



**universitas
bandar lampung**
SOLUTION FOR PRESENT AND FUTURE
Bandar Lampung University, Indonesia

Icon-LBG 2016

**The Third International
Conference on Law,
Business and Governance**

PROCEEDINGS

Hosted by
Faculty of Law, Faculty of Economics and Faculty of Social Science
Bandar Lampung University (UBL)



Icon-LBG 2016

THE THIRD INTERNATIONAL CONFERENCE
ON LAW, BUSINESS AND GOVERNANCE 2016

20, 21 May 2016
Bandar Lampung University (UBL)
Lampung, Indonesia

PROCEEDINGS

Organized by:



Faculty of Law, Faculty of Economics and Faculty of Social Science
Bandar Lampung University (UBL)
Jl. Zainal Abidin Pagar Alam No.89 Labuhan Ratu, Bandar Lampung, Indonesia
Phone: +62 721 36 666 25, Fax: +62 721 701 467
website :www.ubl.ac.id

PREFACE

The Activities of the International Conference are in line and very appropriate with the vision and mission of Bandar Lampung University (UBL) to promote training and education as well as research in these areas.

On behalf of the Third International Conference on Law, Business and Governance (3th Icon-LBG 2016) organizing committee, we are very pleased with the very good response especially from the keynote speaker and from the participants. It is noteworthy to point out that about 46 technical papers were received for this conference.

The participants of the conference come from many well known universities, among others : International Islamic University Malaysia, Unika ATMA JAYA, Shinawatra University, Universitas Sebelas Maret, Universitas Timbul Nusantara, Universitas Pelita Harapan, Universitas Bandar Lampung, Universitas Lampung.

I would like to express my deepest gratitude to the International Advisory Board members, sponsor and also to all keynote speakers and all participants. I am also grateful to all organizing committee and all of the reviewers who contribute to the high standard of the conference. Also I would like to express my deepest gratitude to the Rector of Bandar Lampung University (UBL) who give us endless support to these activities, so that the conference can be administrated on time

Bandar Lampung, 21 May 2016

Mustofa Usman, Ph.D
Icon-LBG Chairman

PROCEEDINGS

Icon-LBG 2016

**The Third International Conference
on Law, Business and Governance**

20,21 May 2016

INTERNATIONAL ADVISORY BOARD

M. Yusuf S. Barusman, Indonesia
Andala R.P. Barusman, Indonesia
Mustofa Usman, Indonesia
Hayyan Ul Haq, Netherland
Renee Speijcken, Netherland
Zulfi Diane Zaini, Indonesia
Agus Wahyudi, Indonesia
Harpain, Indonesia
Khomsahrial Romli, Indonesia
Ida Farida, Indonesia
Warsono, Indonesia
Andreas Budihardjo, Indonesia
Pawito, Indonesia
I Gusti Ayu Ketut Rahmi, Indonesia
Lintje Anna Marpaung Indonesia
Zainab, Indonesia
Nik Ahmad Kamal Nik Mahmood, Malaysia
Maliah Sulaiman, Malaysia
Mohanraj, India
Wahyu Sasongko, Indonesia
Ari Darmastuti, Indonesia

PROCEEDINGS

Icon-LBG 2016

**The Third International Conference
on Law, Business and Governance**

20,21 May 2016

STEERING COMMITTEE

Executive Advisors

Dr. Ir. M Yusuf S. Barusman, MBA
Dr. Hery Riyanto, M.T.
Dr. Lintje Anna Marpaun, SH., MH.
Drs. Thontowie, MS

Chairman

Dr. Andala Rama Putra Barusman, SE., MA.Ec.

Co-Chairman

Dr. Bambang Hartono, S.H., M.Hum.
Dr. Yadi Lustiadi, M.Si.

Secretary

Hanindyalaila Pienresmi, S.I.Kom., M.I.Kom.

Technical Committee of Law Division

Dr. I Gusti Ayu Ketut Rachmi Handayani, SH., MH
Dr. Erina Pane, SH., MH
Dr. Bambang Hartono, S.H., M.Hum.
Dr. Zulfi Diane Zaini, SH.,MH
Dr. Zainab Ompu Jainah, SH., MH
Dr. Tami Rusli, SH., M.Hum.
Erlina B, SH.,M.Hum

Technical Committee of Economics, Business and Management Division

Prof. Dr. Sudarsono
Dr. Andala Rama Putra Barusman, SE., MA.Ec.
Dr. Lindrianasari, S.E., M.Si., Akt, CA
Dr. Angrita Denziana, SE., Akt,MM, Ak. CA
Dr. Iskandar Ali Alam, MM.
Tina Miniawati, SE., MBA.

Dra. Rosmiati Tarmizi, MM, Ak.
Afrizal Nilwan, SE,, M.Ec., Akt.

Technical Committee of Social Sciences Division

Prof. Dr. Khomsahrial Romli, M.Si.
Dr. Yadi Lustiadi, M.Si.
Dr. Supriyanto, M.Si.
Dr. Ahmad Suharyo, M.Si.
Dr. Wawan Hernawan, M.Pd.
Dr. Dra. Ida Farida, M.Si.
Dr. Malik, M.Si.

