

IPR, Subsidy, and Competition Policy: Potential Disharmony on Economic Regulations

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ABSTRACT

As a legal instrument as well as an economic instrument, Intellectual Property Rights / IPR carries two functions. In essence, IPR represents legal instrument as to the basis of the establishment of rights, including moral right and protection at the commercialization stage. Meanwhile, as an economic instrument, IPR becomes a stimulation of innovation, triggers creation, and even becomes trade commodities, including licensing agreement. Both of these instrumental functions encourage economic growth and generate social welfare in parallel system. In the economic side, IPR is applied in the industrial sector until in the trade estuary. In the context of this downstream-upstream relationship, there are some hidden issues, especially those related to various government policy schemes in providing subsidies. By definition, subsidy is assistance provided by the government to reduce or alleviate the burden of costs that should be borne by the community. This subsidy scheme has a direct impact on the cost of production which leads to the condition that selling prices "must" be adjusted to the level of ability or purchasing power of the people.

From the aspect of policy, subsidies are given to reduce commodity prices or increase industrial output. As a control of economic activity, subsidy has a reasonable and correct rational and does not violate any prevailing law. However, there is a question on the perspective of business competition which has been carried out in the same spirit in controlling the market? So far, the justification of the subsidy policy has rarely been linked to the conception of IPR which also lays its legal foundation on the values of fair and open business competition.

If it is true that subsidy is considered part of the pro-people survival policy against the market, is that fair in the perspective of law? Has not such policy treated unfairly to the business competitor or business rivals?

In this context, the Repression of Unfair Competition as one of the IPR doctrines was chosen to be the analysis tool to prove the potential disharmony of the above mentioned economic regulations.

Keywords: *IPR, subsidy, competition, policy*

I. INTRODUCTION

Without having to be linked to local or national or international boundaries, the conception of Intellectual Property Rights / IPR[1] becomes increasingly attractive if it is displayed in parallel with the doctrine of competition, as well as the subsidy policy which has been greatly ignored. Instrumentally, IPR is a means of rights establishment and legal protection for intellectual works. Meanwhile, "competition" is the spirit of creation (IP Generation), of management (IP Management), and of commercialization (IP Commercialization). As a regulation, IPR legal rules are

continuously being developed, refined and supplemented with guidance from various relevant international conventions and agreements. International institutions such as WIPO, WTO, and the APEC Forum have discussed the position, role and function of IPRs in a nation's development, economy, and social welfare enhancement. Moreover, IPR is even considered as the driving force for humanity. In its implementation, IPRs have penetrated across territories, across geographies and across generations. IPR becomes the motor engine for the industrial world, the trade dynamic administrator, and the driver of the economy up to the level of small business actors and local communities.

How such a strategic role can be run optimally among the local community definitely requires special tips to answer. [2] Intellectual property rights that are internalized into the life of each segment of society will in turn become the driving factor of the economy, especially in supporting the creative economy and innovative society. Local and national!

In the context of creation, management and commercialization, there are serious problems related to policies (Government) in the field of industry and trade. The problem is related to the provision of subsidies, a trading instrument that in the short term seems to be a solution. That is, a solution to inefficiencies or weaknesses in competitiveness. However, if it is not based on appropriate and measured policy studies, subsidies can become a virus of inefficiency and destroy the climate and the spirit of competition.

This paper will examine the relationship between IPR, Subsidies, and Competition in a pure thread of academic study, without the potential to blame the management authority of economic and trade policies.

2. IPR FROM THE PERSPECTIVE OF LAW AND ECONOMY

Theoretical approach classifies IPR into the Copyright domain and industrial property coalition which includes trademarks, patents, industrial designs, trade secret, integrated circuits and new varieties of plants. In its development, there was an extrapolation of the concept of intellectual property, such as Related rights [3], geographical indications, and traditional knowledge as well as indigenous technology [4]. On the other hand, the protection of new varieties of plants [5] remains open to be subject in parallel to the patent law regime [6]. This means, there is space and flexibility for IPRs to develop conceptually and operationally. This means, the grouping that was previously based on industrial and non-industrial dichotomy, has now lost its justification. The Copyright Domain which was originally in the grade sterile in the touch of industry, has now even shifted to a very industrious (Large Scale Industry) [7]. For Indonesia, the IPR Legal System [8] has complete and adequate regulatory instruments. International conventions that serve as an umbrella have also been ratified [9]. The technical guide has also been arranged to underlie the operationalization of this legal system. All of them are complete instruments of protection of a series of intellectual rights, which are guaranteed by substantive norms, administrative rules and operational guidance.

