The Objectivity of Intellectual Property Rights in Indonesia

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Abstract
Indonesia as a rechtsstaat, all positive laws must be obeyed and enforced to protect the interests of the people and the State. It is the duty of law enforcement officers to enforce the law in a bold and fair manner. The word objectivity we assert is defined as the lack of favoritism toward one side or another. Our group chose this topic because we have seen and read many cases in Indonesia where it is debatable whether verdicts are made fairly and that goes against the principle of legal certainty. We find that objectivity should be at the very center of Intellectual Property Rights ("IPR"). Our group feels that the Law of IPR in Indonesia in both enforcement and substance has failed to achieve justice, and rather has served to create confusion and has greatly harmed the corporate climate of Indonesia. This article will attempt to clarify the exact factors that are behind this issue and explain all the implications of a faulty IPR law, be it social, economic or political

Keywords: Justice, Right, Enforcement, Objectivity, Confusion

A. Introduction

Intellectual property ("**IP**") is concerned with any basic human cognitive structure, such as artistic, literary, technological, or scientific constructs. Intellectual Property Rights ("**IPR**") are the legal rights provided to an inventor or manufacturer to protect their innovation or product. These legal rights give an exclusive right on the inventor/manufacturer or its operator who fully utilizes his

invention/product for a specified time. In other words, the legal rights forbid anybody else from utilizing the IP for commercial reasons without the prior approval of the IP rights holder. Trade secrets, utility models, patents, trademarks, geographical indications, industrial design, layout design of integrated circuits, copyright and associated rights, and novel plant varieties are all examples of intellectual property rights. It is widely acknowledged that IP which currently plays a vital role in the modern economy.

IPR is a powerful instrument for protecting the inventor or creator of the IP's investment, time, money, and effort, since it grants the inventor or creator an exclusive right to utilize its invention or creation for a certain period of time. Thus, IPR influences a country's national economic development by supporting healthy competition and boosting industrial and economic progress reflecting the State's Constitution.

Illustrating the protection behind IPR, IPR works as legal mechanisms namely copyright, trademark, patent, and allows people to get recognition or financial profit from what they innovate or produce. The IP system attempts to establish an environment in which creativity and innovation exists and flourish. This is done through striking the correct balance between the interests of inventors and the greater public interest.

The scope of the IP protection is broad can be copyright or industrial property. Human innovation (creation of anything original) through human creativity must be protected and will be protected through the ius constitutum namely Law No. 28 of 2014 concerning copyright, Law No. 13 of 2016 concerning patents, Law No. 20 of 2016 concerning trademarks, Law No. 30 of 2000 concerning trade secret, Law No. 31 of 2000 concerning Industrial design, Law No. 29 of 2000

concerning plants, Law No. 32 of 2000 concerning circuit design jo. The Omnibus Law No. 11 of 2020 which is inline with the 1945 Constitution arguably to a certain extent. These laws provide each person with fundamental human rights mentioned under the 1945 Constitution Section XA, Article 28A – 28J, where through this protection, every person can enjoy the economic value and at the same time contribute to build national economy and potentially brings social welfare discussed in Section XIV of the 1945 Constitution granted by the State through the government. In other words, this IP protection in given in form of exclusive right (moral rights and economic rights) in accordance with the declarative principle if we refer to the Indonesian Copyright Law No. 28 of 2014 Article 1 Paragraph 1 which is different for example with Law No. 30 of 2000 concerning trade secret because this need to be seen case by case basis and what is the interest of the parties. On the other hand, IP protection is recognised by international treaties such as in Article 27 Declaration of human rights.

The purpose of IP protection is simply so that other people who do not own the right make economic use of other people's copyrighted works without the permission of the creator per se. This rationale works because human innovation arises from the results of human thought that produces a product or process that is useful for humans themselves in relation to building the State's economy and appreciating the creator, generating creativity's motivation. The creation of these laws itself encourages the peoples to be creative and gives the knowledge on how important creativity is.

