

THE POTENCY OF STATE LOSS AS THE IMPACT OF THE INTELLECTUAL PROPERTY RIGHTS VIOLATION

By

Yoan Nursari Simanjuntak

Foreword

Intellectual property rights are one foundation to support the state tenacity and Indonesian nation. The essence of intellectual property rights is not only the matter of acknowledgment on moral rights, but also the matter of economic rights, that is the potency of profit through all chains economic process of that intellectual property rights. The consciousness to protect economic potency from the fraud, cheating, and hijacking on the others intellectual property rights, pushed many countries in the world to create an agreement via TRIPs (*Trade Related Aspects of Intellectual Property Rights*), and the countries which are successful in implementing this intellectual property rights can get the benefits.

Indonesia hasn't got a full of benefit from the intellectual property rights, which is so strategic to support Indonesian economic. Indonesian is very rich with culture diversity and the nation's creativity but the lack of response on the importance of the intellectual property rights causes a lot of "losses" for Indonesia.

Protection portrait of the intellectual property rights in East Java province, in this case is micro, small and medium business (UMKM), is far from ready to enter international business competition even though the label of "The Region of Intellectual Property Rights Culture" is accomplished. There are so many violations on the intellectual property rights which causes a lot of losses not only for the individual but also for the state. In the case of industrial protection, for the example, there is no effective breakthrough to prepare the readiness of UMKM. The choices of programs from the Government of the East Java Province show the inappropriate and the lack of speed, the number of industrial design registration is less than the number of design circulating in the market, the Local Government doesn't fully master the concept of the intellectual property rights, and the support of media is not optimum. On the other of the intellectual property rights, the protection of geographical indication is not optimum because not all regions in East Java Province understands how to protect and develop the potency of the intellectual property rights.

Because of that, to avoid the bigger loss, it is necessary to take a total action. Not only the action to protect an individual but also the action to create a strategic law system which is responsive systematically to it.

The Protection of the Intellectual Property Rights is the Protection of Moral and Economic Rights.

Intellectual property (IP) can be defined broadly as creations of the human mind. Intellectual property rights (IPRs) are legal rights that protect these creations. Unlike rights over physical property, an IPR generally gives its owner only gives the time limited right to exclude others from making use of their property, that too conditional upon certain criteria.¹

The essence of the intellectual property rights is the protection of exclusive rights, that is moral and economic rights for everyone who produces the intellectual works. Moral rights adhere to the person who produces the intellectual works and it can't be erased or eliminated by so whatever reasons even though the rights can be transferred. The name of the person must be used even though the rights is already transferred (Article 7 UU no. 32/2000 The Rights for Integrated Circuit Design and Article 8 UU no. 31/2000 Industrial Design; the Law of the Intellectual Property Rights).

Basically, the Economic rights is the rights to get economic benefits from an intellectual works. For the owner of the rights, the aspects are so broad including to make, to use, to sell, to import or to distribute (Article 9 UU 31/2000), to rent, to deliver, or to provide for selling or renting or delivering the products with the patent (Article 16 verse 1 UU no. 14/2001 about Patent).

IPRs can be divided into two broad categories of according to their economic purpose or function. One set of IPRs aim to stimulate creativity and inventiveness so that society benefits from new or improved products, services or creative works. This category comprises of IPRs such as patents, copyright, industrial designs and various specialized IPR regimes such as the protection of plant varieties or layout designs of integrated circuits. The second set of IPRs comprise of distinctive signs, such as trademarks and geographical indications, whose economic function is to maintain the integrity of the market place by correcting information asymmetries between the buyer and the seller of a good or service. There are some forms of protection that prevent unfair competition, such as passing off or the protection against the theft of trade secrets that could be included in one or both categories and are further discussed in these two contexts below.

The Economic Benefits of the Protection of the Intellectual Property Rights for the State

If it is seen from TRIPS (*Trade Related Aspects of Intellectual Property Rights*) as the reference of the Protection of the Intellectual Property Rights on the members of WTO, Article 7 states that the aim of the Protection of Intellectual Property Rights is:

"... to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users

¹ <https://www.wto.org>

of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. "

The aim to create an economic welfare is clearly stated, it means that the protection of the Intellectual Property Rights can produce many big economic benefits for the owner of the rights.