PROCEEDINGS

Icon-LBG 2016

**The Third International Conference
on Law, Business and Governance**

20,21 May 2016

ORGANIZING COMMITTEE

Chair Person

Dr. Iskandar Ali Alam, MM.

Secretary

Tya Rizna Pratiwi, S.E., M.S.Ak

Treasure

Samsul Bahri, S.E.

Administration

Proceedings and Certificate Distribution

Dina Ika Wahyuningsih, S.Kom

Tri Nuryati, S.Kom

Vida Yunia Cancer, S.A.N.

Agung Saputra

Desi Anggraini, SE.

Recca Ayu Hapsari, S.H., M.H.

Nurdiawansyah, S.E.

Sponsorship

Ir. Indriati A. Gultom, MM.

Yulia Hesti, SH., MH.

Bery Salatar, S.Pd

Receptionist and Registration

Rifandy Ritonga, SH., MH.

Ade Nur Istiani, S.I.Kom., M.I.Kom

Haninun, SE., MS., Ak.

Hepiana Patmarina, SE., MM.

Tya Rizna Pratiwi, S.E., M.S.Ak

Selfia Alke Mega, S.T., MM.

Revita Sari, S.E. MA.

Tri Lestira Putri Warganegara. S.E., M.M.

Transportation and Accommodation

Irawati, SE
Zainal Abidin, SE.
Desi Puspitasari, SH.

Documentation

Noning Verawati, S.Sos
UBL Production

Special Events

Khairudin, SE., M.S.Ak
Aminah, SE., M.S.Ak
Olivia Tjioer, SE., MM.
Drs. Suwandi, M.M.
Dra. Azima Dimiyati, M.M.
Drs. Soewito, M.M.
Dra. Agustuti Handayani, M.M.
Risti Dwi Ramasari, S.H., M.H.
Siti Rahmawati, SE.
Arnes Yuli Vandika, S.Kom., M.Kom
Melissa Safitri, S.H., H.H.
Selvi Diana Meilinda, S.A.N., M.P.A.
Syahril Daud, S.P., M.Si.

Consumption

Dra. Yulfriwini, M.T.
Susilowati, S.T., M.T

Table Of Content

| | |
|---|-------|
| Preface..... | ii |
| International Advisory Board | iii |
| Steering Committee | iv |
| Organizing Committee..... | vi |
| Table of Content | ix |
| Keynote Speakers : | |
| 1. Capability of Public Organizationstructure After Regional Extention in Way Kanan Regency (A Study on Basic Service Organization) – Yadi Lustiadi | I-1 |
| 2. Criminalisation of Copyright Piracy And International Trade: A Marriage of Convenience? The Case With Transpacific Partnership Agreement – Ida Madieha bt. Abdul Ghani Azmi | I-8 |
| 3. Legislative Measures To Prevent And Combat Sexual Violence Against Child: National and International Perspective – Antonius PS Wibowo | I-15 |
| 4. The Impact of Economic Structure Change on The Local Own Source Revenue and Its Effect Towards The Regional Income Improvement – Iskandar Ali Alam | I-25 |
| 5. The Influence Of Audit Committee and Internal Auditor Toward The Prevention of Fraud (A Survey In SOEs of Indonesia) – Angrita Denziana | I-40 |
| Paper Presenter : | |
| Law : | |
| 1. Application of Islamic Economic Law of Murabahah Funding In Islamic Banking – Nunung Rodliyah | II-1 |
| 2. Consultative Board Role of Country (BPD) in Monitoring Implementation of Government in The Country by Act Number 6 Of 2014 Concerning The Country – Rifandy Ritonga & Indah Satria | II-6 |
| 3. Identifying Criminalitor Using Face Detection on Room Security System – Robby Yuli Endra, Ade Kurniawan & Ari Kurniawan Saputra | II-14 |
| 4. Juridical Studies Mastery Mine Concept in The Approach to History and Principles of IMS (<i>Internasional Minimum Standard Of Civilization</i>) – Recca Ayu Hapsari | II-19 |
| 5. Legal Protection of Bank Customers In Cyber Crime Connected With The Internet Bankinglaw Number 11 Of 2008 Concerning Information and Electronic Transactions – Risti Dwi Ramasari | II-24 |
| 6. Legal Standing of Financial Services Authority (FSA) as Supervision of Banks Institutions in Indonesia – Zulfi Diane Zaini & Tami Rusli | II-28 |
| 7. Outlook for Tapis Fabric as Traditional Crafts Lampung Society in The Indication Geography Legal Protection – Erlina B, Recca Ayu Hapsari & Risti Dwi Ramasari | II-35 |

8. Punishment System Policy in The Prevention Effort To Criminal Act of Murder (Case Study of Murder Under Drunkenness) – Bambang Hartono & Benny Karya Limantara II-38
9. The Policy of Criminal Law Against The Crime of People Trafficking – Intan Nurina Seftiniara II-45
10. Analysis Reject Measure in Testing Non Constitutional Law on The Constitution NRI 1945 – Baharudin and Tantolailam II-51