There are 4 principles respected namely Economic principle, Legal certainty principle, Cultural principle, and social principle. The Economic principle explores the fundamental rights the human is

given where the human innovation through creativity shall offer economic values in terms of economic rights which will potentially give benefit to the copyright owner. Therefore, it can be used economically and not be abused by other parties who are not entitled. The Legal certainty principle allows the owner to get justice which means in the form of protection that guarantees the owner has full rights over the use of his work. The Cultural principle existence of state protection on intellectual property rights aims to encourage the development of literature, art, and science. Therefore, it can improve the standard of living, and bring economic benefits to the entire community, nation, and state. The Social principle regulates human interests as citizens, so that the rights that have been given by law to a work are a unit that is given protection based on a balance between the interests of the individual and the community creating social integrity.

In short, both copyrights and patents respect (in terms of acknowledgement) first to file system. Both patent and copyrights have their scope where for example you can protect a map in copyright but in patent you cannot because it is not novelty. Copyright and patent are different, to receive the exclusive rights, copyright get the right automatically and to propose or to file the application for protection is just a secondary to ensure the works is protected and for evidence in the court as well different with patent where it is granted based on the submission of an application to the Minister and later it will be decided whether the application will be accepted or rejected. In a patent, the first to file principle applies, meaning that a patent right will be granted to the person who first applies for patent protection for his invention.

B. Discussion

B. 1. Intellectual Property Rights in Indonesia as an Instrument For Legal Mechanisms

B. 1. 1. Intellectual Property Rights in Indonesia

Indonesia has ratified 5 international conventions in the field of intellectual property rights, which are as follows[1]:

1. Paris Convention for the Protection of Industrial Property and Convention Establishing the World Intellectual Property Organisation (Presidential Decree No. 15 of 1997 concerning Amendments to Presidential Decree No. 24 of 1979);
2. Patent Cooperation Treaty (PCT) and Regulation under the PCT (Presidential Decree No. 16 of 1997);
3. Trademark Law Treaty (Presidential Decree No. 17 of 1997);
4. Berne Convention for the Protection of Literary and Artistic Works (Presidential Decree No. 18 of 1997);
5. WIPO Copyright Treaty (Presidential Decree No. 19 of 1997).

The Intellectual Property Rights Act which was first enacted in Indonesia was a product of Dutch law, which was transferred and implemented in Indonesia by the colonial government of the Dutch East Indies during the colonial period. The Dutch colonial government implemented a pluralistic legal system in Indonesia. Customary law itself does not recognize the existence of Intellectual Property Rights, so that most Indonesian people rarely or at all have no dealings with the IPR law, except for the Trademark Law. Changes in political policy on Intellectual Property Rights in Indonesia began with the ratification of TRIPs ("Agreement on Trade Related Aspects

[1] Kementerian Perindustrian Republik Indonesia, "Hak Atas Kekayaan Intelektual", Departemen Perindustrian, https://kemenperin.go.id/download/140 /Kebijakan-Pemerintah-dalam-Perlindungan-Hak-Kekayaan-Intelektual-dan-Liberalisasi-Perdagangan-Profesi-di-Bidang-Hukum 2007.

of Intellectual Property") which is part of the agreement to establish the world trade organization WTO ("World Trade Organisation"). Indonesia's participation in the WTO requires Indonesia to make adjustments to national legislation governing Intellectual Property Rights. Various norms and standards for the regulation and protection of Intellectual Property Rights contained in the TRIPS agreement must be nationalized as soon as possible into our Intellectual Property Rights legislation, so that there will be harmonization of the regulation and protection of Intellectual Property Rights in Indonesia with those applicable in Indonesia.

World Intellectual Property Organisation ("WIPO"), has the main criterion of invention such as it must be useful, show the elements of novelty, it shall have unique feature characteristic that is not known in the existing body of knowledge in its technical sector. The invention must demonstrate an inventive step that a person with average technical understanding would not be able to discern. Therefore, it is patentable. What WIPO did was develop an international legal instrument that would give traditional knowledge, generic resources, and traditional cultural expressions effective protection. Under Article 4 regarding Patents, Utility models, Industrial designs, Marks, Inventors' Certificates, Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

Copyright Law, governed under Law Number 28 of 2014 concerning Copyright. Copyright is the exclusive right of the creator that arises automatically based on declarative principles after a work

is realized in a tangible form without reducing restrictions in accordance with the provisions of laws and regulations. Related Rights are rights related to Copyright which is an exclusive right for performers, phonogram producers, or broadcasting institutions. Trademark, governed under Law Number 20 of 2016 concerning Trademarks and Geographical Indications.