These intellectual efforts create new technologies, describe new ways of doing things, develop new products and services, and expand the cultural richness of society. They result in intellectual assets, or pieces of information, that may have economic value if put into use in the marketplace. Such assets are called intellectual property to the extent they bear recognized ownership. The economic returns to creating them depend on their costs of creation, their desirability to potential users, the structure of markets in which they are sold, and the legal rights established to permit property owners to control their use.²

One country which is able to get a big benefit from its protection for the intellectual property rights is USA. Because of that it is quite normal if there is an accusation that behind the necessity for all members of WTO to protect their intellectual property rights in their own country there is an importance of USA to protect its potency.³

Data from USA shows that the foreign sales and exports of these core copyright areas remain significantly larger than the entirety of exports of other major industry sectors. As reported in table 1 below, copyright industry sales in foreign markets generally exceed exports of the following U.S. industries: chemicals (excluding pharmaceuticals and medicines); aerospace products and parts; agricultural products; food and kindred products; pharmaceuticals and medicines. In 2013, the core copyright industries generated non-U.S. sales of \$156.3 billion. In the same year, the U.S. chemical industry (excluding pharmaceuticals and medicines) achieved foreign sales and exports of \$147.8 billion. In 2013, reported foreign sales and exports for U.S. aerospace products approached \$128.3 billion while U.S. agricultural foreign sales and exports were approximately \$68.9 billion. In 2013, foreign sales and exports of pharmaceuticals and medicines stood at \$51.6 billion.⁴

² Keith E. Maskus, no year, "The Economics of Intellectual Property Rights and Globalization : Dancing The Dual Distortion", final draft Chapter Three from "Intellectual Property Rights in Global Economy, Department of Economics, University of Colorado at Boulder, p 2.

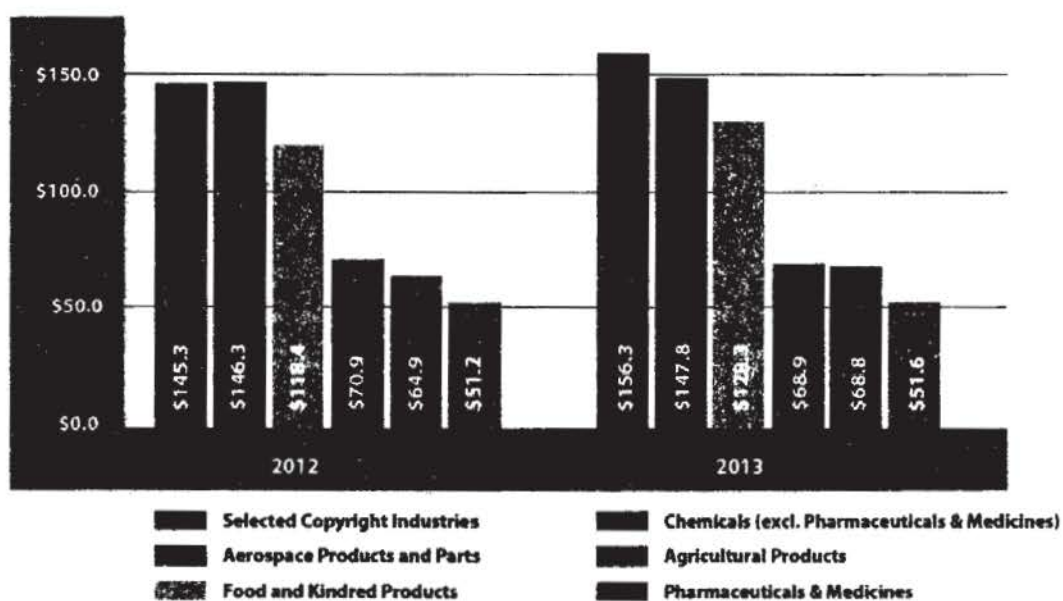
³ Ignatius Haryanto., 2002, "Penghisapan Rezim HAKI", a collaboration of debt-WATC with H Indonesia KreasiWacana, Yogyakarta, hal. 21-25.

⁴ Stephen E. Siwek, 2014, "Copyright Industries in The U.S. Economy : The 2014 Report", International Intellectual Property Alliance (IIPA), p.16

Table 1
Foreign Sales and Export for Selected Industries (Billions of US Dollars), 2012 - 2013

| Industry | 2012 | 2013 |
|--|----------------|----------------|
| Selected Copyright Industries (Motion Pictures, TV, Video; Recorded Music; Newspapers, Books, Periodicals; Software Publishing) | \$145.3 | \$156.3 |
| Chemicals (excluding Pharmaceuticals & Medicines) | \$146.3 | \$147.8 |
| Aerospace Products and Parts | \$118.4 | \$128.3 |
| Agricultural Products | \$70.9 | \$68.9 |
| Food and Kindred Products | \$64.9 | \$68.8 |
| Pharmaceuticals & Medicines | \$51.2 | \$51.6 |