Business:

1. An Analysis of Business Strategy To Increase Sustainable Competitiveness in Street Vendors (Studies in Mang Udin Ice Business in Bandar Lampung) – Sapmaya Wulan & Mahmudi III-1
2. Analysis of Economic Growth And Inflation Rate of Unemployment in Lampung Province – Achmad Subing III-10
3. Critical Success Factors and Risks Management in Applying Extensible Business Reporting Language – Idris Asmuni III-19
4. Differences Stock Return Between Company Which Has High Accounting Conservatism Level and Low Accounting Level to Company Registered at Stock Exchange of Indonesia Period 2010-2014 – Haninun, Angrita Denziana, Hepiana Patmarina & Theresia Aprilliani III-24
5. The Influence of Human Resources, Commitment Leader, The Use of Information Technology, and System Internal Control on The Quality of Local Government Financial Report Pringsewu – Chairul Anwar & Devi Meliana Mukadarul III-30
6. Foreign Debt Management Analysis And Impact On Economic Growth – Habiburrahman II-39
7. Influence of Motivation And Performance Work The Performance of Employees in Train Indonesia Company Tanjung Karang Bandar Lampung (A Case Study in The Commercial Employees) – Endang Siswati Prihastuti III-45
8. Influence of Work Motivation And Work Discipline on The Performance of Employees in Regional General Hospital in The District Demang Sepulau Raya Central Lampung – M.Oktaviannur & Adhetya Pratama III-52
9. Leverage Ratio Analysis Comparison Before and After Fixed Assets Revaluation in Jakarta Stock Exchange Impact on Investment Decisions Studies on The Company's Manufacturing IES Which Went Public on The Jakarta Stock Exchange – Ardansyah & Jant Kennedy Junior III-59
10. Market Regime and Relative Risk Between Sectors - Defrizal III-68
11. Moderating Effect of Switching Cost on Relationship Between Perceived Value, Satisfaction, Trust on Loyalty of Young-Age Customer In Tokopedia – Margaretha Pink Berlianto III-74
12. Marketing Mix Effect on Sales Volume of Banana Chips in Joint Business Group (KUB) "Telo Rezeki" in Bandar Lampung – Olivia Tjioener III-86
13. The Effect of Intellectual Capital and Corporate Governance on Bank's Financial Performance in Indonesia – Tia Rizna Pratiwi III-98

| | |
|---|---------|
| 14. The Effect of Number Of Customers and Fund of Third Parties (DPK) on The Provision of Cash In Bni Sharia Yogyakarta Branch Period 2008-2010 – Revita Sari | III-107 |
| 15. The Effect of Services Quality on Satisfaction of Visitors Tourism in Recreation Park Mutun Beach Lampung – Selfia Alke Mega | III-113 |
| 16. The Effect of The Implementation of Good Corporate Governance on The Company Financial Performance – Nurdiawansyah & Aminah | III-121 |
| 17. The Influence of Leadership Style and Work Motivation Toward Employee Performance at Department of Communication and Information in Bandar Lampung City – Tri Lestira Putri Warganegara | III-129 |
| 18. The Influence of Quality Products and Quality of Customer Loyalty in Cigarette Class Mild in PT.Niaga Nusa Abadi Bandar Lampung) – Farida Efriyanti & FerdyaRahman | III-136 |
| 19. The Influence of Transparency and Accountability Local Government Financial Report on The Level of Corruption Local Government of Sumatera Area – Khairudin, Rosmiati Tarmizi, Herry Goenawan Soedarsa & Rina Erlanda | III-146 |
| Governance: | |
| 1. Analysis of Implementation Program Village Funds in Supporting Regional Revenue - Ida Farida | IV-1 |
| 2. Development of A Public Service Model Through E-Government in Lampung Province - Malik & Noning Verawati | IV-6 |
| 3. Implementation of The Policy Program Bina Lingkungan The Government of Bandar Lampung City (A Studies on Vocational High School 2 Bandar Lampung) – Asrudi, Ferdiansyah & Sundari Saputri | IV-12 |
| 4. Motivation and Creativity Influence Toward Students Academic – Azima Dimiyati & Agus Purnomo | IV-15 |
| 5. Political Marketing and Communication Strategy To Win Legislative Nominee’s Competition Within Golkar Party in General Election 2014 – Pujono | IV-20 |
| 6. Sustainable Development Offuture Firmreputation - Vienda A Kuntjoro | IV-31 |
| 7. The Influenced of Good Corporate Governance to Corporate Sustainability – Vienda A Kuntjoro | IV-39 |
| 8. The Village People Empowerment to Increase Social Welfare - Wahyu Edi Purnomo, Desi Wahyuni & Widia Paramita | IV-45 |
| 9. The Dominant of Characteristic of Company at The Disclosure of Intellectual Capital (Study In Banking Company Registered In BEI Period 2010-2012) – Soewito, Suwandi & Hotma Margaretha Rumapea | IV-50 |
| 10. IT Bussiness : At A Glance Cloud Learning System in EF Bandarlampung – Arnes Yuli Vandika, Ruri Koesliandana & Dina Ika Wahyuningsih | IV-61 |