Trademark is a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, color arrangement, in the form of 2 (two) dimensions and / or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) dimensions or more of these elements to distinguish goods and/or services produced by persons or legal entities in the activities of trading goods and / or services. While Geographical Indication is a sign indicating the area of origin of an item and/or product which due to geographical environmental factors including natural factors, human factors or a combination of these two factors gives a certain reputation, quality, and characteristics to the goods and/or products produced. Signs used as Geographical Indications can be in the form of labels or labels attached to the goods produced. The sign can be the name of a place, area, or region, words, pictures, letters, or a combination of these elements.

Patent, governed under Law Number 13 of 2016 concerning Patents. Patent is the exclusive right of the inventor to the invention in the field of technology for a certain period of time to carry out himself or give approval to other parties to carry out his invention.

Industrial design, governed under Law Number 31 of 2000 concerning Industrial Design. Industrial Design is a creation about the shape, configuration or composition of lines or colors, or lines and colors, or a combination thereof in the form of three or two dimensions

which gives an aesthetic impression and can be realized in three-dimensional or two-dimensional patterns and can be used to produce a design. products, goods, industrial or handicraft commodities

Trade Secret, Governed under Law Number 30 of 2000 concerning Trade Secrets (State Gazette of the Republic of Indonesia Year 2000 Number 242). Trade Secret is information that is not known by the public in the field of technology and/or business, has economic value because it is useful in business activities, and is kept confidential by the owner of the Trade Secret.

Integrated Circuit Layout Design (DTLST), governed under Law Number 32 of 2000 concerning layout design or integrated circuit. Integrated Circuit Layout Design is a creation in the form of a three-dimensional layout design of various elements, at least one of these elements is an active element, as well as part or all of the interconnections in an integrated circuit and the three-dimensional layout is intended to prepare for the manufacture of an integrated circuit.

B. 1. 2. The Philosophy

From a philosophical standpoint, the discussion over the notion and the new IPR system began in the 18th century. The notion of safeguarding intellectual property rights known as the flow of Natural Law was inspired by the opinions of John Locke (1632-1704) and Jean Jacques Rousseau (1712-1778). According to Locke, everyone has an inherent right to oneself and, as a result, the outcome effort (labor), since they have made sacrifices in the form of discovering, digesting, and contributing "personality" to anything, as articulated as follows: "*…yet every man has a "property" in his own 'person'. This nobody*

has any right to but himself. The 'labor' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labor with it, and joined to it something that is his own, and thereby makes it his property."

B. 2. The Objectivity

B. 2. 1. Concept of Objectivity

Let us start off by saying that the concept of objectivity by itself is shrouded with controversy, many scholars, legal, philosophical and others, have debated on two very key points with regards to objectivity. Its attainability, and its desirability. Learning from our predecessors, it has long been concluded that Objectivity is an ideal, meaning it is something that can never exist in reality and only in theory but there are some forms of conceptualisation that we can follow as well. Namely, that objectivity can be perfected through different means, first faithfulness to facts, second, the absence of commitments to norms and a freedom from values and third the absence of personal bias.

The first concept ascribes to the theory that objectivity comes from the choosing to only accept information that arises from proven facts. This is because facts are independent of perspective, a tree remains a tree no matter who views it. As such, much of the information that is accepted per se are observations rather than opinions. However, criticism remains because as mentioned previously, true objectivity is ultimately unobtainable and that most facts are facts until proven otherwise.