In an economic perspective, IPR has a valid rationality to justify the protection of works containing intellectual property. What stands out is the existence of economic value for the intellectual work produced. The greater the economic value of intellectual property, the stronger the need to obtain legal protection. The rationality of legal protection needs is the same as the necessity for the

guarantee of protection for our tangible assets. If IPR legal instruments are able to guarantee protection of intellectual property, reward cycles will work without problems. This cycle works with economic logic. Namely, the economic benefits gained from his work will trigger the spirit to produce more and further. Economic benefits will be a stimulus that drives the cycle of creativity and innovation continuously. Conversely, the interpretation of a *contrario* will depict the breakdown of the cycle and the stagnation of enthusiasm and the bluntness of creativity if economic interests are not maintained and protected [10].

On a broader scale, this reward system [11] works alongside with the incentive theory. Incentive theory [12] relies more on the logic of creating motivation in work. In essence, a person's behavior, including in work activities, is more often based on the motive to receive incentives or income. This theory with its economic characteristics, in its implementation, also rests on legal arguments. Logically, the need to receive incentives, however, must be guaranteed by the state through legal instruments that are compiled and implemented, including rules regarding licenses [13]. In such a legal logic, the conception of monopoly on private rights is recognized and established in IPR legislation. Monopoly in the domain of IPR appears in the form of a right to solely exploit the economic benefits inherent in the intellectual work produced [14]. This principle in parallel prohibits anyone from using the intellectual property of others and makes it an unlawful act if done without the owner's approval. Through a protected monopoly, the owner of Intellectual Property gets a guarantee of protection and security in the utilization of his rights [15]. At the operational level, the exploitation of the economic benefits of intellectual property requires clear, effective and adequate regulatory support. With this understanding, IPR is not only a legal instrument but also an economic instrument. Namely, triggering motivation, guaranteeing economic rewards, and becoming a stimulus for the creation of intellectual property in a sustainable manner within the framework of broad creativity without limits [16].

In the economic context, IPR is an important factor in determining the cost structure efficiency in industrial activities. Creativity and innovation power inherent in the creation of IPR, becomes the determinant of the quality of the products produced. The more creative and innovative the IPR creation, the higher the competitiveness of the products produced. Shortly, IPR provides added value and even with the existence of a trademark, it guarantees the authenticity of the goods being traded. Through patented technology, for example, an industrial product becomes more effective in its use. More aesthetic because of the aesthetic touch of industrial design. These benefits have an impact on the efficiency of treatment or maintenance. With the role described above, IPR becomes the determining factor of industrial efficiency and enhances production's selling point.

3. SUBSIDY POLICY

With the aim to reduce the burden of financing, subsidies economically mean spending on government fees without getting compensation. In the scale of the national economy, the provision of subsidies means more government assistance to alleviate the burden of costs that should be borne by the community. Such policies are commonly given for price control. For example, to supply certain commodities, including basic necessities such as rice. In addition, subsidies are also commonly given in relation to the procurement of imported goods. The government often does it to control various rice commodity prices. In rice commodities, the Government imports rice, to fill the stock market so that there is no increase in prices due to the unbalanced supply and demand. If the import price of goods is higher than the domestic market price, the consequence is that the government will bear the difference in the import prices of these commodities. It is certain that subsidies so far have been directed at overcoming the problem of poverty [17].

It must be acknowledged that the policy of providing subsidies also applies in many countries as one of the economic instruments [18]. The forms of subsidies provided vary greatly depending on the needs and reasons for justification. In Indonesia, on a financial scale, if the subsidy becomes a necessity within the framework of the national economic policy, the allocation will be borne by the State Budget (APBN). This applies, for example, for the fuel subsidy (BBM) which still has to be provided every year in Indonesia [19]. Similarly, electricity subsidy [20]. Apart from that, there are types of subsidy (in the field) of agriculture, business credit subsidy, and export credit subsidy. The last two are carried out by the National Banking to support business actors, including export-oriented ones [21].