CRIMINALISATION OF COPYRIGHT PIRACY AND INTERNATIONAL TRADE: A MARRIAGE OF CONVENIENCE? THE CASE WITH TRANSPACIFIC PARTNERSHIP AGREEMENT

Ida Madieha bt. Abdul Ghani Azmi
Civil Law Department of Internasional Islamic University, Malaysia

Corresponding email : imadieha@iium.edu.my

Abstract

The signing of the Transpacific Partnership Agreement (TPPA) between twelve member countries, with Malaysia included, has set a new, higher benchmark for copyright enforcement. In three ways, the landscape of copyright law has been changed significantly. First, TPPA expand the coverage of the kinds of Intellectual Property recognised. Secondly, what constitute copyright violations has been expanded. Thirdly, sanctions for copyright piracy has been made tougher and sentencing lengths for such piracy has been lengthened. The usage of trade agreements to compel countries to improve copyright domestic policy is not a new strategy. The antecedent to TPPA is the TRIPs Agreement that was concluded on the basis that copyright piracy and counterfeiting has grown from just mere domestic nuisance to an effective barrier to free trade. This paper addresses the TPPA and analyses the rationale to the introduction of more stringent measures under TTPA. It seeks to understand the shift in the discourse of the policy makers regarding the 'severity' of copyright offences. It examines questions such as to what extent should copyright infringement be criminalised? Even if it is criminalised, why must it be imposed with more severe penalties than an ordinary economic crime?

1. INTRODUCTION

Copyright piracy has been the impetus behind the conclusion of a number of international treaties in the world. Starting from Berne Convention, we have seen the growth of treaties which specifically aim to force reform in domestic copyright policy in order reduce copyright piracy such as TRIPS Agreement, ACTA and the latest TPPA. The use of such international treaties is to push for adoption of copyright measures which are far more restrictive than what the domestic policy of the particular country would require. If not of external forces, the said country would not have been compelled to introduce reforms in domestic policy to arrest copyright policy effectively. The reason could be that it is not in the country's trade interest to tighten copyright rules because it is not a major producer of information intensive products and services which are heavily reliant on copyright.

TPPA seeks to rewrite the global rules on copyright law in three ways; first by ensuring that the member countries accede to the specified global treaties on copyright so that member countries abide by the same international rules. Secondly, member countries abide by the same minimum binding commitments. The minimum binding obligations can be further classified into several categories. The first are obligations in the form of TRIPS-plus standards that are actually US standards on IP rights. Second are obligations on areas not traditionally classified as IP rights under existing treaties, such as domain names, clinical data and Internet retransmission. This entails the extension of the above subject matters protected under IP under the proposed TPPA. The third category comprises obligations relating to the administration and management of IP which are of interest to all Contracting Parties, such as registration systems, adjudication of disputes or enforcement of rights.

The paper seeks to explore the minimum binding commitments on copyright enforcement. It seeks to examine how through trade agreements, US has been able to export their intellectual property standards to the rest of the world through free trade agreements in the name of fighting piracy. These trade agreements compels member countries to set a new, higher benchmark for enforcement. This is followed with an examination of the justifications for and against the imposition of stronger punishment and penalties for copyright offences.

2. PIRACY AND TRADE AGREEMENTS.

Copyright piracy and counterfeit goods are nothing new in the world, more so in ASEAN. In the area of music, whilst physical piracy shows no sign of being abated, online piracy continues to grow exponentially with new forms of online sharing and swapping of music tracks. Among the forms of online piracy are illegal websites, P2P networks and Bit Torrents. As reported by IFPI, supporting piracy dampens the growth of the music industry which may be the driver of a country's economy. The argument is that the suppression of piracy brings immeasurable benefits to the country.

The relationship between copyright piracy and domestic economy is obvious. But the relationship between copyright piracy and international trade is even more difficult to establish. Yet, many international treaties have been entered into as a means to control copyright piracy. Copyright, being intangible, can be infringed across borders. Hence, the wanton and indiscriminate piracy in one country as a result of weak copyright law may constitute trade barriers against free trade. The uneven standards of copyright from one country to another prompted the copyright industries in the US to lobby for the inclusion of intellectual property rights into a trade agreement by the World Trade Organisation. The resulting agreement known as TRIPS Agreement was meant to harmonize national systems of IPRS. TRIPS is the first multilateral treaty on intellectual property that profess the link between domestic policies on intellectual property and external policies on international trade.

Copyright can also be one of the main economic driver of a country which compels that country to monitor piracy across its border. The United States for example keep a vigilant watch or surveillance of global piracy by listing country's piracy performance in the U.S. Trade Representatives annual "Special 301" Reports from as early as 1980s. In this list, many of the ASEAN countries are classified as either under the Watch List or more serious the Priority Watch List. The covert method to enforce legal reform through Special 301 measures has been an effective US foreign policy against developing countries particularly that require some form of disciplining for lack of strong rules and enforcement of copyright policies.

