure, penal policy is part of criminal policy and criminal policy is part of social policy. It is described by following scheme. It is clear from the scheme that the goal to pursue is integration of social welfare and social defence. It means that the final purpose must be the attainment of welfare and protection to whole society. It is in line with Sudarto's notions that in criminal policy, people make judgment and choose one among several alternatives (Muladi and Arief, 1998). In criminal policy, there are two policy alternatives, i.e., penal or non-penal. Both derived from one goal, namely protecting and increasing society's welfare. Thus, prevention and tackle of crime should be carried out with integral approach; there should be balance between penal and non-penal mechanisms. Non-penal mechanism is more preventive and considered as a strategic policy. Penal mechanism has many disadvantages. According to United Nation Congress, Policy strategy which can prevent and overcome crimes is described follows.

Eliminate causal factor contributing to crimes; crime prevention and penal justice should be carried out with integral/systemic (not simplistic and fragmentary); maintain priority management towards certain types of potential crime; improve and increase the quality of law enforcers, institutions and organization management system/data management; "Guidelines", "Basic Principles" "Rules" and "Standard Minimum Rules (SMR)" are well arranged; widen international cooperation. Given that penal policy stage includes formulation stage, legislative role in composing law is pivotal. Insubstantial law leads to its implausible enforcement. Integrating strategy between penal and non-penal policies follows staged approach, emphasizing formulation stage (legislative policy), application stage (judicative policy) and execution stage (administrative/executive policy).

To best performance, there should not be distortion in one of the stages. Distortion in one stage leads to distortion in others. Distortion in formulation stage makes it harder to enforce the enforcement. In penal law, penal policy is repressive in nature. It means that penal policy is more treatment-focused; its system researches after penal offense transpires.

Repressive measure only highlights how to treat instead of how to prevent. Non-penal policy, on another hand is more preventive. In response to intellectual property right crimes, government has resorted to penal law to eliminate them. As we have seen, it has been proved ineffective. Government not only wants to punish but also educates the offender with the expectation of bringing them back to society by "fixing" them during their imprisoning period.

In reality, that expectation is left an expectation as many ex-convicts who have served their sentences find it hard to come back to society. Many rules and policies serve as wall separating the ex-convicts and society instead. Thus, the philosophy of correction embraced by government is not more than a meaningless slogan. The penal treatment does not "cure" them as it does not effectively stop them from committing the same crime. It can be said that non-penal policy is more promising solution. Since, it has preventive nature, it seems to be more effective in solving the crime. The best solution is one that eliminates the main cause of wrongdoing.

Some of the offenders are surprisingly not aware of offending aspect of their deeds. Limited public and law officer's knowledge of intellectual right regulations worsen it. A person for instance without thinking of the necessity of license may design featuring list of singers, songs, lyrics, photos and album covers. While illegally, it is massive practice. Internet makes life easier and more efficient, nevertheless, it also becomes the main source of intellectual property right offences.

Penal law has its limitations to be panacea. The wrongdoers can disappear at once and reappear at a later time to avoid law sanctions. Integration between penal and non-penal is believed more promising. Non-penal policy can take many forms. It can be materialized into such kind of events that boost people's creativity and genuineness that make people feel the air of originality thus, encourage them to avoid plagiarism. Seminars can also be used to socialize intellectual property right regulations. Several aspects of penal policy are noteworthy. These are discussed as follows.

Investigator comprises of police and civilian. The latter is a government staff at a department which responsibilities are related to intellectual property right. In line with Law Number 8 year of 1981 concerning the Law of Crime such a person is given the right to investigate. Intellectual property right Law stipulates investigator's authorities as follows: investigate the truth of complain report; investigate person's or institution's suspected offending intellectual property right law as accused in complain report; ask clarification from parties involved; examine the record, files and other documents related to the case, search a place to find evidence, records, files and other documents and impound materials deemed important as evidence and elicit expert assistance to accelerate investigation. The results of investigation are extended to attorney by police investigators (Section 107 of Law No. 8 of 1981 on Penal Procedure).

Zen Umar Purba proposes several means on how to make the research of governmental civilian investigators more effective. The means should allow governmental civilian investigators to extend their investigation results directly to attorney by bypassing police institution. Following this course, police institution can focus on more urgent issues such as banking, corruption and the like.

Only Intellectual Property Right Law that can apply stipulation of minimum and maximum limit. This stipulation warrants surety. Minimum limit in fine sanction, however which is up to 1 billion Rupiahs, put a huge burden to the perpetrator's who mostly does (do) not afford to pay. If observed closely, the limits in fine and prison stipulated in all copyright laws vary vastly. They are also grounded on irrational arguments, reflecting the absence of harmony among the laws.

All intellectual property right embraces complain report principle, except plant varieties law and copyright law. There should be rational ground to decide which law that can implement complaint report and which cannot. Trisno Raharjo offers two considerations: if the loss to society is obvious then, complain report is not necessary (non-complaint report principle). If otherwise, then the principle is necessary. In the case of the latter, law officers should act proactively. Zen Umar Purba holds that two principles can impose some problems. If this is a complaint related to private matters, only the right holders know the occurrence in some cases they resolve their conflict privately. Even if they resolved their problem, complaint report sent to the police cannot be revoked. non-complaint report principle sometimes incurs problem as public wishes for government to continuously eradicate the crime without complaint report from society. It is then necessary to decide which principle is appropriate to be embraced.

From seven intellectual property right laws, only plant varieties protection law that clearly states that wrongdoings specified therein are crimes. While in brand law, only one offence stipulated which is qualified for penal crime. The absence of such qualification in all other laws will cause some problems in imposing penal law to crime-attempt and assistance, concursus, overdue charge and penal implementation.

All intellectual property laws lack of stipulation on corporation liabilities in intellectual property offense. Corporations and firms are not free from industrial rights such as patent, brand or industrial designs. These materials are closely related to corporations and firms. The offender can be person's but they can commit the crime by the name of institutions. Trisno Raharjo proposes three forms of corporation liabilities: the management, the corporation and both.

CONCLUSION

The Present Intellectual Property Right Law is a response to ustr releases annual special 301 report on intellectual property rights. Copyright Law No. 28 of 2014 is concerned with penal stipulations. The law contains 8 sections setting out penal stipulations compared to only one in Copyright Law No. 19 of 2002, that is Section 72. Those are spread from Verses 112-119 mentioning sentences of prison and fine. Prison sentence is made maximum 10 years compared to 7 years in the previous law. Fine sentence is made maximum IDR 4,000,000,000.00 compared to only IDR 1,500,000,000.00 in the previous law.

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RECOMMENDATIONS

It is obvious that the present law provides more detailed and complete protection in penal and civil terms for inventor, copyright holder and related right-holder. The present law also allows a bigger room for resolution by resorting to mediation and arbitrage. These improvements should lead to more conducive atmosphere for inventor, copyright holder and related right holder to keep producing researches.

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