In the framework of the WTO, the subsidy instrument is regulated in Article XVI GATT [22]. Regarding the definition of subsidy, it is generally stated that subsidies that are given either in the form of income or price support, which directly or indirectly affects the increase of exports or reduction of imports, must be notified to other parties in writing, how large the scale is and what forms of subsidies are given, including the estimated effect on the increases and decreases of export imports, and the reason why subsidies are given [23].

Normatively, Article XVI GATT further elaborates the meaning of subsidies, the forms including tax exemptions, internal transport charges, export credit, border tax adjustment and duty drawback.

Interpretation guidelines are also given to give meanings to the impact of subsidy, directly or indirectly and their effects on export increases and import declines (increase exports & reduce imports). In the context of the estimated effect, (instead of anticipated effects) [24], it is emphasized that the serious prejudice to the interest of any other contracting party is caused or threatened [25].

It should be noted that the principles and guidelines for subsidy as stipulated in the GATT Provision bind Indonesia to comply. That is why, Law No.7 Year 2014 on Trade regulates the norms of trade protection and security, including the application of subsidies to operationalize the GATT principles [26]. Provisions regarding subsidy are specifically regulated in Government Regulation No. 34 Year 2011 on Antidumping Measures, Reward Measures and Trade Safeguard Measures.

It is affirmed in Government Regulation No. 34 that what is meant by subsidy is any financial assistance provided by the government or government agency, both directly and indirectly, to companies, industries, industry groups or exporters, and / or any form of support for income or prices given directly or indirectly to increase exports or reduce imports from or to the concerned country, which can provide benefits to the recipients of subsidies.

Furthermore, in national regulation, these principles serve as the basis for regulating fuel subsidy, among others, through Presidential Regulation No. 191 Year 2014. Subsidy in the agricultural sector, especially fertilizers, is regulated in the Minister of Trade Regulation No. 15 / M-DAG / PER / 4/3/2013 concerning Procurement and Arrangement of Subsidized Fertilizers for the Agricultural Sector. This elaboration merely shows the chain of subsidy regulation provided by the government. To be sure, beyond what has been mentioned, the field of subsidies and the foundation of regulation are still many more and varied [27].

Even though it is legally tolerable [28], subsidies are impossible to negate the economic impact that tends to be negative. However it is impossible to eliminate that impact. The maximum that can be done is to minimize the consequences of subsidizing. Therefore, without careful calculations, subsidies can have excessive impacts. More than that, it has the potential to create trade disputes [29]. To be sure, subsidies are only allowed in the form of general subsidies.

On a domestic scale, the rationality of banning subsidies can be made to be the logic of the protector of healthy business competition conception among business people in Indonesia. Business rivalry that is shadowed under unfairness has the potential to occur among business actors. Subsidy recipients will benefit because the production costs are relatively lower compared to non-subsidized products. Subsidies provided by the Local Government, for example, for the purpose of encouraging the growth of local industries, are examples of potential disruptions to healthy competition. Besides Local Government, Ministry programs such as Cooperatives & SMEs, Industry, Agriculture, or even Creative Economy Agency, can become the obstacle to the fertile growing of the climate and spirit of fair competition in the business world. Business people with industries containing intellectual property rights must be protected from various aspects in order to optimize the

role of intellectual property as a factor in increasing the competitiveness of their products and business activities, including of course subsidies! Both subsidies from the Central Government and the Local Government!

In the microeconomic context, subsidies become the determining factor in the decrease of production costs. With lower production costs, the selling price of products becomes cheaper. It is also expected that traded products will become more competitive. Through subsidies, products traded on the market become competitive. However, criticism of subsidies records several negative phenomena. Among other things, subsidies create irrational cost of production. Subsidies also create apparent competition and even intervene in markets by pushing unfair competition. In short, subsidies are fragile because at any time they can be stopped if the Government is no longer capable of providing subsidies.