The table below illustrates the ranking of ASEAN countries in the United States Trade Representative Reports (USTR) Special 301 Report.

Table 1: The ranking of ASEAN countries in the USTR Special 301 Report

| | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 |
|-------------|------|------|------|------|------|------|------|------|------|------|
| Brunei | | | | WL | WL | WL | WL | | | |
| Cambodia | | | | | | | | | | |
| Indonesia | PWL | *WL | WL | *PWL | PWL | PWL | PWL | PWL | PWL | PWL |
| Laos | | | | | | | | | | |
| Malaysia | WL | WL | WL | WL | WL | WL | * | WL | | |
| Myanmar | | | | | | | | | | |
| Philippines | WL | WL | WL | WL | WL | WL | WL | WL | * | |
| Singapore | | | | | | | | | | |
| Thailand | WL | *PWL | PWL | PWL | PWL | PWL | PWL | PWL | PWL | PWL |
| Vietnam | WL | WL | WL | WL | WL | WL | WL | WL | WL | WL |

Source: USTR Special 301 Report (2006-2015)

In the above table, it can be seen that Malaysia has been listed under the Watch List since 2006 and was phased off in 2014 as a result of more stringent copyright measures introduced in the 2012 copyright amendment. Indonesia, in the meantime has been listed in the Priority Watch List since 2006 and has been there until now. According to the 2015 USTR Special 301 Measures¹, US is particularly concerned with piracy in Indonesia which it considers as market access barriers affecting US businesses that depends on intellectual property protection. Among factors cited are lack of enforcement, lack of cooperation between relevant ministries that has led to rampant piracy and counterfeiting in Indonesia. Indonesia is a member of WTO and would have been in compliance with the TRIPS Agreement.

¹ 2015 Special 301 Report, available online at <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>

TRIPS Agreement was considered to be an ambitious multilateral agreement at the time of its conclusion, i.e. 1994. It seeks to harmonize global standards on intellectual property protection, developed countries and developing countries alike. Among the strong measures introduced by TRIPS Agreement are the mandatory protection of copyright to lifetime plus fifty, copyright to be granted automatically, the recognition of computer program as the subject matter of protection and the acceptance of exceptions to exclusive right but subject to the three step test.

Despite the success of TRIPS Agreement in regulating copyright piracy between member countries, it soon transpired that the TRIPS standards are not effective enough to stem piracy. This leads to the inclusion of more stringent copyright measures through free trade agreement either at bilateral, regional or pluri-lateral level.

Malaysia, despite having graduated from the USTR Watch List find itself having to agree for more stringent copyright measures through the Trans Pacific Partnership Agreement. This paper moves into examining the measures introduced by TPPA to hit hard on piracy.

3. TRANSPACIFIC PARTNERSHIP AGREEMENT.

Transpacific Partnership Agreement (TTP) has been hailed as the 21st century trade rules that has rewritten the rules for global trade. By creating a single set of trade and investment rules on trade areas, TPPA promises to provide greater certainty and predictability for business by creating harmonisation of standards enabling parties to compete on a more level playing field. TPP is quite comprehensive in its coverage, extending on traditional trade issues such as market access, technical barriers to trade, sanitary and phytosanitary measures to non traditional trade issues such as labour standards and capacity building. The harmonisation of intellectual property rules is established through the intellectual property chapter, one of the biggest chapters in the TPPA. In particular, TPPA aims to rewrite global rules on copyright enforcement. The list of these new rules can be found in table (2) below.

Table 2: Copyright enforcement provisions under the TPPA

| | | |
|--|---|--|
| | Presumptions | The validity of copyright, trade mark and patents that have been substantively examined by the competent authority |
| | Enforcement practices | Judicial decisions and administrative rulings shall preferably in writing, and published Publish information on enforcement of IPR |
| | Damages | Damages may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price Availability of pre established damages or additional damages Damages may not be available against a non profit library, archives, educational institution, museum, or public non commercial broadcasting entity |
| | Criminal liability for aiding or abetting | Member States to provide for criminal liability for aiding and abetting copyright infringement. |
| | Border measures | Judicial authorities have the authority to order for infringing goods to be destroyed without any compensation of any sort Availability of court order to obtain relevant information regarding person, means of production or channels of distribution of infringing goods Border measures available for imported goods, export and goods in transit Goods detained or suspended as a result of border measures - the right holder must be informed of the names of the parties involved as well as of the details of the goods Ex officio border measures available also for |

| | | |
|---|-----------------------------------|---|
| | | imports, exports and goods in transit Border measures also applicable to goods of commercial nature sent in small consignments |
| | Criminal procedures and penalties | On a commercial scale includes acts carried out for commercial advantage or financial gain and significant acts, though not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the right holder Also applicable to willful importation |
| Trade Secrets | Criminal procedures and penalties | Availability of criminal procedures and penalties for unauthorized, willful access and disclosure of trade secrets |
| Protection of encrypted programs-carrying satellite and cable signals | Criminal offences | Manufacture, assemble, modify, import, export, sell, lease or distribute devices used to decode an encrypted program-carrying satellite signals |
| | Civil and criminal remedies | Availability of such remedies in specified circumstances |

