



CASE ASSOCIATES

Intellectual property and competition law - Indonesia

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Presentation to

**Getting the Balance Right - Intellectual Property,
Competition Law and Economics in Asia**

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COMPETITION
& REGULATORY
ECONOMISTS

Topics covered

Cento Veljanovski

- Part 1: Background – IPRs in Indonesian economy
- Part 2: Institutional & Policy Issues – interrelation between IP and competition laws

Prof. Ningrum Sirait*

- Part 3: Legal & Policy Developments in Indonesia

*Professor Siriat is not affiliated to Case Associates

Speaker

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Cento is Managing Partner of Case Associates, Associate Research Fellow, Institute of Advanced Legal Studies, University of London, IEA Fellow in Law and Economics, Adjunct Senior research Fellow, Centre for regulation and Market Analysis (CRMA), University of South Australia, and Member, Economic Advisors' Panel, Infocomm Development Authority of Singapore (IDA). He is a well-known economist with nearly 40 years' experience as an adviser to companies on competition, regulatory and communications economics. Cento has assisted a large number of fixed, mobile, internet and other communications operators in regulatory proceedings, merger investigations and on competition issues. He has been selected as one of the '*most highly regarded*' competition economists globally and one of the top five in Europe by the 2006 Global Competition Review survey. Cento was appointed an expert advisor to the Microsoft Monitoring Trustee in 2006 to examine FRAND royalties, and has assisted on a number of IP cases. He often acts as an expert witness in competition law, commercial and damage litigation, and on the communications and media sectors most recently in the English High Court, Irish High Court, Federal Court of Australia, Dutch District Court, Finnish Higher Administrative Court, the UK Competition Appeals Tribunal, Irish High Court, Hong Kong Appeals (Telecommunications) Tribunal, and the International Court of Arbitration.

PART I

Background

Country information (2007)

- population 228.1 millions
- GDP real growth rate 6.3%
- GDP per capita (US\$) 1,925
- Poverty (living below US\$ 1.25/day) 21.4 %
- GDP by sector - industry (46%), services (40%) and agriculture (13%)
- main trading partners Japan, China, EU, US and Singapore
- exports - oil and gas, electrical appliances, plywood, textiles, rubber
- imports - machinery and equipment, chemicals, fuels

Economic performance

	2002	2003	2004	2005	2006	2007	2008
PDB Growth (%)	4.5	4.8	5	5.6	5.5	6.1	6.09
Investment Growth(%)	4.7	0.6	14.7	10.8	2.9	10.7	20.5
Export Growth (%)	1.5	6.8	6.1	19.7	13.1	6.3	9.50
Inflation (%)	11.8	6.8	6.1	10.5	13.1	6.3	9.10
SBI (BI rate-1 Month) (%)	15.1	10.1	7.5	9.6	11.6	8.6	8.67
Exchange Rate (Rp/US)	9.315	8.573	8.936	9.711	9.167	9.151	9.745
GDP/Capita (in million RP)	8.46	9.4	10.61	12.7	15.03	17.5	21.7

Source: UNCTAD

Market and institutional factors

- high barriers to trade
- highly concentrated markets - 44% with C4 >75%
- low R&D
- major monopolies subsidised by government
- weak legal and judicial systems

least competitive; low IP protection

2008, Ranking out of 134 countries

Global Competitiveness Index

Sub-indices Rank

Country	Overall	Institutions	Macroeconomic stability	Innovation	IPRs	IP protection
Indonesia	55	68	72	47	117	102
Singapore	5	1	21	11	4	2
China	30	56	11	28	54	53
Japan	9	26	98	4	15	14
Korea	13	28	4	9	39	26
Australia	18	12	28	20	13	10
India	50	53	109	32	52	57
Thailand	34	57	41	54	61	55
US	1	29	66	1	26	18

Source: World Economic Forum

Indonesia and IPRs

- middling innovation
- low R&D expenditure
- little patenting
- weak IP protection
- significant IP infringement

Research and development

Country	R&D/GDP (%)	
	1995	2002-05
Japan	2.98	3.19
Korea	2.68	2.99
Taiwan	1.81	2.45
Singapore	1.10	2.36
Hong Kong	0.30	0.74
China Coast	0.93	1.59
All China	0.60	1.34
Malaysia	0.20	0.63
Thailand	0.10	0.25
Phillipines	0.70	0.30
Indonesia	0.10	0.50
India	0.50	0.61
OECD average	2.07	2.25

Source: Hu & Jefferson (2007)