4. CONCEPTION OF COMPETITION POLICY

In business chemistry, competition [30] is energy. The competition is very effective in triggering the improvement of products and services in the market [31]. Meanwhile, winning the competition is a target that must be achieved. The problem is, because of the tight and tough competition, business people undergo competition by cheating. A lot of manipulative recreation is done to win the target of achieving market control [32]. Such manipulative recreation tends to be dishonest or unfair. One of the excesses that has been attempted to be avoided is actually the destruction of the trust chemistry in trade relations. Trust and relative like that have the potential to collapse due to unfair competition practices. Legal literature explains that unfair competition has the root norms in the Common Law System [33]. This legal system develops legal remedies for various actions that disrupt trade relations. In short, a system that is designed to safeguard and protect trade relations from the threat of violations of norms, ethics and legal arrangements that have the potential to cause damage to the business climate in a broad sense [34].

In the framework of intellectual property law, the concept of unfair competition doctrine is established in the Paris Convention Article 10 [35] but Paris Convention, which affirms:

- (1) *The countries of Union are bound to nationals of such countries effective protection against unfair competition.*
- (2) *Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition*

(3) *The following in particular shall be prohibited:*

1. *All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor:*
2. *False allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;*
3. *Indications or allegations to use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristic, the suitability for their purpose, or the quantity, of the goods*

It should be noted that the WTO-TRIPS Agreement explicitly re-imposes the obligations of WTO / TRIPS member states to comply, inter alia, with the Article 1-12 Paris Convention. [36] This means, Article 10bis above, is also binding Indonesia to comply and use it as a basis for regulation and protection in the face of unfair competition practices.

A conception similar to unfair competition is known in Indonesia in the two major provisions of the legacy of the Criminal Code and its partner in the Civil Code. In the criminal system, Article 382bis of the Indonesian Criminal Code stipulates:

“Any person who, in order to establish, to retain or to expand the sale of his trade or business or those of the trade or business of another commits a fraudulent act of misleading the public or a certain person, shall, if there from some loss for his competitors or competitors of the other person may arise, being guilty of unfair competition, be punished by a maximum imprisonment of one year and four months or a maximum fine of nine hundred rupiah.”

Whereas, in the conception of private law, the stipulation of Article 1365 of Indonesian Civil Code affirms:

“A party who commits an illegal act which causes damage to another party shall be obliged to compensate therefor”

It must be recognized that the two provisions emphasize the act of fraud and/or unlawful act that are potential to harm the competitor or other parties, as a basis for the criminal punishment and imposition of sanction, either imprisonment or fines, as well as compensation. Both of

them become absolute ground which excludes other actions not including those categorized as unfair competition. Subject to this understanding, the use of illegal IT, including illegal software for a company, is considered an unfair competition. Because, the action will be a threat and at the same time a serious violation of companies that use legal IT infrastructure [37]. Price disparity certainly becomes a differentiator that interferes with and disturbs the operation of market mechanism. What is certain, the factories' products that use illegal IT get the opportunity to differentiate lower selling prices. The calculation of cost of production is relatively low, allowing products to be traded at a cheaper price. Such practices will in turn disrupt the reputation and business continuity due to unfair competition. This means that the concept of unfair competition has a strategic goal of protecting trade interests, business actor interests and overall market interests. Trade interests refer to the relationship of business actors vertically with consumers and suppliers (customer & supplier) and horizontally with business actors in the same line of business.

In the context of the violation of this software Copyright, the government's neglecting attitude has indirectly provided an opportunity to save expenses illegally. Moreover, it could also be classified as subsidy. If the government or local government wishes to support a creative economy development and industry potential, as well as local trade, this form of negligence should be stopped. On the other hand, if the government provides various convenience and facilities, including provision of subsidies, then it will cumulatively cause an unequal calculation of production cost. This is one of the factors that disrupts business environment as a whole. In short, it will distort the development of a fair and continuous and sustainable business environment.