Source: Extracted from Chapter 18 of the Trans-Pacific Partnership Agreement

The TPPA contains provisions on criminal offences which originates from the US law (Margot Kaminsky, 2013-2014). In the US, the shift in the policy discourse on the severity of copyright offences triggered the enactment of No Electronic Theft (NET) Act in 1997. The Act marks the beginning of treating copyright offences as criminal offences. The analogy is that copyright offences are equivalent to theft and should be treated like other offences that cause grave harm to the public. The process of copyright criminalisation entails that a major paradigm shift from civil to criminal copyright. (Eldar Haber, 2015)

Article 18.77(1)(b) of TPPA requires Member States to provide for copyright offences in respect of acts which are not carried out for commercial advantage or financial gain but have a substantial prejudicial impact on the interests of the copyright owner. The article provides:

Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale. In respect of wilful copyright or related rights piracy, "on a commercial scale" includes at least:

- a). acts carried out for commercial advantage or financial gain; and
- b). acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace.

With this provision, TPPA has substantially changed the rationale behind the criminalisation of copyright offences. Previously, the international standard is to impose criminal penalty when piracy occurs at a commercial scale as set by Article 61 of the TRIPS Agreement. The rationale is that civil suits are available to the right holders and criminal procedures should only be available if the piracy is so widespread that it harms the society. In the words of Article 61, strong criminal penalty should be made available when the piracy is 'committed willfully and on a commercial scale'.

The scope of Article 61 has been the subject of review in a WTO Dispute Settlement Body's decision in China-Intellectual Property Rights. In the estimation of the Panel, both 'willful' and 'on a commercial scale' constitute a major limitation to the provision of criminal penalties. The two phrase which comes before and after the phrase 'trademark counterfeiting or copyright piracy' defines the types of cases of that of grave consequences that they deserve maximum penalty. Fundamental to the issue is to what extent would copyright piracy or trade mark counterfeiting be considered to be "on a commercial scale"? On this the Panel viewed that "commercial scale" refers to the magnitude or extent of typical or usual commercial activity, i.e. the piracy must occur at a magnitude that it will harm the commercial interest of the copyright owner.

The WTO Panel decision in China-Intellectual Property Rights, was a major turning point for the United States as they lost their endeavour to impose their jurisprudence on copyright criminal provisions on the rest of the world. With the intention to shift the discourse of policy makers regarding the 'severity'

of copyright piracy and counterfeit trade marks, the US champions the imposition of more stringent penalties in trade negotiations, hence the conclusion of the Trans-Pacific Partnership Agreement.

The imposition of stringent copyright measures under TTPA is also seen as a measure to export rules from the Anti Counterfeiting Trade Agreement (ACTA), a multinational treaty signed by twelve member countries comprising of Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, United States, Mexico and the European Union. As the Agreement focuses on global trade of counterfeit goods and copyright infringing goods, a number of new criminal provisions were introduced. Among them are provisions criminalising willful trade mark counterfeiting, copyright piracy, or "willful importation and domestic use" of counterfeit labels and packaging in the course of trade on a commercial scale". Under ACTA 'commercial scale is defined to include acts "carried out as commercial activities for direct or indirect economic or commercial advantage". which may include online infringement. To determine whether certain goods are infringing, the relevant law is the law of the country where procedures are revoked. This entitles developed countries with higher intellectual property rights to take action in accordance to their domestic law even if such activities are lawful in the country where the goods originate.

ACTA also mandates for the imposition of criminal penalties for aiding and abetting criminal conduct'. Equally criminal is the act of cam cording movies in theaters, online copyright piracy and anti-circumvention measures. Finally, the border measures is extended for in transit and exports of copyright infringing and counterfeit goods. The powers of the custom authorities are also strengthened by conferring them with an ex officio powers to take action regardless of complaint or notice from the right holders. These are the exact provisions that are brought in by TPPA in its intellectual property chapter.

ACTA has been criticised heavily by many quarters as being ' global one way IP ratchet" or 'having he features of the scheme of a Vaudeville Villain' (Kimberlee Weatherall, 2011). Table 3 below illustrates how the TRIPS, ACTA and TPP progressively introduce new copyright crimes and increase the severity of the penalty for such offences.