Patents granted

Country	Number of patents		Patents per 100,000 people		
	1990-04	2000-04	1990-04	2000-04	Change
Hong Kong	184	616	3.15	9.32	11.4
Korea	633	4,009	1.44	8.67	19.7
Singapore	36	382	1.09	9.87	24.6
Taiwan	1,307	6,593	6.3	30.17	17
Indonesia	6	15	0	0.01	8.8
Malaysia	13	64	0.07	0.28	15.3
Phillipines	6	18	0.01	0.02	10.4
Thailand	6	43	0.01	0.07	20.9
China	48	368	0	0.03	22.9
Japan	22,647	35,687	18.23	28.54	4.6
USA	59,024	97,104	23	33.56	3.9

Source: Brahmhatt & Hu (2007)

International IP Watch List 2009

Estimated trade losses due to copyright piracy (millions US\$)

Estimated levels of copyright piracy (%)

Country	Business Software				Records & Music				Books		Total	
	Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss
	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007
India	1384	1013	68	69	36.2	13.8	55	55	NA	38	1420	1195
Indonesia	299	226	85	84	20	20.2	95	92	NA	32	319	278.2
Thailand	335	253	76	80	21.7	20.7	50	50	37	35	458.1	308.7
Malaysia	184	156	59	59	26.2	16	60	45	NA	9	210.2	181
Hong Kong	135	134	48	51	NA	NA	NA	NA	NA	4	135	215.8
Japan	748	876	21	23	NA	NA	NA	NA	NA		748	876
Singapore	98	95	36	37	NA	NA	NA	NA	NA	2	98	97
Taiwan	111	118	39	40	4.4	4.9	22	21	NA	16	115.4	341.8

Source: IIPA's 2009 Special 301 Report on Copyright Protection and Enforcement

Note: data not available for Motion Pictures and Entertainment Software, hence not included.
Indonesia was on the Priority Watch List.

Infringement of copyright

- IBA survey (inc. Australia, China, Vietnam, Hong Kong)
- 30% of judges lack training in IP laws
- goods most affected inc. CDs, DVDs, clothing and software
- increasing role played by media campaigns and public awareness initiatives
- rights holders' loss of royalties
- international efforts: TRIPS, WIPO Treaties, enforcement cooperation and training (ACTA)

IPRs in developing countries

- ineffective implementation + inadequate enforcement
- lack of consumer and business awareness
- limited coordination between national and international enforcement agencies
- piracy major income of many people
- low training of officials
- corruption

PART 2

INSTITUTIONAL & POLICY ISSUES

Are IP laws necessary?

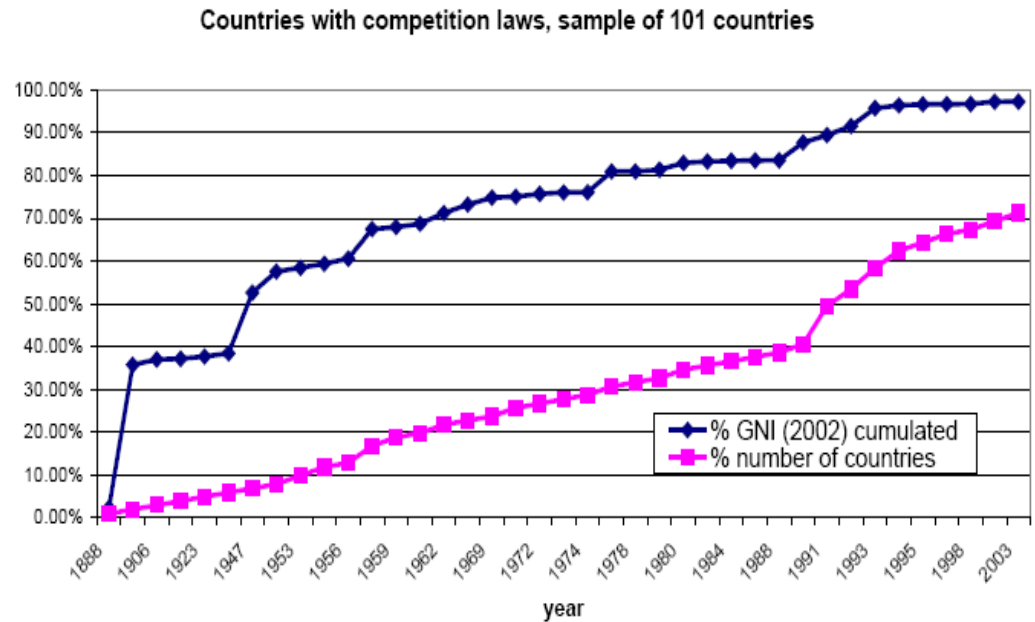
- private property foundation of market economy
- IPRs foster innovation? - Plant (1934) no; Schumpeter (1945) yes/no; Jaffe & Lerner (2004) US patent system has wrecked havoc on innovation; growth, and productivity; due to easy patenting, litigation & uncertainty.
- Landes & Posner (2003, pp. 9/10): *“the economic arguments that we make for intellectual property protection are not based primarily on a belief that without legal protection the incentives to create such property would be inadequate. That belief cannot be defended confidently on the basis of our current knowledge. The concerns we highlight have rather to do with such other things as optimal management of existing stocks of intellectual property, congestion externalities, search costs, rent seeking, and transactions costs”*