5. CONCLUSION

Drawing a straight line of relationship between IPR, Subsidy, and Competition, it appears there is disharmony of among economic regulations. IPR as legal instrument as well as economic instrument openly offers a concept of business protection through monopoly of intellectual property, [38] both that is used in the upstream level of industry activities, as well as in the downstream level at the market arena. In this respect, Intellectual Property Rights becomes a closely related determining factor of its quality, competitiveness and economic value of commodities. Meanwhile, subsidy as a form of policy intervention has a direct impact towards the rationality of production cost. With subsidies, the cost of production is reduced, something that is not obtained from the optimization of efficiency efforts. As a policy, subsidy is indeed not considered as a violation of law. However, on a broader scale, especially associated with horizontal trade relations, subsidies can potentially dilute healthy and fair competition. Normally, the depletion of fair competition

is more felt by business actors in trading partner countries whose governments do not provide subsidies to the same industrial sector. Consequently, the WTO Agreement reaches it in a simple regulation. The direction is to restore the price balance in order to make it equivalent to a non-subsidized product as to countervailing duty.

At the domestic level, the environment of unfair competition can also infiltrate among vertical relations, namely between consumers and suppliers. Consumers who have no access to products from subsidized producers are forced to consume commodities that are products of non-subsidized industry. Likewise, the effect sequentially goes down to the relevant suppliers. Although it seems hypothetical, the effect on both of them exists. What is certain, subsidies only create quasi-competitive values. More seriously, the spirit of competition is diminishing, something that has been strategically engineered in the IPR legal system. With such a sequence, subsidies have created disharmony in economic regulation in a hidden manner. Consequently, for and in the name of the fair competition principle, subsidies must not be given to certain industrial sectors based on intellectual property, especially for certain industries, for and in the name of any reason that can harm the fair, healthy, and open competition in Indonesia.

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[7] Creations in the fields of science, art and literature which are within the domain of copyright, are currently inseparable from the process of fiction through industrial processes, even those that rest on high-tech based industries. Read more, *The Digital Dilemma, Intellectual Property in The Information Age*, Committee on Intellectual Property Rights and The Emerging Information Infrastructure National Academy Press, Washington DC 2000, pg. 47

[8] *Legal Aspect of Intellectual Property Rights (Intellectual Property Rights)*, O.K. Saidin, RajaGrafindo Persada, Jakarta, Year 2004, pg. 19 to 44

[9] Two main IPR Conventions, Paris Convention and Bern Convention, have been ratified in 1997. More, *WIPO Copyright Treaty dan WIPO Performance and Phonogram Treaty, Patent Cooperation, Trademark Law Treaty* and the last one *Madrid Protocol* has also been ratified

[10] This economic value is attached to the assessment of the utility benefits of intellectual work in accordance with economic rules and market law. In the form of works of art, for example, economic values have parameters of beauty, uniqueness, and expressions of creativity that appear in the created work. Whereas in technical work, the strength of economic value lies in the benefits of problem solving offered. The value of the usefulness or usefulness of a work is usually directly proportional to the economic value of the work.

[11] *Reward System* is one of the human resource management that has an influence on motivation. Reward System can include financial or non-financial components. Read : *Motivation and Reward System*, Wendelien Van Eerde, University Of Amsterdam. 2017 pg. 27

[12] *The Meantime Theory Of Motivation*, Kendra Cherry, Blog, Verywell mind, updated 29 Juni 2018. <http://www.verywellmind.com> Accessed on 5 August 2018.

In many ways, in addition to the demands of personal needs, one's actions are based on motivation to receive reward from the community (external

rewards). Incentive theory is one of the main theories which postulates that a person's behavior is based more on needs or desires to get incentives.

[13] *Hukum Hak Cipta (Copyright Law)*, Rahmi Jened, PT. Citra Aditia Bhakti, Bandung, 2014, pg. 179 s/d 190

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[15] *Copyright Law and Practice*, Collin Golvan Sc, The Federation Press, 2007 pg. 7

[16] Every legislation in the field of intellectual property has the same mission, which is to encourage the spirit of working creatively and innovatively to support economic growth in order to improve the social welfare. As a legal instrument, regulation recognizes restrictions and exceptions. That is, legal protection is only promised for intellectual works that do not violate the law, norms of decency, religion and public order. This limitation is minimal. Because, beyond that, the values of propriety and fairness also become restrictions on norms and instrumental exceptions. In short, only works that do not intersect with the law will get protection.

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[23] *Scope and Application of Article XVI GATT*

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[25] *GATT Analytical Index, Guide to WTO Law and Practice* (Updated) http://WTO.org/english/res_e/publication pg. 450

[26] Article 67 - 72 of Law No. 7 Year 2014 on Trade

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