Foreign sales and exports data by industry are also reported graphically in table 2 below. The data represent the significant contribution made by American copyright works sold abroad to the overall trade balance of the U.S. economy, as well as by comparison with other industry sectors.⁵

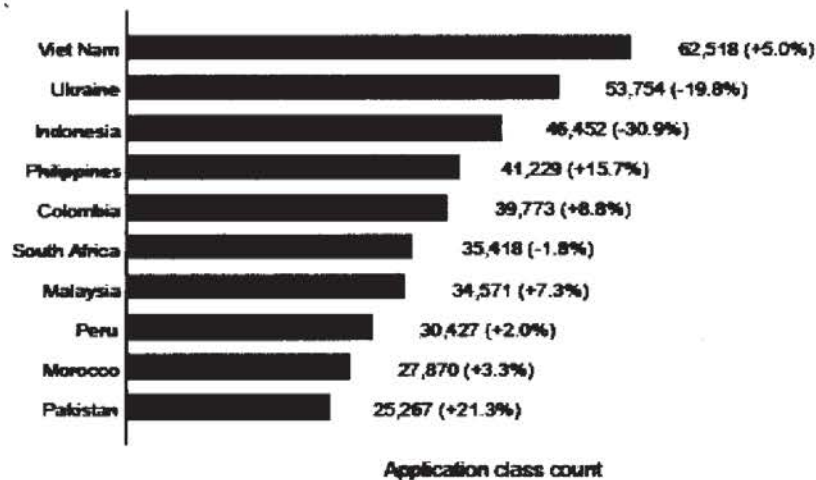


The Protection of the Intellectual Property Rights in Indonesia

Based on the WIPO statistic in 2015, in the group of countries with middle and low incomes, the number of Indonesian applications for trade mark can be seen in the following Table 3:

⁵ Ibid., p. 17.

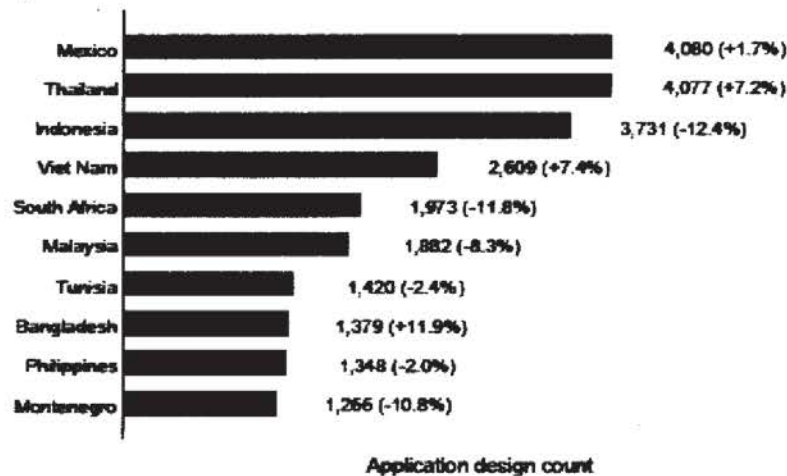
Application class counts for offices of selected low- and middle-income countries, 2014



Source: WIPO Statistics Database, October 2015.

The data show that Indonesian’s position is good enough, even when it is compared to some countries in Asia. On the Industrial Design, the rank of Indonesia is under Thailand and Mexico (Table 4), and for the patent, Indonesia is not in the list.

Application design counts for offices of selected low- and middle-income countries, 2014



Source: WIPO Statistics Database, October 2015.

Another illustration can be taken from the data of the Global Intellectual Property Centre (GIPC) U.S. Chamber of Commerce 2016, from 38 countries surveyed, Indonesia is in rank of 33 with IP 8.59. Compared to other countries in Asia, Indonesia is in better position than Vietnam (35), Thailand (36) and India (37) but it is under Malaysia (17), Korea (10) and Japan (9).

The condition of law enforcement for the Intellectual Property Rights in Indonesia is still not good. It is seen from the position of Indonesia in the United State Trade Representative (USTR) in 2016.