Is competition law necessary?

- Hill (1999) free trade sufficient e.g. Singapore and Hong Kong
- Krakowski (2005) 101 countries - competition legislation greatest impact on competition; benefits large for developing economies
- Hylton & Deng (2007) 102 countries - mixed effects - anti-cartel laws positive; monopoly and merger laws negative

Does competition law increase wealth?

Data shows positive correlation between date competition law and gross national income (GNI)



Source of Data: UNCTAD, World Investment Report 1997, figures for years after 1996 updated with national data.

EU modernisation

- Indonesia's competition law based on EU law
- EU moved from formalistic exemptions approach to economic, effects-based approach with 'safe harbour' post-1999
- Article 81 balances consumer harm against economic benefits but not Article 81
- More tricky issues of standard setting, dominance (Microsoft), parallel trade (pharma), etc.

IP v/+ competition law

- legal protection to stimulate innovation v. market power?
- no presumption that IPRs are immune from competition laws
- should competition agencies modify approach to accept IPRs (no), adopted dynamic efficiency concerns (maybe) or innovation markets (how)?
- subject to rule of reason – how real is this?
- difficulties of dealing with IPRs e.g. network effects, tipping, implications for remedies

Indonesia's competition law

- objectives not clear
- public and judges understanding low
- low enforcement (231 complaints; 46 decisions; 70% conviction rate; low penalties)
- focus on protecting SMEs rather than consumers
- commissioners political appointees
- corruption
- poor cooperation between KPPU and Courts
- old style approach - exemptions

PART 3

How is Indonesia dealing with this

I now turn over to my co-presenter

Professor Ningrum Sirait
of the University of North Sumatra

I. Background:

- Following the economic crisis in 1998, Indonesia decided to adopt a market economy and began to focus on economic reforms and foreign investment;
- As an emerging economy, Indonesia is no longer a backward economy characterized by low economic growth rates, inadequate infrastructure etc. Rather, Indonesia is in a transition to a competitive market;
- To promote economic growth, Indonesia welcomes foreign direct investment, and thereby expects to increase development and access to new technologies;

- During this transition, Indonesia also adopted many new laws as part of the effort to participate in the global market competition. These include Intellectual Property Right Law (IPR), covering patent, copyrights and trademarks, and Competition Law, both of which have been enacted and enforced;
- With respect to IPR law, producers argue strong protections in this area are needed to protect investment, which will lead to the development of more products, more innovation, more choices and overall benefit to society;

- Although Competition and IPR law both serve to promote consumer welfare but they approach this goal from different directions and they may appear to conflict;
- Consumers argue IPR creates restrictive trade practices that distort competition, requiring consumers to pay more for protected products.
- They argue that weak IPR would allow cheaper products and freer access to information and methods;
- IPR provide rights to exclusivity, while competition law instead encourages competition and discourages exclusivity;
- Competition Law may limit the market power of the IPR holder, which may cause less incentive to develop or import technology through licensing agreement;

- Exemptions are another issue relating to Competition Law and IPR. Competition Law usually regulates certain business, industries or practices are commonly exempted by the law. Basic types of exemptions are determined by each Country's constitutions, stated or implied by law/regulations. Some countries that enacted Competition Law stated that there are IPR are being exempted with different purposes and incentives;
- It can become complicated since Competition Law must balance between encouraging or creating incentives for Indonesia to import and develop technology and simultaneously preventing the abuse of any monopoly power that is created;
- But note the two laws have the common purpose of promoting consumer welfare;

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Exemptions under competition law require balance:

- Interests of owners and interests of users;
- Interests of producers and consumers;
- Restrictive trade practices and acceptable levels of competition;
- State regulation or competition policy:

II. Development of IPR Issues under Indonesian Competition Law

- As legal basis, Indonesia enacted the following IPR laws:
- Copy Rights: Law No.6/1982 superseded by Law No.7/1987 and Law No.12/1997 and lastly superseded by Law No.19/2002;
- Patent: Law No.6/1989 superseded By Law No.13/1997 and superseded again by Law No.14/2001;
- Trademark: Law No.19/1992 superseded by Law No.14/1997 and superseded by Law No.15/2001;
- Competition Law (Law No.5/1999). Law No.5 under Article 50 (b) granted exemption to IPR with the purpose to encourage and protect innovations etc;

- Despite being a young jurisdiction, the Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha – KPPU*) has executed its duties;
- With over 1000 complaints and more than 124 decisions, KPPU gained public trust and confidence;
- To date the KPPU has issued the following guidelines:
 - Guideline Article 22: Bid-rigging;
 - Guideline Article 47: Sanctions;
 - Guideline Article 50 a : Exemption for actions and/or agreements with the purpose to implement prevailing law;
 - **Guideline Article 50 b: Exemption for IPR Licensing Agreement;**
 - Guideline Article 50 d: Exemption for agreements for agency or franchise;
 - Guideline Article 51: Exemption for State Owned Enterprises.

- Although Indonesia has enacted an IPR law, some observers consider that it has failed to successfully enforce it. This view was expressed during the 2nd World Intellectual Property Organization (WIPO) International Conference on Intellectual Property and Creative Industries in held December 2008;
- We realize that IPR is difficult to protect and to enforce and robust competition law enforcement poses same issue. Without adequate protections for IPR, then investors have less incentive to invest;
- Apart from poor enforcement and lack of willingness for IPR registration, Law No.5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition has a different perspective on IPR issues; [what is the perspective?]

- Patent holders have only limited incentives to register with the Directorate of IP Rights because doing so offers limited protection;
- Furthermore, there is no clear guidance on the operation of the exemptions, if the IP Rights holder should register their right to the KPPU to get the exemptions under Article 50 (b);
- The IP Rights holders come to the attention of KPPU only if there is a complaint about the abuse of dominance related to the IPR;

Summary of Law Enforcement

Thn	Laporan	Perkara	Putusan	Penetapan	Keberatan
2000	7	2	2	0	0
2001	31	5	4	1	0
2002	48	8	4	4	1
2003	58	9	7	2	3
2004	77	9	7	2	5
2005	183	22	18	4	8
2006	139	18	12	6	3
2007	244	43	27	4	11
2008	231	88	43	19	21
TOTAL	1018	204	124	42	48

III. KPPU Guidelines for Article 50 (b): Exemption

- In May 2009, KPPU issued Guidelines for Article 50 (b) on regulating exemptions for Licensing Agreement for IPRs;
- The guidelines pose some important guidance and KPPU standing on the crosscutting issue between IPR and Competition, i.e: that IPR and Competition Law are two complementing laws that are aimed at improving efficiency and consumer welfare;
- Harmonization of the law under Indonesian law may be found implicitly in the limitation of exclusive right owned by the IPR holder such as in Article 47(1) Law No.19/ 2002 on Copy Right and Article 71(1) Law No.14/ 2002 on Patent;
- Guideline Article 50 (b) explains details on terminologies stated in the law as follows:

- Licensing Agreement for IPRs are exempted under Article 50 (b) in Law No.5/1999:

***“Exempted from the provisions of this law are:
b. agreements connected with intellectual property rights such as license, patent, trademark, copyright, industrial product design, integrated electronic circuit, and trade secrets, as well as agreements related to franchising”***

- Over KPPU's 120 decisions, 2 cases that touched on the IPR issues related to exemption are found in: KPPU Decision No. 19/KPPU-L/2007 on violation of Article 23 by EMI Music South East Asia, EMI Indonesia, Arnel Affandy, S.H, Dewa 19, dan Iwan Sastrawijaya and Astro case KPPU Case Decision No:No. 03/KPPU-L/2008 on BPL Broadcasting 2007 – 2010. Neither case provides any guidance about what kind of agreement could be exempted;

- First, KPPU determine that term “license” a form of agreement found in IPR Law which may be applied in all forms of IPR rights, followed by patent, trademark, copyright. Licensing is not its own distinct category of IPR;
- Second, the use of trademark seems to exclude “service mark”. KPPU determine that the term shall apply for both trade and services;
- Third, industrial product design is not one of the right in the IPR Law and the right shall be applied is the right on the integrated electronic circuit;
- KPPU stated that exclusivity does not mean that such right shall automatically indicate or lead to the existence of monopoly. This is because exclusivity right shall allow the use, modification or copying the creation to public (for example copyright on computer program to distribute the creations with licensing). Also, exclusive right holder can choose not to produce the creation and to exclusively license the IPR. In this context, element of monopoly have not been satisfied;