The second concept refers to the prerequisite in objectivity in that values must not exist, because values are subjective to each

person. Objectivity requires a certain disconnection from worldly concepts such as prejudice. If such a principle is followed, all objective judgments would be very easy to accept. The third concept, absence of personal bias, is the theory of objectivity being based on a generally accepted fact. For example, the length of 1 meter is objective but an arm's length is subjective. This represents the fact that objectivity can arise from generally accepted facts or norms.[2]

With that established, in terms of IPR, our group wants to use these concepts of objectivity to reshape the legal regime such that justice is more likely to be achieved. It is important to establish the relationship between objectivity and justice, our group feels that the more objective a judgment, the fairer it is and as such, a greater justice is achieved. As stated, true objectivity cannot be achieved, but in attempting to improve the system to its utmost, an objective verdict is much more likely to be reached and therefore, a fairer legal regime can be achieved to ensure legal certainty for all persons before the law.

B. 2. 2. Legal, Economic and Political objectivity

We find that there are several points in IPR that we as a group find confusing starting with some of the legal substance followed with the comments on economic and political objectivity in Indonesia. Our group has found that IPR law in general (not in Indonesia) is very clear in distinguishing the various different IPRs, however, this has not exactly brought about clarity on the issues of IPR.

Our group finds that there are overlapping areas between the various IPRs and this overlapping nature serves to convolute IPR

[2] Stanford Encyclopedia, "Scientific Objectivity", Stanford, https://plato.stanford.edu/entries/scientifi%20c-objectivity/

disputes. Maybe as a result of only learning IPR for one semester, our group cannot fully comprehend the exact legal regime of IPR, but through our understanding right now, we have come to the consensus that it would be beneficial not only for legal students, but more importantly the laymen. We claim that such complications do not provide objectivity to the extent at which the law does not provide certainty to the very property it is supposed to protect. In our point of view, entrepreneurs are usually the owner or holders of IPRs and by having such a complicated system, they have no choice but to rely on the lawyer to resolve their issues as there is no easy way to understand IPR. This dependent relationship in our view is a detriment to the corporate climate as now the entrepreneurs are at the mercy of the competence of their lawyer, as we find that not only are there few expert lawyers in IPR, there are even fewer judges who are knowledgeable in the field of IPR. As a result, our group finds that there are many cases with questionable outcomes that do not follow basic principles such as good faith. We find that the law is not exactly objective or unbiased when it comes to enforcement because of the many cases that we will list down in a later section. As for the economic aspect, we find that the system implemented in IPR also lacks economic objectivity. Economics is generally considered a social science and as such it is necessary for its assessment to be objective.

Looking at the economics of IPR in general, it is similar to a public good but differs in two ways, in that it is non-rivalrous, and it is non-excludable. Non-rivalrous refers to the notion that one person's use of the IP does not diminish another's use. Non-excludable means that it may not be possible to prevent others from using the information without authorization. To elaborate, this means that if the IP were to be copied illegally, there will be no sanctions and usage is

permitted. As such, there may be no incentive to create an IP in the first place. On the one hand, static efficiency requires wide access to users at marginal social cost, which may be quite low. On the other hand, dynamic efficiency requires incentives to invest in new information for which social value exceeds development costs. These are both legitimate public goals, yet there is a clear conflict between them. In Indonesia in particular, our group is of the opinion that the IPR laws are too strong, and that the laws encourage monopolies to form, suffering from inadequate dissemination of new information. This means that innovation from such companies are at the expense of the consumer currently, in exchange for payoffs to innovation that would benefit the consumer in the future.[3]

Looking at the political aspects of IPR in Indonesia, realizing that Indonesia recognizes and has ratified the WTO/ TRIPS Agreement, Indonesia is a sovereign State stated under the 1945 Constitution, this means Indonesia has the freedom to independently provide for the needs of its people. Additionally, this annunciate that Indonesia per se is not required to comply with all conventions to the maximum extent stipulated in the WTO / TRIPS. We note that the WTO/ TRIPS does not require signatory States to stipulate broader provisions than those included in the international agreement.

[3] Keith. E. Marcus, "Globalization and the Economics of Intellectual Property Rights: Dancing the Dual Distortion," *Peterson Institute for International Economics (2022),* https://www.piie.com/publications/chapters_preview/99/3iie2822.pdf.