Table 3: The ratcheting of copyright criminalisation through trade agreements.

| | TPP | TRIPS | ACTA |
|--|-----|-------|------|
| SPECIAL MEASURES RELATING TO ENFORCEMENT IN THE DIGITAL ENVIRONMENT | | | |
| Special requirements for digital enforcement | / | X | X |
| Legal incentives for ISPS in restraining the unauthorized storage and transmission of copyrighted materials | / | X | / |
| Safe harbour for ISPs | / | X | X |
| Detailed notification and counter-notification procedures for right holders, ISPs and subscribers. | / | X | X |
| TECHNOLOGICAL PROTECTION MEASURES | | | |
| Criminalisation of unauthorized acts against the circumvention of effective technological measures | / | X | / |
| Make circumvention a distinct cause of action, independent of infringement. | / | X | / |
| CRIMINAL ENFORCEMENT | | | |
| criminal procedures and penalties must be applicable for willful trademark counterfeiting or copyright on a commercial scale | / | / | / |
| Provide for criminal procedures on unauthorised transmission or copying of motion picture or other audiovisual work (TPP)or unauthorized copying of cinematographic works (ACTA) | / | X | / |
| Criminal liability for aiding and abetting is available under its law. | / | X | / |
| Provides penalties that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future infringements | / | / | / |
| Seizure of suspected counterfeit or pirated goods | / | / | / |
| Forfeiture and destruction of all counterfeit or pirated goods | / | / | / |
| Forfeiture or destruction of materials and implements | / | / | / |
| Seizure or forfeiture of assets the value of which corresponds to that of the assets derived from, the infringing activity. | / | X | / |

| | TPP | TRIPS | ACTA |
|--|-----|-------|------|
| Ex officio action without the need for a formal complaint. | / | X | / |

The paper proceeds with a discussion as to the justifiability of the paradigm shift in copyright offences.

4. JUSTIFICATIONS OVER CRIMINALISATION OF COPYRIGHT OFFENCES

The traditional justification for more severe penalties for copyright piracy is that they are necessary in response to the increase in global trade in counterfeit goods and copyright infringing materials. The copyright industries suffer continued financial loss which is unprecedented given the evolution of new technologies to facilitate copying (Isabella Alexander, 2007). The widespread use of file sharing for example necessitates the prosecution of file sharing operator that openly defy civil enforcement actions (Benton Martin & Jeremiah Newhall, 2013). As there is no longer social stigma associated with downloading and file sharing, enforcing obedience by way of criminal offences is therefore justifiable (Cheng Lim Saw, 2010). Unlike civil suits which aim to compensate the author for the unauthorised use of his work, the aim of criminal enforcement is to enforce obedience (Benton Martin & Jeremiah Newhall, 2013). As the criminal powers is to aim deterrence, the range of penalty and punishment imposed must be severe enough to stop the offenders from repeating the offence. The continuous campaign against piracy is taking up a significant amount of cost. The amount of harm caused to the interests of the right holders are substantial (Timothy D. Howell, 1996). This is a classic situation where John Stuart Mill's theory of harm is neatly applicable. The premise of the argument is that where the conduct of the individual causes harm to others in society, the State is justified to restrict individual liberty (Cheng Lim Saw, 2010). Further, taking other's right is a morally wrong behaviour. Considered that intellectual property belongs to the one who creates it, it is ethically wrong for someone else to reap it without sowing the seeds, so to speak (Cheng Lim Saw, (2010); Jeff Vinall, (2013).

Another oft repeated claims is that the organizations behind the copyright piracy are somehow connected with syndicates and organised crimes and are actually channeling the funds to terrorist activities. With criminal proceeding, the assets of the infringers can be frozen and the instruments used for the commission of the offence be seized and the proceeds of the criminal activity can be forfeited. The operation of the syndicates can be paralysed if their financial sources are stemmed. More fundamentally, the collection of crucial evidence can be facilitated through search warrant by the enforcement agencies. Enforcement agencies can scourge the computer systems of the copyright infringer for evidence or even wire tap their communication system surreptitiously for evidence gathering (Jeff Vinall, 2013)

5. CRITICISMS AGAINST THE CONTINUED PROGRESSION OF CRIMINALISATION OF COPYRIGHT OFFENCES

Despite those assertions, critics point out that copyright infringement lacks the moral force to be criminalised unlike theft. Many does it with no financial motive, or at a small scale and even those that encourage sharing for purpose of learning and education. As a result, many feels that the extension of property concepts to intellectual property which is intangible is difficult to digest. The public does not regard the harm caused by the commission of copyright offences to be as severe as theft.

More fundamentally, most of the claims on harm caused by copyright piracy has been criticised as being based on dubious statistics. In reality, there is no accurate measurement of the actual cost caused by copyright piracy. The assumption each copy of counterfeit constitute a potential loss of sale for an original piece of copyright work. Such assumption is clearly misplaced as those who indulge in file sharing may not necessarily be willing to purchase the original copyright material in the first place. The same goes with counterfeit goods.

The nature of intellectual property which is non rivalrous and non excludable further departs it from tangible goods. Whilst the taking of tangible good results in the deprivation of the original owner of his ownership, intellectual property piracy involves making more copies of the work while retaining the original copy intact. There is this' no deprivation of ownership of the property right, so to speak, unlike physical property. Due to this, commentators feel that copyright crimes should be less damaging than stealing of a physical property (Margot Kaminsky, 2013-2014).