The Special 301 Subcommittee reviewed 73 trading partners during the 2016 Special 301 process. The Subcommittee received stakeholder input on

more than 100 trading partners, but focused its review on those submissions that responded to the request set forth in the notice published in the Federal Register to identify whether a particular trading partner should be named as a Priority Foreign Country (PFC), placed on the Priority Watch List (PWL) or Watch List (WL), or not listed in the Report. Following extensive research and analysis, USTR has listed 34 trading partners as follows:⁶

| Priority Watch List | Watch List | |
|--|--|---|
| <ul style="list-style-type: none"> • Algeria • Argentina • Chile • China • India • Indonesia • Kuwait • Russia • Thailand • Ukraine • Venezuela | <ul style="list-style-type: none"> • Barbados • Bolivia • Brazil • Bulgaria • Canada • Colombia • Costa Rica • Dominican Republic • Ecuador • Egypt • Greece • Guatemala | <ul style="list-style-type: none"> • Jamaica • Lebanon • Mexico • Pakistan • Peru • Romania • Switzerland • Turkey • Turkmenistan • Uzbekistan • Vietnam |

This list is not without sanction. If Indonesia can't fix the condition, the sanction of 301 Specific Use of US Trade Act will be applied. It gives a mandate to the US Government to retaliate in economic sector for Indonesia. In this case, the market of Indonesia in USA will be in stake. The areas which are in focus to be watched are the Intellectual Property Rights related to the hijack of compact disc videos, computer programs, and the pharmaceuticals' patent.

The United States is concerned about widespread piracy and counterfeiting in Indonesia, particularly with respect to the lack of enforcement against dangerous products. It is essential that Indonesia fully fund and support a robust IPR enforcement effort. The United States encourages Indonesia to address this problem through greater coordination between the National Inter-Ministerial IPR Task Force and Creative Economy Agency, as well as to create a specialized IPR unit under the Indonesia National Police (INP) that would focus on investigating the Indonesian criminal syndicates behind counterfeiting and piracy, and that would initiate larger and more significant cases. Enforcement cooperation among relevant agencies is essential, including with the Directorate General for Intellectual Property (DGIP) and *Badan Pengawas Obat dan Makanan*, the regulatory agency that focuses on fake and substandard food and drug products. Further, the United States suggests increased coordination between the INP and the Attorney General's Office so that specialized IPR inspectors and prosecutors can enhance the effectiveness and efficiency of their investigations. Finally,

⁶ USTR 2016 Special 301 Report, p.3

the United States encourages deterrent-level penalties for IPR infringement in physical markets and over the Internet.⁷ The United States continues to encourage Indonesia to provide an effective system for protecting against the unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products. The United States also remains concerned about market access barriers in Indonesia, including measures related to the importation of motion pictures and measures that appear to condition permissions to import medicines on at least some local manufacturing or technology transfer requirements. As Indonesia considers amendments to its patent law, the United States urges Indonesia to provide interested stakeholders with meaningful opportunities to provide input. The United States also remains concerned about the lack of clarity surrounding legal procedures under the Indonesian patent law in connection with the grant of compulsory licenses. The United States encourages Indonesia to provide for judicial or other independent review of any compulsory license authorizations. The United States welcomes increased engagement with the Government of Indonesia, including through the IPR Working Group of the United States-Indonesia Trade and Investment Framework, to work toward substantively resolving these important issues.⁸

Some Factors Influence the Protection of the Intellectual Property Rights in Indonesia

- The significance of the Protection of the Intellectual Property Rights is not internalized in society, i.e. the Intellectual Property Rights is very important to develop economic and community welfare, including the significance of the Intellectual Property Rights in the international trading. As an example, the condition in East Java. Especially the micro, small and medium business (UMKM), is far from ready to enter international business competition even though the label of 'the region of intellectual property rights culture' is accomplished. There are so many violations on the intellectual property rights which causes a lot of losses not only for the individual but also for the state. In the case of industrial protection, for the example, there is no effective breakthrough to prepare the readiness of UMKM. The choices of programs from the Government of the East Java Province show the inappropriate and the lack of speed, the number of industrial design registration is less than the number of design circulating in the market, the Local Government doesn't fully master the concept of the intellectual property rights, and the support of media is not optimum. On the other of the intellectual property rights, the protection of geographical indication is not optimum because not

⁷ Ibid., h. 36

⁸ Ibid., h. 37

all regions in East Java Province understands how to protect and develop the potency of the intellectual property rights.

- The violations of the intellectual property rights are high and the law enforcements are weak. The report from Business Software Alliance (BSA) states that the level of the software hijacking in Indonesia in 2003 is 88% and the potential loss around USD 157 million. Indonesia is hijacking country number 4 in the world and number 3 in Asia Pacific. Based on the data released by the Indonesian Singer, Composer and Musician Association in 2013, the loss because of this illegal practice reaches 4 quintillion a year. The data from the Indonesian Association of Industrial Recording (ASIRI) states that illegal music recordings capture 95.7% market since 2007 in Indonesia.
- The patents in Indonesia are so minimum. The number of patents produces by a country is parallel to the economic and technology developments. The less the number of the patens in a country, the poorer it is.