B. 2. 3. Relevant Intellectual Property Cases

1. Onitsuka Tiger:[4]

   Onitsuka Tiger is a basketball sneaker and running shoes brand in Japan that has been under ASICS Corporation, Onitsuka Tiger's parent company since the 1950s. In Indonesia, two men namely: Theng Thing Djie and Liog Hian Fa registered a logo that looks like Onitsuka Tiger in 1994 for their own sneaker company. ASICS Corporation brought a lawsuit before the Central Jakarta Commercial Court and the Supreme Court in 2010 but the Commercial Court rejected ASICS Corporation demands and ruled that Djie and Fa were the rightful owners of Onitsuka Tiger in Indonesia.

2. Polo Ralph Laureno[5]

   Polo, owned by Richemont International S.A, Ralph Lauren, was in dispute with an Indonesian local businessman, Hartafadjaja Mulai, who claimed to file Polo on 19 February 2004. Polo Indonesia won the case against Richemont International S.A, therefore the Indonesian POLO is authentic as Only Indonesia has exclusive rights to manufacture original Polo for the Indonesian local market; resulting Polo by Ralph Lauren unable to open any distributor in Indonesia.

[4] Renaldo Gabriel, "How Two Indonesian Men Stole a 70-Year-Old Sneaker Logo", VICE, June 8, 2017, https://www.vice.com/en/article/3kzkyw/why-do-brands-like-asics-and-ikea-keep-loosing-copyright-complaints-to-local-companies.
[5] Patenin.com, "Richemont Menang Sengketa Merek Piaget Polo", Paten Indonesia, April 15, 2013, https://www.patenindonesia.com/?p=673.

3. Ikea[6]

   The Swedish furniture company IKEA lost the right to use its own brand name in Indonesia since a local company in Indonesia claimed the trademark. In 2014, the Jakarta Commercial Court granted the rights to use the Ikea brand to a company named PT Ratania Khatulistiwa that sells its own furniture with the acronym for Intan Khatulistiwa Esa Abadi. In short, Ikea lost a trademark case, but did not lose their right to the Ikea trademark all together because the Inter Ikea still has the right, the exclusive rights to use Ikea brand in Indonesia since the Indonesia company claimed that those registration were never used within the statutory period of 3 years after registration under the Trademark Law year 2001.

4. Toyota Lexus v. Prolexus[7]

   Toyota, Jidosha Kabushiki Kaisha, a Japanese businessman, lost a lawsuit against Welly Karlan, a local businessman regarding the Prolexus trademark. Toyota claimed that "Prolexus" that belongs to the Indonesian businessman has similarity in essential parts of "Lexus" which may confuse the public in general. The advocate from Mulia & Partners representing the Indonesian Businessman contends that Toyota is way too excessive since the famous mark is "Toyota" and not "Toyota Lexus". Furthermore, "Prolexus"

[6] Ipeg.com, "IKEA trademark in Indonesia, What Really Happened?", Intellectual Property Expert Group, December 16, 2021, https://www.ipeg.com/ikea-trademark-in-indonesia-what-really-happened/.
[7] Jiii. or.jp , "IP News in Indonesia", Japan Institute for Promoting Invention and Innovation, October 6, 2014, http://www.jiii.or.jp/chizaiyorozuya/pdf/kawara/ID_IPNews021_20141006.pdf.

is the mark for class 25 which is for clothing and not automotives. Therefore, they contend that it is impossible for the public world to get confused. These relevant case examples show how powerful the Indonesian Intellectual Property Right Law is without realizing how this system actually has a devastating impact towards the Indonesian corporate climate where foreign companies would contemplate before investing in the Indonesian local market. Furthermore, these decisions upheld by the Indonesian court encourages squatting where local businesses who registered foreign companies' trademarks try to offer to sell a company back its own brand when that company tries to set up an Indonesian office.

C. Conclusion

There are many other things that can be explored further and applied in the IPR protection system in Indonesia. The discourse of IPR as a custom in Indonesia, can be developed further by taking into account the current state of Indonesian society. Taking a glance at the concept of objectivity, Indonesia current IPR is still lacking in terms of protecting future foreign companies. To a certain extent foreign companies are detrimental to Indonesia since it contributes to national economic growth. We contend that the IPR system in Indonesia is not enforced properly, therefore, the International Treaties are not reflected precisely at the current practice.

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