Critics also raised a number of human rights issue with heightened enforcement. For example, monitoring of the internet to reduce online piracy might chill freedom of expression. As the conduct of online sharing and downloading is so widespread, it is next to impossible to enforce it effectively. This might give rise to selective prosecution with indiscriminate suits again certain target groups instead of targeting the offenders at large. The gap in the enforcement of the criminal offences have been attributed to many reasons. Whilst the industry lobbyist are responsible for the introduction of criminal offences but

they were not successful in forcing prosecution of cases (Elder Haber, 2015). Not surprisingly, many critics argues against TPP provisions on the basis that they are skewed to favour copyright owners interest without sufficient balance to legitimate users of the copyright goods (Jessica Litman, 2007).

The correlation between the severity of the punishment imposed and the offences committed has also been questioned. In the context of online policing for file sharing, the basic assumption is that copyright is unrelated to freedom of expression (Margot Kaminski, 2013-2014). The concern is whether the range of punishment imposed is proportional to the harm copyright piracy caused to the society (Diane L. Killpatrick-Lee, 2005-2006). In addition, the problems with online piracy is a regurgitation of the problems faced with music piracy in the physical world. The only difference is the scale of the operation. Regardless, the failure to stem piracy effectively may suggest that the problem could be more complicated than that (Isabella Alexander, 2007).

6. CONCLUSION

The Trans Pacific Partnership Agreement pushes for a paradigm shift in the discourse relating to the criminality of copyright piracy. The push for punitive damages and longer imprisonment indicates that copyright piracy is no longer considered just economic harm but blameworthy act that harms the society. The widespread of online piracy warrants aggressive use of criminal prosecution, again, to force obedience and compliance. The penalties include a range of punishment including imprisonment as well as monetary fines sufficiently high to deter future acts of infringement. In the online environment, the concern is whether online policing is warranted as it brings the fear of a police state. Above all, it is really questionable whether copyright law can really be able to keep up with piracy. (Stephanie Minnock, 2014) It is understandable that indulging in piracy is a blameworthy act, however the bigger issue is whether the imposition of severe penalties, much higher than other economic crimes is justifiable or not. What is more worrying is that these imposition of higher standards of intellectual property rights are done in the name of free trade when it has very little to do with trade.

REFERENCES

- [1] Alexander, I., Criminalising Copyright: A Story of Publishers, Pirates and Pieces of Eight, *The Cambridge Law Journal*, 66 [2007], 625-656.
- [2] Bitton, M. 2012. Criminal Law: Rethinking the Anti-counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures, *102 Journal of Criminal Law & Criminology* 67.
- [3] Flynn, S.M. , Brook Baker, Margot Kaminski & Jimmy Koo (2012), the U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement, *28 American University International Law Review*, 105.
- [4] Manta, I.D., 2011 The Puzzle Of Criminal Sanctions For Intellectual Property Infringement *Harvard Journal of Law & Technology*, Volume 24, Number 2 Spring 2011
- [5] Haber, H., Copyright's Technological Technologies Interdependencies, *18 Stan. Tech. L. Rev.* 247.
- [6] Howell, T.M., 1996. Intellectual Property Pirates: Congress Raises the Stakes In the Modern Battle To Protect Copyrights and Safeguard the United States Economy, *27 St. Mary's L.J.* 613.
- [7] Martin, B., & Newhall, J., Criminal Copyright Enforcement Against File sharing, *North Carolina Journal of Law and Technology*, Vol 15, Issue 1: October 2013
- [8] Kaminski, M., Copyright Crime and Punishment: The First Amendment's Proportionality Problem, *73, Md L. Rev.* 587 2013-2014.
- [9] Killpatrick-Lee, D.L., Criminal Copyright Law: Preventing A Clear Danger to the US Economy or Clearly Preventing the Original Purpose of Copyright Law? *14 U. Balt. Intell. Prof. L.J.* 87 2005-2006.
- [10] Litman, M. 2007. Frontiers of Intellectual Property: Lawful Personal Use, *85 Tex. L. Rev.* 1871.
- [11] Minnock, S., Should Copyright Laws Be Able to Keep Up With Online Piracy, *12 Colo. Tech. L.J.* 523 2014.
- [12] Saw C.H, 2010. The Case for Criminalising Primary Infringements of Copyright- Perspectives from Singapore, *Int J Law Info Tech* (2010) 18 (2): 95.
- [13] Vinall, J., The Criminal law's treatment of twenty-first century copyright pirates: A treacherous new frontier for property offences, *2013 Oxford U. Undergraduate L.J.* 57 2013.
- [14] Weatherall, K., Intellectual Property Law Enforcement and the Anti-Counterfeiting Trade Agreement (ACTA), *American University International Law Review*, 26 Am. U. Int'l L. Rev. 839



**universitas
bandar lampung**
SOLUTION FOR PRESENT AND FUTURE



Bandar Lampung University
Zainal Abidin Pagar Alam Street No. 26 Labuhan Ratu
Bandar Lampung, Indonesia | www.ubl.ac.id | Phone +62 721 773 847