Because of that, to avoid the bigger loss, it is necessary to take a total action. Not only the action to protect an individual but also the action to create a strategic law system which is responsive systematically to it.

References

- Ignatius Haryanto., 2002, *Penghisapan Rezim HAKI*, debt-WATCH Indonesia and Kreasi Wacana, Yogyakarta
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TACKLING FINANCIAL CRIMES

VARIOUS INTERNATIONAL PERSPECTIVES

Head of Editors:

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VARIOUS INTERNATIONAL PERSPECTIVES

Act No 19 of 2002 of Copyright

Scope Of Copyright

Article 2

1. Copyright shall mean the exclusive right of an Author or a Copyright Holder to publish or reproduce his/her work, which emerges automatically after the creation of the work without prejudice to restrictions pursuant to the prevailing laws and regulations.

Criminal Provisions

Article 72

1. Any person who deliberately and without right conducts any acts as referred to in Article 2 paragraph (1) or Article 49 paragraphs (1) and (2) shall be sentenced to imprisonment of at least 1 (one) month and/or a fine of at least Rp. 1,000,000.- (one million rupiah) or imprisonment of at most 7 (seven) years and/or a fine of at most Rp. 5,000,000,000. (five billion rupiahs)
2. Any person who deliberately broadcasts, exhibits, distributes, or sells to the public a work or goods resulting from an infringement of copyright or related rights as referred to in paragraph (1) shall be sentenced to imprisonment of at most 5 (five) years and/or a fine of at most Rp. 500,000,000.- (five hundred million rupiahs).

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Various International Perspectives

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Foreword

Economy development is every country's agenda, but the developments come with challenges. Beside the wrongful acts of people who wanted to gain personal profit wrongfully, they are also legal methods or governance failure could result a crack in a system which can suppress the development itself.

Economy development comes along with the financial crime. Global development also makes country "borderless". Financial crime become the problem of all countries. It becomes every country's concern. That is why, perspectives on how to prevent and eradicate financial crime are necessity. Creating a regime that holds the agenda of financial crime prevention and eradication is very important. Thus, it is important to have academicians and practitioners ideas in a book that elaborates current issues in building the regime, including the obstacles and accomplishment.

This book divided into four chapters, each chapter composing ideas that associating criminal law to the financial crime context. The contributors from academicians shown the strong points of theoretical approach, while the legal practitioner gave their perspective of experience and theories. Chapter one discuss about criminal law principle implementation toward financial crime context, with perspectives in Indonesia and Thailand context. Chapter two is about current issues of financial crimes, with some global and local context elaboration from the contributors. Chapter three is about money laundering and the principles of criminal law implementation in some countries context. While chapter four discuss about anti-corruption regime building in Canada, Thailand and Indonesia.

I am very grateful to the contributors who gave their positive support and excellent ideas in this book. Also the support from University of Surabaya-Indonesia, United States Department of Justice-USA, Thammasat University-Thailand, which are involved in making this publication possible. I also hold dearly our colleague, one of the contributor in chapter one who recently passed away, Shinta Agustina, may she rest in peace and let this book be one of her legacy.

Last but not least, I hope this book can contribute significantly toward the regime of financial crime prevention and eradication, and can be used as a good resource for legal practitioners, academicians, and law students.

Dr. Elfina L. Sahetapy
Head of Editorial Board

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TACKLING FINANCIAL CRIMES

VARIOUS INTERNATIONAL PERSPECTIVES

The development of crime, in this particular-financial crime, has massively increased. Its manifestation has become major problems in all countries. The variety of financial crime manifestation can be understood such as fraud, corruption, money laundering, financing of terrorism and proliferation, cyber laundering, etc. These kinds of financial crime have attracted all the nations concern to build a good regime of the prevention and eradication against these crimes. The instrument of law such as criminal law and international law plays an important role in eradication while it is easily to mention that those variety of crimes has its characteristic as transnational crime and should be categorized as extraordinary crime.

Criminal law in its function to be a law which can maintain peace living between offender-victim and society of states shall be reconstructed to achieve its goals. Criminal law is not only about punishment. The problem of financial crime will need refunctioning of criminal law in all areas, national and international.

Emphasizing on the current condition, in global context economic growth is significant. In particular, Asia-Pacific is the fastest growing economic region and the largest continental economy by gross domestic product (GDP) purchasing power parity in the world. Therefore, it is important for all countries to keep the integrity of the economies from subversive wrongful actions.

This book is suitable for law students, legal practitioner, and people who interested in area of building a good regime in financial crime prevention and eradication.

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