

Provisional Orders in the Intellectual Property Rights Regime

On 30 July 2012, the Supreme Court (*Mahkamah Agung* “MA”) promulgated a new Supreme Court Regulation, MA Regulation No. 5 of 2012 on Provisional Orders (“MA Regulation 5/2012”). MA Regulation 5/2012 aims at providing clear and detailed provisions on the requirements and process for applications for provisional orders, because the Industrial Design Law, Patent Law, Trademark Law, and Copyrights Law apparently do not do so.

Under MA Regulation 5/2012, a provisional order is an order issued by a Commercial Court in the form of an instruction which must be complied with by the relevant parties, and may order one of the following:

- (i) the prevention of the entry of products alleged to have violated the Intellectual Property Rights;
- (ii) the seizure and prevention of disposal of evidence by the respondent;
- (iii) the halting of an infringement in order to prevent greater losses.

Criminal sanctions (ie imprisonment or a fine) under the Indonesian Criminal Code may be imposed on any party who fails to comply with the above provisional orders.

The holder of the Industrial Design, Patent, Trademark, or Copyrights rights which are being or have been violated may submit an application in writing for a provisional order to the Head of the Commercial Court with jurisdiction over the area where the violation has been committed, with certain supporting documents attached, such as, sufficient evidence of an indication of a violation and evidence of the right ownership. The applicant must also deliver a guarantee in cash or a bank guarantee equal to the value of the object of the provisional order, and provide clear information on the object and/or document which is/are required to be searched for, collected, and/or seized for verification purposes.

The reasons for the application, including the concern that the evidence may be disposed of by the party suspected of having committed the violation, must also be included in the application.

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The Commercial Court has a full discretion as to whether to accept or reject the applicant's provisional order application, after reviewing and studying the evidence and considering the applicant's statement. The Commercial Court should make a decision within two days of submission of the application.

If the Commercial Court accepts the application, the Commercial Court may, among other things, instruct the respondent and other related parties to allow the Bailiff (*Juru Sita*) of the Commercial Court (accompanied by the applicant) to carry out certain actions required to secure the evidence. However, if the Commercial Court rejects the application, the guarantee must be returned to the applicant. Under MA Regulation 5/2012, provisional orders are final and binding, and may not be appealed.

Once the provisional order has been implemented, the Commercial Court must then decide whether it will change or cancel, or even confirm the provisional order within 30 days of the issuance of the provisional order, after allowing both parties to present their statements, as well as considering all of the evidence.

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If the Commercial Court confirms the provisional order, the applicant may file a lawsuit in the Commercial Court within 30 days; otherwise, the provisional order will automatically cease or terminate.

A similar civil procedure is followed in the common law system, known as “Anton Piller – style civil search and seizure order”, ie an order in Anglo Saxon civil procedures issued by the court, which provides the complainant the right to search premises and seize evidence. This order aims at preventing the destruction of relevant evidence by the respondent, specifically in trademark, copyright, or patent infringement cases. Prior to the promulgation of MA Regulation 5/2012, provisional orders were already provided for in the Patent, Copyright, Industrial Design and Trademark laws. However, no implementing regulations had been issued so provisional orders could not be carried out. So far, since MA Regulation 5/2012 has only just been issued, we doubt that it has been tested in practice.

Furthermore, the enforcement of MA Regulation 5/2012 is still questionable because it is not in line with the Indonesian Civil Procedural Law. Under the Indonesian Civil Procedural Law, a plaintiff must apply for a provisional order along with the lawsuit it files in the court. Therefore, a provisional order cannot be applied for without a lawsuit being filed in the relevant court. As the procedure for applying a provisional order under MA Regulation 5/2012 is not in line with the procedure under the Indonesian Civil Procedural Law, in practice, it is likely that the judges of the Commercial Court use their discretion in applying MA Regulation 5/2012.

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