- However, under certain circumstances, monopolistic practices may exist as the consequences of exclusivity of IP rights. First, this condition may happen when the holder is the only one to have the business or when the IP holder appoint single firm as a licensee;
- Second, controlling production/or marketing may happen when goods/services only made by the IP holder or the licensee;
- Third, unfair business competition may happen when business of the IP holder and or licensee have engage in unfair business practices, or violate the law;
- Fourth, public interest may be jeopardized;
- From these perspective, KPPU determines the kind of agreement which shall be deemed to be exempted by Law No.5/1999. And that's only if the agreement proved to inhibit competition and affected the market;

- The guidelines define the meaning of licensing agreement where one party is the holder of the IP Right and provide the license and the other party would accept the license. The meaning of licensing here is the permit to enjoy the economic use from an object protected by the IP Rights for certain period of time;
- As reward for granting the license, the licensee shall pay amount of royalty for certain period of time. Considering that economic right may vary in the exclusivity right, licensing agreement may also vary. Licensing agreement may granted all exclusive right or partial exclusivity;
- Licensing agreement must at least contain information on: licensing object, period of time, whether the agreement may be extended or not, if licensing shall apply for partial or entire exclusivity right, amount of royalty and payment, if the licensing maybe granted to the third party, geographical boundary for licensing agreement and whether the licensor shall be able to implement his own IP Right which have been licensed;

- Licensing agreement must be registered at the Directorate of IP Right and will be listed in General List. Failing to register the agreement, the agreement shall have no effect to the third party, and will automatically be excluded from the exemption in the guideline;
- Licensing agreement may be prepared in special format, without exclusivity. If so, the format must be stated clearly in the licensing agreement. If there is not explicit statement, the default term is non exclusivity. Therefore allowing the licensor to implement the IPR he has licensed or granted to the third party;
- Licensing agreement shall not constitute any direct or indirect condition which may affect Indonesian economy or to apply limitation which may limit Indonesia's ability to possess and develop technology in general – refer to Patent Law. Agreement with this clause shall be refused by the Directorate General of IPR. This concluded that Article 50 (b) shall only applied to the licensing agreement stipulated under IPR Laws;

IV. Limitation of the exemption:

- KPPU reiterated that exemption shall be based on the following premises:
- IP rights do not automatically cause monopolistic practices and unfair business practices;
- Competition law should be the tool to deter unfair business practices because of the licensing agreement;
- To apply Competition Law to the licensing agreement, conditions must be satisfied are: licensing agreement complied with the IP Law and monopolistic practices and unfair business practices existed;
- Competition law exemption may be applied if licensing agreement proved not to be anti-competitive;

- The guidelines provide analysis guidance if the licensing agreement relates to any anticompetitive conduct such as exclusive dealing;

- Under the guidelines, Licensing agreement contain exclusivity if there is clause on:
 - 1) Pooling Licensing and Cross Licensing;
 - 2) Tying Arrangement;
 - 3) Limitation of raw material;
 - 4) Limitation on the production and sales;
 - 5) Limitation in sale and resale price ;
 - 6) Grant Back clause;

The licensing agreement is not automatically anti-competitive but the Commission shall look at each condition to determine if it is anti-competitive;

What do we expect from the guidelines?

- The Guidelines do provide information about the analytical framework that KPPU will use when determining whether agreements could be exempted or not;
- But it appears that the KPPU does not provide any clear guidance on the operation of the exemption process including who must request an exemption and when they must do so;
- Nevertheless, it is a major step to have a set of guidelines in place;

- IP Rights remain one of the complex areas of competition law and policy;
- Developing credible and consistent regulations to balance between the two conflicting approaches remains a challenge for Indonesia;
- When it comes to exemptions, provisions need to be in place for withdrawing or limiting the exemptions. In another words, exemptions should be granted on limited basis and need to be reviewed periodically. The review should include analysis on their impact on economic efficiency and consumer welfare;

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About CASE

Case Associates provide economic analysis in competition law and regulatory investigations.

Case use rigorous economic and quantitative techniques to address the critical issues and marshal evidence to define relevant markets, assess alleged monopoly abuses, anti-competitive practices, cartels, and evaluate the competitive impact of mergers. It also specialises on competition, regulatory and financial issues of the network industries – communication, energy, transport

Case have provided expert reports and testimony to regulatory bodies in the UK, Europe, Asia, New Zealand, and Australia, on a wide range of issues in many different sectors.

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